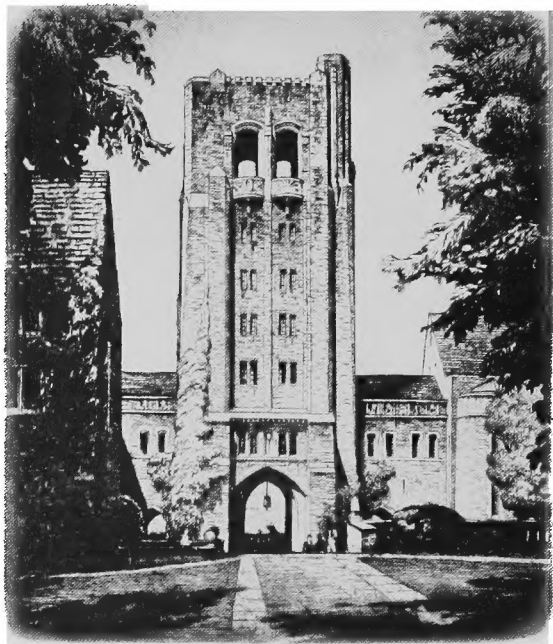


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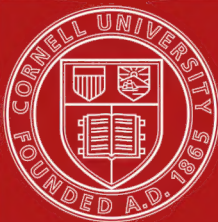
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A
TREATISE
ON THE
MODERN LAW OF CONTRACTS

INCLUDING A FULL CONSIDERATION OF THE CONTRACTS AND
UNDERTAKINGS OF PUBLIC AND PRIVATE CORPORATIONS

AS DETERMINED BY

THE COURTS AND STATUTES OF ENGLAND
AND THE UNITED STATES

BY

CHARLES FISK BEACH JR.,

AUTHOR OF

"PUBLIC CORPORATIONS," "PRIVATE CORPORATIONS," "INSURANCE," "RECEIVERS,"
"MODERN EQUITY JURISPRUDENCE," "MODERN EQUITY PRACTICE," "WILLS,"
"INJUNCTIONS," "CONTRIBUTORY NEGLIGENCE," ETC.

IN TWO VOLUMES

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TO THE
HONOURABLE EDWARD DOUGLASS WHITE

OF LOUISIANA
LAWYER JURIST DIPLOMAT AND MAN OF AFFAIRS
LONG A LEADER OF THE BAR
IN NEW ORLEANS
SOMETIME A SENATOR OF THE
UNITED STATES AND NOW
AN ASSOCIATE JUSTICE OF OUR FEDERAL SUPREME COURT
THESE VOLUMES ARE CORDIALLY
AND RESPECTFULLY
DEDICATED

PREFACE.

IN these volumes the purpose has been to set forth in a plain and practical way a complete statement of the Modern Law of Contracts in all its branches and in very full detail.

The statements are illustrated by explanatory notes and a full consideration of all the recent decisions reported either in England or America, and all of the earlier cases necessary to show the development of the principles.

That this work might be a complement to my books on corporations, particular reference has been made to the contracts and engagements of public and private corporations. Five chapters have been devoted to corporate contracts, separate treatment being given to the undertakings of railroad companies and building and loan associations.

Contracts in restraint of trade and contracts against public policy have special consideration in separate chapters of unusual length devoted to each subject.

In the matter of authorities I have endeavored to cite every well considered case of recent years, giving these the preference over the earlier decisions with a view of making this what it purports to be—the Modern Law of Contracts.

For some years I have been convinced that there is a recognized demand for a comprehensive treatise on the law of to-day

with reference to contracts, a work considering the recent developments and modern applications of the law, rather than confining itself to elementary principles. It is with the hope that these volumes will supply that demand that they are offered to the profession.

I wish to express my high appreciation for patient, laborious and intelligent assistance rendered in the preparation of these volumes by William E. Bullock, Esq., of the Brooklyn, New York, Bar.

CHARLES FISK BEACH, JR.

TABLE OF CONTENTS.

VOLUME I.

CHAPTER I.

INTRODUCTORY.

SECTION.	PAGE.
1. Simple contracts defined.....	1
2. Contract complete before formally written.....	3
3. Rule as to written draft.....	4
4. The promise—Consideration essential.....	6
5. Consideration further discussed—Mutual promises.....	8
6. New consideration where written contract changed.....	11
7. Execution and form of contracts.....	12
8. Delivery of contracts.....	13
9. What is a good delivery.....	14
10. The same subject continued.....	16
11. Contracts classified and distinguished.....	17
12. Sealed contracts.....	19
13. Sealed contracts further considered.....	21
14. Express and implied contracts.....	22
15. Implied contracts distinguished.....	24
16. Reservations and exceptions.....	25
17. Contracts of record.....	26
18. The same subject continued—Warrant of attorney.....	27
19. Merger in judgment.....	28
20. Merger of mortgage in legal title.....	29
21. Judgment as estoppel.....	30
22. The same subject continued—Illustrations.....	31
23. Statutes as contracts.....	32
24. The same subject continued—Treaties.....	34
25. State grants.....	35
26. Written evidence of contracts the best.....	36
27. Negotiable instruments—How far conclusive.....	37
28. Where written contract is unambiguous.....	40
29. Complete written contract excluding parol evidence.....	42

SECTION.	PAGE.
30. Contracts in a foreign language.....	44
31. When parol evidence admissible, although contract written.....	46
32. Parol evidence as to written consideration.....	48
33. Notice and assent as evidence of contract.....	49
34. Circumstantial evidence of contracts.....	50

CHAPTER II.

OFFER AND ACCEPTANCE.

35. General nature of contract.....	53
36. What is a proposal.....	54
37. Revocation of offer.....	55
38. The same subject continued.....	56
39. The same subject continued—Illustrations.....	57
40. Offer when revocable.....	57
41. General offers.....	59
42. Revocation of a general offer.....	60
43. Lapsing of offer by death.....	60
44. Proposal—Reasonable time.....	61
45. The effect of a mere inquiry on an offer—Rejection.....	62
46. Method of refusal.....	63
47. Proposals contained in tickets, receipts, etc.....	63
48. The same subject continued.....	65
49. What constitutes acceptance.....	65
50. Acceptance of written offer—Delivery.....	66
51. Absolute acceptance.....	67
52. The same subject continued—Illustrations.....	68
53. Acceptance to be without condition.....	69
54. Condition as rejection of offer.....	70
55. The same subject continued—Counter offers.....	72
56. Ancillary matters.....	73
57. Acceptance by conduct.....	73
58. The same subject continued.....	74
59. Revocability of an acceptance.....	76
60. The same subject continued—Effect of postal regulations.....	77
61. Authority to accept by post.....	78
62. Proposal and acceptance by letter.....	80
63. Proposals by telegraph.....	82
64. Contract by letters and telegrams.....	83
65. Certainty of proposal and acceptance.....	84
66. Place of contract.....	87
67. The English doctrine of proposals in deeds.....	88
68. The same subject continued.....	89
69. The American doctrine.....	89
70. The same subject continued.....	90
71. Revocability of a deed before delivery—Mutuality.....	91

CHAPTER III.

CERTAINTY.

SECTION.	PAGE.
72. Certainty as a general requisite.....	94
73. The same subject continued—Contracts sustained if possible.....	95
74. Rule of construction.....	96
75. Contracts to make future contracts.....	97
76. Miscellaneous uncertainties—Particular instances.....	98
77. The same subject continued—Stipulations reducible to certainty.....	99
78. <i>Id certum est quod certum reddi potest.</i>	101
79. The same subject continued.....	101
80. Uncertainty as to time.....	103
81. Uncertainty as to place and time.....	106
82. "Car loads".....	107
83. "More or less".....	108
84. The same subject illustrated—"About".....	109
85. "More or less" in descriptions of land.....	110
86. "Say," and "say about".....	110

CHAPTER IV.

CONDITIONS.

87. Kinds of covenants.....	113
88. Time of performance.....	113
89. Covenants construed as dependent.....	114
90. Mutual promises.....	116
91. Conditions in insurance policies.....	117
92. The same subject continued—Suicide.....	118
93. Examples of conditions precedent—Vendor and purchaser.....	119
94. Condition of arbitration—Waiver.....	120
95. Vendor and purchaser.....	121
96. Sales of goods.....	123
97. The same subject continued.....	124
98. Sale of goods to arrive.....	125
99. The same subject continued.....	125
100. Architect's or engineer's certificate of approval.....	126
101. The same subject continued—Illustrations.....	127
102. The same subject continued.....	128
103. Promise conditional upon approval of promiser.....	130
104. Right of approval to be exercised reasonably.....	131
105. Right of approval not to vary contract.....	133
106. Limitations upon the right to reject.....	134
107. Performance of conditions precedent.....	134
108. The same subject continued—Illustrations.....	135
109. Further illustrations—Waiver.....	136

SECTION.	PAGE.
110. Building contracts.....	138
111. The result of the cases.....	139
112. Substantial performance of building contracts.....	140
113. Substantial performance—Delay.....	141
114. Insufficient performance.....	142
115. The same subject continued—A contrary view.....	143
116. Doctrine of the Supreme Court of the United States.....	144
117. Sales—Incomplete delivery.....	144
118. The New York doctrine.....	145
119. Personal services.....	146
120. The same subject continued.....	147
121. The same subject continued—Contrary view.....	148
122. Delivery by installments.....	149
123. <i>Mersey Steel Co. v. Naylor</i>	150
124. Insolvency of buyer.....	152
125. Subscriptions to stock.....	153
126. Waiver.....	154
127. Recitals.....	154
128. Subscriptions before incorporation—How far absolute.....	155
129. The subject-matter of conditions in subscriptions to stock	155
130. How the condition must be stated.....	156
131. Performance.....	157
132. Performance—Full performance waived.....	158
133. Time of performance—Reasonable time.....	160
134. Pleading	161
135. Conditional sales.....	161
136. Form of contract of conditional sale.....	163
137. Transfer of rights under conditional sale.....	164
138. Rights of the parties on default.....	164
139. Rights of buyer.....	165
140. Waiver of forfeiture and title.....	166
141. Destruction of the property.....	167
142. Recording.....	168
143. Miscellaneous matters.....	169
144. Condition subsequent in deed—Subsequent defeasance.....	170
145. Surety's bond signed under condition.....	171
146. Refunding dues to withdrawing members	172

CHAPTER V.

CONSIDERATION.

147. Consideration defined.....	177
148. Sealed instruments.....	178
149. Contracts in restraint of trade.....	179
150. Statutory abolition of seals.....	180
151. The same subject continued.....	181
152. Executed and executory considerations.....	182

SECTION.	PAGE.
153. Moral obligation.....	183
154. The same subject continued—Exceptions.....	184
155. Benefits received—Consideration accepted involuntarily.....	185
156. Power to return the benefit.....	186
157. Existing legal obligation as a consideration.....	187
158. The same subject continued.....	189
159. Promise to new party.....	192
160. Past consideration.....	192
161. Consideration moved by previous request.....	193
162. Statute of limitations.....	194
163. The same subject continued.....	196
164. Doing what another is bound to do.....	197
165. Where party is already bound.....	197
166. The same subject continued.....	199
167. Forbearance.....	200
168. Extension of time.....	201
169. Further illustrations.....	203
170. Forbearance to sue—Time.....	204
171. Extension—Paying interest—Surety's consent.....	205
172. The same subject continued.....	206
173. <i>Nudum pactum</i> —Promise of indulgence.....	208
174. Disputed and doubtful claims.....	209
175. Further illustrations.....	210
176. Forbearance where the right or claim is doubtful	211
177. Dismissing a suit.....	213
178. Mutual promises.....	214
179. The same subject continued—College endowment bond.....	215
180. Past consideration—Future services.....	220
181. Marriage.....	221
182. Illustrations.....	222
183. Representations.....	222
184. Conveyances.....	223
185. Promise of third person.....	225
186. Illustrations of third person's promise.....	226
187. Marriage as the consideration of dower.....	227
188. Naming child as a consideration.....	228
189. Change of name as a consideration.....	229
190. Adequacy of consideration.....	230
191. Illustrations.....	232
192. Further illustrations.	233
193. Inadequacy in equity.....	234
194. The same subject continued.....	235
195. Consideration moving from plaintiff.....	236
196. Further illustrations.....	237
197. The English rule	238
198. Exceptions to the English rule.....	239
199. Restrictions upon the American rule allowing third party to sue.....	240
200. Limitations	241
201. Illegality—Rescission.....	245

SECTION.	PAGE.
202. Rescission not to affect rights attached.....	246
203. Delivery essential to gift—Voluntary trust distinguished.....	248
204. Gift of savings bank deposit.....	251
205. Gratuitous subscriptions.....	252
206. The present doctrine.....	257
207. Revocation by death.....	258
208. Subscription to capital stock—Before incorporation	259
209. After incorporation.....	260
210. The consideration for such a subscription.....	260
211. Sufficient consideration illustrated.....	261
212. The same subject continued.....	262
213. The same subject continued.....	263
214. Insufficient consideration illustrated—Common carrier.....	265
215. Where grantee is to sell for grantor—The trust as consideration.....	266

CHAPTER VI.

IMPOSSIBLE CONTRACTS.

216. Impossibility defined.....	269
217. The general rule.....	270
218. Impossibility by act of God.....	273
219. Contracts excepting acts of God.....	273
220. Events exempting carrier.....	274
221. The same subject continued.....	276
222. Physical impossibility at time of contracting—Known to the parties.....	276
223. Further illustration.....	277
224. Legal impossibility at time of contracting.....	278
225. Impossibility caused by subsequent law.....	279
226. The same subject continued—Recovery <i>pro tanto</i>	282
227. Contracts of service.....	283
228. The same subject continued—Recovery.....	284
229. Further illustrations of recovery.....	285
230. Contracts for personal acts.....	286
231. What are contracts for personal acts.....	287
232. Contracts to build becoming impossible.....	289
233. The same subject continued.....	290
234. Particular contracts concerning specific things.....	291
235. The same subject continued—Further illustrations.....	292
236. Bailment.....	294
237. Delivery of goods.....	295
238. "Strikes".....	296
239. Impossibility caused by the promisee.....	297
240. Impossibility caused by the promisor.....	300
241. Alternative promises.....	300
242. The same subject continued.....	301
243. False assumption of impossibility—Provisions excepting impossibility.....	302

CHAPTER VII.

WARRANTY AND PERFORMANCE.

SECTION.	PAGE.
244. Sales—Quantity	304
245. Sales—More or less.....	305
246. Insurance warranties—Nature and effect.....	307
247. The same subject continued—Illustrations.....	309
248. The same subject continued.....	310
249. Insurance warranty distinguished from representations.....	314
250. The same subject continued—Marine statute.....	315
251. Insurance warranties not favored.....	317
252. Description as warranty—Agent's mistake.....	318
253. Insurer may waive breach—Effect of waiver.....	319
254. Warranties in sales—Horses.....	321
255. The same subject continued—Machinery.....	322
256. Warranty of workmanship.....	323
257. Statements in catalogues.....	324
258. The same subject continued.....	325
259. Construction of warranties.....	327
260. The same subject continued.....	328
261. To what defects a warranty extends.....	330
262. The same subject continued—Horses.....	330
263. Warranty of horses—Stallions.....	331
264. Further illustrations—Soundness in horses.....	332
265. Open defects.....	333
266. Written contract excluding oral warranty.....	333
267. The same subject continued—Illustrations.....	334
268. Seller's oral warranty—Illustrations.....	337
269. Implied warranty excluded by written.....	338
270. Implied warranty as affected by acceptance—Sale by sample.....	340
271. The same subject continued—The federal doctrine.....	341
272. Co-existing implied and written warranties.....	342
273. Receipts and memorandum excluding oral warranty.....	343
274. Substitution of warranties.....	344
275. Implied warranty of identity—Genuineness of passage ticket.....	344
276. Implied warranty of quality.....	346
277. Warranty as to quality—Illustrations.....	347
278. Implied warranty as to fitness—Latent defects—Fraud.....	349
279. The same subject continued—Illustrations.....	351
280. Vendor's warranty as to value	353
281. Warranty of future state of an article.....	354
282. Implied warranty of title.....	354
283. Seller's implied warranty of title—Exception.....	356
284. The same subject continued—When the seller is not in possession...	357
285. What constitutes breach of warranty of title.....	358
286. The same subject continued.....	359
287. Implied warranty of title by sheriffs and administrators.....	360
288. Implied warranty of title to bonds.....	361

SECTION.	PAGE.
289. General warranty covenant	362
290. Covenants of warranty—Grantor's rights	363
291. Damages for breach of warranty.....	364
292. Covenant of seizin—Damages for breach.....	367
293. Performance of building contract.....	368
294. The same subject continued—Digging wells.....	372
295. Method of performance.....	373
296. Miscellaneous.....	374

CHAPTER VIII.

TENDER.

297. Tender defined.....	377
298. Necessity of tender—Illustration.....	378
299. What constitutes a tender.....	379
300. Statutory rules.....	379
301. Method of tender.....	380
302. Continued readiness to pay.....	381
303. The same subject continued.....	383
304. Time of tender.....	384
305. Notes and bills.....	385
306. Ordinary contracts.....	386
307. Tender of delivery of goods.....	387
308. Producing the money.....	388
309. Further illustrations.....	389
310. Production of the money due on a mortgage.....	390
311. Money available for tender.....	391
312. Power of congress to pass legal tender acts.....	391
313. Waiver of defect of tender.....	392
314. Tender of note or check.....	393
315. Contracts payable in gold or silver dollars.....	394
316. Amount of tender.....	394
317. The same subject continued.....	395
318. Sufficiency of amount—Waiver.....	396
319. Tender on several debts.....	397
320. Conditional tender.....	398
321. The same subject continued.....	399
322. Giving receipt.....	400
323. To whom a tender should be made.....	401
324. Tendering at a bank.....	402
325. Tendering to an attorney at law.....	402
326. Tender of money into court.....	403
327. By whom a tender may be made.....	404
328. Tender under protest.....	404
329. Place of tender.....	405
330. Unliquidated damages.....	406
331. Effect of tender.....	407

SECTION.	PAGE.
332. The same subject continued.....	408
333. Further illustrations.....	409
334. Vendee's tender and demand of performance.....	410
335. In cases of pledge and mortgage.....	411
336. Tendering back borrowed stock.....	412
337. Tendering railroad fare.....	412
338. Tender excused.....	413
339. Questions of practice.....	414
340. Touching costs.....	415

CHAPTER IX.

VENDOR AND PURCHASER.

341. Contracts for sale of land	416
342. Title founded on adverse possession.....	417
343. Title from a stranger	418
344. Remedying defects	419
345. Whether a title is marketable.....	419
346. The same subject continued—Illustrations.....	420
347. Duties of vendor.....	421
348. Burden of proof	421
349. Illustrations of unmarketable titles.....	422
350. Specified land to be conveyed.....	423
351. Sales in gross.....	424
352. Conflict in description	425
353. Compensation for deficiencies.....	425
354. <i>Bona fide</i> purchaser—Possession as notice	426
355. Vendor's lien	427
356. Vendor's lien—Liability of purchaser from vendee.....	428
357. Vendor's lien—Expressly reserved.....	430
358. Reserving lien on crops to secure purchase-money.....	432
359. Vendor's right to earnest money	433
360. Equitable mortgage analogous to vendor's lien.....	433

CHAPTER X.

PAYMENT.

361. Payment defined	436
362. Conditional payment	438
363. Voluntary payments—Illustrations.....	439
364. Payment under protest.....	439
365. Compulsory payments—Recovery back.....	440
366. Payment by a stranger.....	441
367. Medium of payment—Illustration.....	442
368. Payment to creditor's creditor or to agent after principal's death.....	443

SECTION.	PAGE.
369. Paying creditor's debt—West Virginia doctrine.....	444
370. Payment by order	445
371. Payment by check.....	447
372. The same subject continued—Illustrations.....	448
373. Certified checks	450
374. Further illustration.....	451
375. Payment by bill or note.....	452
376. The same subject continued.....	453
377. Further illustrations.....	454
378. Evidence of intention to merge the debt.....	456
379. The same subject continued.....	457
380. Repayment of taxes illegally collected.....	458
381. Taxes paid under compulsion	459
382. The same subject continued.....	461
383. Receipts	463
384. Receipts in full.....	464
385. The same subject continued.....	465
386. Receipt under seal.....	465
387. Effect of a receipt.....	466
388. Application of payments.....	468
389. Payments on open account.....	469
390. Application by the creditor	470
391. Debts barred by statute of limitations	471
392. Rights of third parties.....	472
393. Time of appropriation.....	473
394. Appropriation by law.....	473
395. Partial payments.....	474
396. Further illustrations.....	475
397. Exception to the rule as to application of payments.....	477
398. The same subject continued.....	478
399. Payments made under mistake of fact.....	479
400. Payments made under mistake of law.....	481
401. Presumption of payment—Time of payment.....	482
402. Executor's duty to pay debts.....	484

CHAPTER XI.

BREACH OF CONTRACT.

403. Putting it out of one's power to perform.....	486
404. Further illustrations.....	487
405. Promisee disabling promisor.....	488
406. Ill treatment	489
407. Bankruptcy or insolvency.....	491
408. The same subject continued.....	492
409. Refusal to perform, the time for performance not having arrived— The English rule.....	492
410. The same subject continued—Illustrations of the English rule.....	494

SECTION.	PAGE.
411. American rule as to renunciation of contract.....	495
412. The same subject continued.....	495
413. Character of notice.....	496
414. Notice repudiated.....	498
415. Notice retracted.....	499
416. Further illustrations.....	500
417. <i>Scienter</i>	501
418. <i>Locatio operis faciendi</i> —Defective performance.....	502
419. Seller's breach—Buyer's remedy.....	504
420. Loss of profits as damages for breach.....	505
421. Partial or entire breach—Profits as damages.....	506

CHAPTER XII.

ACCORD AND SATISFACTION.

422. Accord and satisfaction defined.....	508
423. The subject illustrated.....	509
424. Further illustrations.....	511
425. The same subject continued.....	513
426. Accord supported by a consideration.....	515
427. Contracts under seal.....	515
428. The same subject continued.....	516
429. Subject-matter of an accord.....	517
430. The same subject continued.....	517
431. Payment of less sum than due.....	519
432. Compromises.....	520
433. The same subject continued.....	521
434. As to unliquidated demands.....	522
435. The same subject continued.....	523
436. Illegal claims.....	524
437. Accord executory.....	525
438. The same subject continued.....	526
439. Further illustrations.....	528
440. Accord without satisfaction.....	528
441. New promise.....	530
442. The same subject continued.....	531
443. Composition with creditors.....	532
444. The same subject continued.....	534
445. Liability of third party.....	535
446. The same subject continued.....	536
447. Further illustrations.....	537
448. Settlement by third person—New consideration.....	537
449. Accord and satisfaction by a joint creditor.....	539
450. Accord and satisfaction with a joint debtor.....	540
451. Reserving rights against co-debtors.....	541
452. Co-tort-feasors.....	541

SECTION.	PAGE.
453. Accord and satisfaction by a stranger.....	542
454. Rescinding accord for mistake or fraud.....	543
455. Pleading.....	544

CHAPTER XIII.

RELEASE.

456. Release defined	546
457. Consideration of release	547
458. Who may release—Limitations.....	548
459. Release under seal.....	549
460. What words make a release.....	550
461. The same subject continued.....	551
462. Effect at law.....	552
463. Effect in equity.....	553
464. Release in equity.....	554
465. Indorsements and entries operating as releases	555
466. Receipts and written memoranda sufficient to constitute a release..	556
467. Where written release not controlled by parol evidence.....	557
468. Destruction of the obligation.....	558
469. Delivery of the obligation.....	559
470. Voluntary declarations.....	559
471. The same subject continued—Illustrations.....	560
472. Release of bills and notes.....	561
473. Release of actions	562
474. Release of debts.....	562
475. Release of dower—Between executors.....	563
476. Release of all demands	564
477. Accessory and consequential matters.....	564
478. What a general release does not cover.....	564
479. Recitals and object of release qualifying it.....	565
480. The same subject continued—Illustrations.....	566
481. Contingent release.....	567
482. Covenant not to sue	568
483. Covenant not to sue for a definite time.....	569
484. Release of sureties.....	569
485. Where extension to debtor does not release surety.....	571
486. Release of a co-debtor	572
487. Release of joint and several debtors.....	573
488. Release of a co-tort-feasor	574
489. Further of joint tort-feasors—Of partners.....	574
490. Statutory provisions	576
491. Express reservation of remedy against co-debtor.....	576
492. Covenant not to sue a co-debtor.....	577
493. Release by a co-creditor.....	577
494. Fraud and mistake.....	577
495. Release obtained by fraud—Illustrations	578

SECTION.	PAGE.
496. Release obtained by fraud.....	580
497. Legal effect of release procured by undue influence.....	581
498. Release by railroad employes' relief department.....	583
499. The same subject continued.....	585
500. Deed-poll or indenture—Instructions for drafting.....	587
501. Pleading.....	587

CHAPTER XIV.

THE STATUTE OF FRAUDS.

502. Its origin and purpose.....	590
503. Its effect on verbal contracts.....	592
504. Promises by executors and administrators.....	593
505. Promises to answer for the debt, default or miscarriage of another...	594
506. Oral agreements to answer for the debt of another.....	594
507. To whom the promise must be made.....	596
508. Original and collateral promises.....	598
509. Original undertakings—Promisor's interest.....	599
510. The same subject continued.....	601
511. The doctrine of the Supreme Court of the United States.....	602
512. The rule in New York and Pennsylvania.....	602
513. The same subject continued.....	604
514. Further illustrations.....	606
515. Illustrations of original agreements.....	607
516. Where the promisor holds the debtor's funds, or where the old debt is extinguished.....	608
517. Relinquishment of lien—The modern rule.....	610
518. Independent promise releasing another.....	611
519. <i>Del credere</i> commission.....	612
520. As to contracts of indemnity.....	613
521. Oral promise to indemnify guarantor not within the statute.....	614
522. The same subject continued.....	616
523. Agreements in consideration of marriage.....	617
524. The same subject continued—Antenuptial contracts.....	618
525. Antenuptial parol agreements reduced to writing after marriage.....	619
526. Contracts relating to lands.....	620
527. Invalid verbal contracts as to land.....	621
528. Cases not within the statute—Constructive trusts.....	624
529. What not an interest in land—Mortgagee's interest.....	625
530. Part performance.....	626
531. Parol contract for sale of land and possession transferred.....	628
532. Parol contract for sale of land—Purchaser's possession.....	629
533. Parol sales of land in North Carolina.....	630
534. Executed oral lease—Statute to be pleaded.....	630
535. Executed parol contract for exchange of land not within the statute.	632
536. Fixtures.....	634
537. Cases not within the statute—Illustrations.....	635

SECTION.	PAGE.
538. <i>Fructus industriales</i>	636
539. Parol sale of perennial crops.....	637
540. Contracts for the sale of grass and growing trees.....	637
541. The same subject continued—Intention of the parties.....	639
542. Licenses to enter on lands	640
543. Easements	642
544. Rule as to sale of buildings	643
545. Partnerships to deal in lands.....	644
546. The same subject continued.....	645
547. Agreements not to be performed within a year.....	646
548. The same subject continued.....	647
549. The Texas doctrine.....	648
550. Illustrations—Cases within the statute.....	649
551. Illustrations—Cases not within the statute.....	652
552. Further illustrations—Cases not within the statute.....	653
553. Performance on one side within a year.....	655
554. Contracts for the sale of goods, wares and merchandise—Executory sales.....	656
555. Contracts for the sale of goods distinguished from contracts for work and labor	657
556. The English rule	659
557. The rule in New York	660
558. Shares in corporations and choses in action.....	660
559. Receipt and acceptance.....	661
560. The same subject continued.....	664
561. Further illustrations.....	666
562. Constructive delivery and acceptance.....	667
563. Delivery to a carrier.....	669
564. Delivery which takes contract out of the statute.....	670
565. Question for the jury	671
566. Earnest or part payment.....	672
567. Auctioneer's sales	673
568. Judicial sales.....	674
569. Form of the memorandum.....	674
570. The contents of the memorandum.....	676
571. The same subject continued.....	677
572. Sale of realty in Texas and Kentucky—The memorandum.....	679
573. What is a sufficient memorandum in other states.....	681
574. Whether the memorandum must show the consideration.....	682
575. Correspondence as evidence of the contract.....	684
576. Bought and sold notes—"Slip contracts".....	685
577. Insufficient writings to take contract out of statute.....	686
578. The signature	687
579. Oral variation of written agreement.....	688
580. Parol discharge of written agreement.....	690
581. When parol evidence may be resorted to	691
582. Remedy for services rendered under voidable contract.....	692
583. As to pleading the statute.....	693

CHAPTER XV.

THE LAW OF PLACE.

SECTION.	PAGE.
584. <i>Lex loci contractus</i>	695
585. The same subject continued.....	697
586. Illustrations.....	693
587. City ordinances.....	702
588. As affecting marriage—South Carolina rule.....	703
589. Promissory notes.....	705
590. Exception to the general principle.....	707
591. Intention of parties.....	709
592. The place of performance.....	710
593. Performance governed by what law.....	711
594. The same subject continued.....	714
595. <i>Lex fori</i>	714
596. The same subject continued—Statutes of limitation.....	716
597. Valid contract not enforceable everywhere.....	717
598. Matters affecting the remedy.....	719
599. As to real estate.....	720
600. As to personal property.....	721
601. Exceptions to the general rule as to personal property.....	722
602. Voluntary assignments for the benefit of creditors.....	723
603. Involuntary assignments under bankrupt and insolvent laws.....	725
604. Promissory notes and bills of exchange.....	726
605. The same subject continued.....	728
606. Interest.....	729
607. Days of grace.....	731
608. Insurance policies.....	731
609. The same subject continued.....	732
610. Contracts of carriers.....	733
611. Connecting lines of carriers—The English rule.....	735
612. The American rule.....	736
613. Contract tickets.....	738
614. Maritime contracts.....	739
615. Contracts of affreightment.....	740

CHAPTER XVI.

TIME.

616. Time at law generally of the essence of a contract.....	743
617. Relative to the sale of goods	745
618. Conditions precedent.....	746
619. When time is not of the essence of a contract.....	747
620. Time not generally regarded in equity as of the essence of a contract	749
621. Illustrations.....	750
622. When the property is subject to fluctuations in value.....	751

SECTION.	PAGE.
623. Stipulations in regard to real estate.....	752
624. Question of damages for delay, penalties or liquidated damages.....	753
625. The same subject continued.....	754
626. Illustrations.....	755
627. Stipulation in building contracts	758
628. The same subject continued—Illustrations of penalties.....	758
629. The intention of the parties and nature of the agreement—Controlling guides.....	759
630. Fractions of a day in the computation of time.....	761
631. Computation of time from a particular day or a particular event.....	762
632. The same subject continued.....	764
633. Time of payment of promissory notes	764
634. Day of performance falling on Sunday.....	765
635. Paper maturing on Sundays and holidays where grace is allowable..	766
636. The term "month"	767
637. Constructions of the words "until," "by," "forthwith" and "immediate"	768
638. The words "from and after"	769

CHAPTER XVII.

IMPLIED CONTRACTS.

639. Distinction between express and implied contracts.....	771
640. <i>Quasi</i> -contracts or contracts implied in law	773
641. The same subject continued.....	774
642. Illustrations.....	775
643. Further illustrations.....	776
644. When silence imports assent.....	778
645. When the law will not imply a contract	779
646. The same subject continued.....	780
647. Waiver of tort and suing <i>in assumpsit</i>	780
648. Liability of corporations on implied contracts.....	782
649. Acceptance of benefits—Gratuitous services.....	783
650. Acceptance of benefits where a promise to pay is implied	785
651. The same subject continued—Illustrations.....	786
652. Request without benefit.....	787
653. Where the law will not imply a promise owing to relationship.....	788
654. The same subject continued—Illustrations.....	790
655. Parent and child—Rule as to services rendered.....	791
656. Case of a person standing <i>in loco parentis</i>	793
657. Exception to the general rule that a child is not entitled to compensation for services to a parent.....	794
658. Contract for services where skill is required	795
659. Implied contracts of professional men.....	796
660. Recovery of money paid under a mistake of fact.....	797
661. Effect of negligence upon the right of recovery.....	799
662. Recovery of money paid under mistake of law.....	800

SECTION.	PAGE.
663. <i>Ignorantia juris neminem excusat</i> —Exception in the case of ignorance of a foreign law.....	801
664. Recovery of money paid under duress or compulsion.....	802
665. Voluntary payment of taxes	804
666. Recovery of illegal taxes paid under compulsion.....	805
667. Effect of a protest.....	806

CHAPTER XVIII.

JOINT CONTRACTS.

668. Joint and joint and several contracts.....	809
669. Illustrations.....	810
670. Joint contracts in Louisiana—Mortgage as indivisible.....	811
671. The interest of the parties.....	813
672. The intention of the parties.....	815
673. Liability of joint obligors.....	816
674. Contracts of subscription.....	817
675. Effect of release of one joint debtor.....	818
676. The same subject continued.....	820
677. Effect of death of joint contractor at law.....	821
678. The rule in equity.....	822
679. Where the deceased joint debtor is surety.....	823
680. When a surety's estate is held liable.....	824
681. Partnership contracts.....	824
682. Contribution among joint debtors.....	826
683. Contribution among sureties.....	827
684. Actions on joint contracts.....	828
685. Actions on joint and several contracts.....	830
686. Judgments on joint contracts.....	831
687. The same subject continued.....	832
688. Statutory modification of the common law rules.....	833
689. The same subject continued.....	834

CHAPTER XIX.

PART PERFORMANCE.

690. The rule at law.....	836
691. Part performance an equitable doctrine.....	837
692. Basis upon which the doctrine rests.....	838
693. <i>Quantum meruit</i> for part performed.....	840
694. Where no recovery for part performance	841
695. What acts do not constitute part performance.....	842
696. Acts of part performance—Possession.....	843
697. Continuance of possession—Landlord and tenant.....	845
698. Improvements.....	846

SECTION.	PAGE.
699. Where the consideration is labor and services.....	848
700. Marriage.....	849
701. Parol gifts of land.....	850

CHAPTER XX.

CONSTRUCTION OF CONTRACTS.

702. The intention of the parties the cardinal rule.....	852
703. Intent as ascertained from the language used.....	854
704. Construing written contracts—When oral evidence excluded.....	855
705. The same subject continued.....	856
706. Superseding the old by a new contract	857
707. Error of the parties.....	858
708. Reasonable construction to be adopted	859
709. The contract to be upheld if possible	860
710. Necessary implications.....	862
711. The whole contract to be considered	863
712. Construing particular clauses	864
713. Reading two instruments as one	866
714. Words to be given their ordinary meaning	868
715. When the ordinary sense will not control.....	869
716. Technical words.....	870
717. Where the contract is capable of two meanings.....	871
718. Repugnancy	872
719. Effect to be allowed to surrounding circumstances	873
720. The same subject continued.....	874
721. Construction by the parties.....	875
722. The same subject continued.....	877
723. The object of construction.....	878
724. Construction by parties—Estoppel	880
725. Parol evidence to show the construction of the parties	881
726. The rule <i>contra proferentem</i>	882
727. Grants	884
728. Contracts partly written and partly printed.....	885
729. The same subject continued.....	886
730. Punctuation.....	886
731. Whether a contract is entire or severable.....	887
732. Whether a contract is severable or joint.....	888
733. The same subject continued—Illustrations.....	890
734. Laws, customs and usages.....	890
735. Construction of deeds.....	892
736. The same subject continued.....	894
737. Construction of insurance policies.....	895
738. The same subject continued.....	896
739. Building contracts.....	897
740. Parol evidence admissible when.....	898
741. The same subject continued.. ..	899

SECTION.	PAGE.
742. Latent and patent ambiguities.....	900
743. Function of judge and jury respectively.....	901
744. The same subject continued.....	903
745. Oral contracts	904
746. Contracts of sale or return—Of sale or bailment.....	905

CHAPTER XXI.

CUSTOM AND USAGE.

747. Custom as an element of contracts—General rule.....	907
748. Mississippi doctrine.....	909
749. Such custom illustrated—Knowledge of custom.....	910
750. Established custom defined.....	912
751. Knowledge of general custom presumed—As to railroads.....	913
752. The same subject continued—Question for jury.....	915
753. Express contract not to be contradicted or varied—Principal and agent	916
754. The South Carolina rule.....	917
755. Custom not to be contrary to law—Railway and banking customs.....	918
756. Customs to be reasonable.....	922
757. Plain terms not to be varied by custom.....	924
758. Proving custom as to measurement, etc., where contract silent.....	926
759. Commercial usage defined and considered.....	928
760. The same subject continued.....	930
761. Knowledge of local usage essential.....	931
762. Agent's knowledge imputed to principal—Bill of lading.....	932
763. How usage may be proved.....	934
764. The same subject continued.....	936
765. Personal customs or habits.....	936
766. Usage as to authority of insurance agents.....	937
767. Custom construed—Charter-party—Demurrage.....	938
768. Relating to brokers.....	940
769. Banking custom as to collections—Evidence.....	940
770. Excluding custom by notice—Pleading custom.....	941

CHAPTER XXII.

CHANGE AND TERMINATION.

771. Ending or changing contracts by conduct.....	943
772. Election between ending and enforcing contract—Right to abandon..	945
773. Effect of death—Of destruction of subject of contract.....	946
774. The same subject continued—Exceptions.....	948
775. Revoking agency by death.....	949
776. Varying or terminating written by subsequent oral contracts.....	949
777. As to consideration of the parol contract.....	950

SECTION.	PAGE.
778. Writing ended by parol although not thus to be varied—Statute of frauds.....	951
779. Terminating contracts under seal by parol.....	952
780. Effect of parol modification of written contract.....	953
781. Parol extension or waiver of time of performance.....	954
782. Explaining written receipt by parol evidence.....	955
783. Where time of the essence—Abandonment—Waiver of condition.....	956
784. Writing not to be varied by contemporaneous oral agreement.....	957
785. Cases where contracts have been held not terminated or modified by parol.....	958
786. Novation.....	960
787. The same subject continued.....	961
788. Breaking contract of sale by sale to another.....	962

CHAPTER XXIII.

RESCISSION AND CANCELLATION.

789. Equity jurisdiction—Damages as remedy	965
790. Rescission to prevent multiplicity of suits.....	967
791. Rescission compared with reformation	969
792. Restoring benefits on rescinding contract.....	969
793. Restoring the consideration.....	971
794. Keeping tender good	973
795. Requisite joinder.....	974
796. Rescission by vendor with forfeiture against vendee	976
797. Rescission for expressions of opinion—Future promise.....	978
798. The same subject continued—If parties in confidence	980
799. Concealment—Representations of value—Warranty.....	981
800. The same subject continued—Miscellaneous	982
801. Rescission for mistake of law	984
802. Where one party only ignorant	985
803. Rescinding release of legacy—Mistake of law—Concealment.....	987
804. Fraudulent representations	988
805. The same subject continued.....	990
806. Further illustrations.....	991
807. Estate not liable to purchaser for executor's representations—Restoration	993
808. Rescinding coal lease for mutual mistake—Lessee's laches	994
809. Sale of ground rent—Mistake of law.....	995
810. Rescission for fraud	996
811. Fraud of vendee, although he pays consideration	997
812. Election by defrauded purchaser—Acquiescence.....	998
813. Rescission for purchaser's fraud.....	999
814. The same subject continued.....	1000
815. Rescinding sale of goods for buyer's fraud.....	1001
816. Fraud must be proved as alleged.....	1003
817. Party put on inquiry—Want of diligence.....	1004

SECTION.	PAGE.
818. Negligent execution of instrument	1005
819. Proof of fraud—Diligence.....	1006
820. Laches in rescinding by one knowing his rights	1007
821. Unreasonable delay.....	1009
822. Rescission of fraud—For inadequate consideration.....	1011
823. Deed of trust by husband or wife.....	1012
824. Effect of ratification	1013
825. Where persons are in confidential relations.....	1014
826. Physician and patient	1015
827. Rescinding deed of trust from wife to husband or son.....	1016
828. The same subject continued—Suit by heirs	1019
829. Rescission by married woman.....	1020
830. Parents' deeds to children	1021
831. Voluntary deed from father to son	1022
832. Deed of gift by old man—Confidential relation	1023
833. Conveyances by lunatics and drunkards.....	1024
834. Test of grantor's capacity.....	1026
835. Evidence of incapacity—Facts <i>versus</i> opinions.....	1027
836. Conveyance by erratic persons.....	1029
837. Where agent sells trust estate to own wife.....	1030
838. Stifling competition at judicial sale.....	1033
839. Canceling mortgage—Want of consideration.....	1034
840. The same subject continued—Security overruled.....	1036
841. Deed given for illegal purpose —Exception.....	1037
842. Where parties were in illicit relation.....	1040
843. Parties <i>in pari delicto</i>	1041
844. The same subject continued.....	1042
845. Rescission for non-performance.....	1043
846. Deed defrauding cotenants.....	1045
847. Directors' contracts for their own benefit.....	1046
848. Rescinding note procured by fraud—Enjoining transfer.....	1048
849. Rescission of sale where price payable in installments.....	1049

VOLUME II.

CHAPTER XXIV.

REFORMATION.

850. Jurisdiction of a court of equity.....	1051
851. The same subject continued.....	1052
852. Nature and effect of reformation.....	1054
853. Mutual mistake or fraud.....	1055
854. Mutual mistake—Reforming against sureties.....	1057
855. Contract not reformed into a new one.....	1059
856. Mistake as to legal effect—Court will not make instrument.....	1060

SECTION.	PAGE.
857. Not reformed to prejudice of third persons—Vested rights protected.	1061
858. Reformation as against purchaser—Sheriff's deed.....	1062
859. Reformation for mistake—Rule as to diligence.....	1063
860. Rule as to proof of mistake.....	1064
861. Clear proof of mistake—Assuming payment of mortgage.....	1066
862. The same subject continued.....	1067
863. Complainant to prove mistake—Corroborating circumstances.....	1069
864. Reforming executor's bond for mistake—Voluntary deed.....	1070
865. Scrivener's mistake.....	1071
866. Mistakes in reducing to writing.....	1074
867. The same subject continued—Contracts with corporations.....	1075
868. Reformation of deed for misdescription.....	1076
869. Misdescription of land—Rule as to consideration.....	1077
870. The same subject continued.....	1079
871. Where instrument wants seal or witness—Two instruments taken together.....	1082
872. Where reformation unnecessary—Remedy at law.....	1083
873. Insurance policy—False representation of complainant.....	1084
874. Requisites of complaint.....	1085
875. Correction as to warranty in policy.....	1086
876. Insurance agent's mistake.....	1088
877. Parties.....	1089

CHAPTER XXV.

SPECIFIC PERFORMANCE.

878. Definition—Ground of the jurisdiction.....	1091
879. Jurisdiction—Liquidated damages.....	1093
880. The same subject continued—Auxiliary jurisdiction.....	1096
881. No jurisdiction to award damages merely.....	1097
882. Where no remedy at law.....	1098
883. Enforcing contract which requires building to be done.....	1100
884. Discretion of court of equity—If contract inequitable.....	1102
885. Judicial discretion—Contract to be mutual.....	1104
886. Mutuality.....	1106
887. Optional contracts.....	1108
888. The same subject continued—Exchange of easements.....	1109
889. When mutuality unnecessary.....	1110
890. The same subject continued.....	1111
891. Certainty of contract as a requisite.....	1112
892. The same subject continued.....	1114
893. <i>Id certum est, quod certum reddi potest</i>	1116
894. Of vague contracts.....	1117
895. Conditional contract not enforceable.....	1119
896. Enforcing inequitable railroad contracts.....	1121
897. Performance by complainant—Burden of proof.....	1122
898. Performance to be alleged—Tender.....	1125

SECTION.	PAGE.
§99. Offer of performance in complaint—Performance as decreed.....	1126
900. Contract must be fair—Must conform to statute.....	1127
901. Must not be against public policy	1128
902. In cases of trust and fiduciary relation	1129
903. Consideration essential—If price deficient or excessive.....	1130
904. Consideration essential—Expression—Seal	1131
905. Testamentary agreements—When enforced.....	1132
906. Son's agreement to support father.....	1133
907. As to inventions made by employe.....	1134
908. Compelling vendee of land to take title—Vendor's laches.....	1136
909. Marketable title considered.....	1138
910. The same subject continued.....	1139
911. Debts and liens.....	1140
912. Tender of deed by vendor—Action at law construed as in equity...	1142
913. Averment of tender.....	1143
914. When vendor's delay to tender title is not laches.....	1145
915. Where vendee knows of and waives defect of title	1146
916. Decree against vendee—Form and requisites.....	1148
917. Enforcing agreement to make will—Executors as plaintiffs.....	1150
918. Statute as bar—Inequitable laches	1151
919. Exception as to laches—Rule as to limitations.....	1152
920. Where contract has restrictions as to use	1153
921. Enforcing purchase of part of land	1154
922. Enforcement against lender to vendee—Against second vendee....	1156
923. When contract against vendor will not be enforced.....	1158
924. Enforcing contract against vendor—Vendee's laches—Tender of price.....	1160
925. Vendee's laches continued.....	1163
926. If transaction speculative.....	1165
927. Compensation for improvements	1167
928. Mining contract.....	1168
929. Vendor's estoppel to set up vendee's laches.....	1170
930. Enforcing contract in another jurisdiction	1171
931. <i>Lex rei sitæ</i>	1173
932. Where description of land is imperfect	1173
933. Incomplete boundaries	1175
934. The rule in West Virginia	1178
935. The rule in Connecticut.....	1180
936. Enforcing land options and oral modifications—Wisconsin statute..	1182
937. Enforcement by third person—Parties—Delivery to one of two.....	1183
938. Enforcing sale of heir's expectancy	1184
939. Against husband and wife	1185
940. Husband and wife's contract to convey.....	1187
941. Contract by husband for self and wife.....	1188
942. Of oral agreement to sell or lease land—Part performance	1190
943. Enforcing oral contracts for sale of land.....	1192
944. Rule as to performance.	1194
945. Contract to be definite and certain.....	1195
946. The same subject continued.....	1197

SECTION.	PAGE
947. The Texas doctrine.....	1193
948. The Kentucky doctrine—Pleading statute of frauds.....	1199
949. Part performance of oral contracts explained.....	1200
950. Of building contract—Partial performance decreed.....	1202
951. Contract of separation.....	1204
952. Where contract improperly closed with agent.....	1205
953. Director's contract with corporation.....	1205
954. Enforcing release of dower.....	1206
955. Contracts for sale of personalty not usually enforced.....	1207
956. Of contracts relating to chattels, stock and patent rights.....	1208
957. Personal services—Specific performance.....	1210
958. Injunction in aid of specific performance.....	1212
959. Accounting as incidental to specific performance—Compensation....	1213
960. Parties.....	1214
901. Pleadings—Variance.....	1215
962. Dismissal of bill without prejudice—Alternative decree.....	1217

CHAPTER XXVI.

CONTRACTS OF CORPORATIONS.

963. Corporate power to make contracts.....	1220
964. Gas company's power to mortgage	1222
965. Implied powers of corporations—Charter as contract.....	1223
966. Incidental or implied powers	1224
967. The same subject continued.....	1225
968. Seal—Acknowledgment.....	1227
969. The same subject continued—Delivery to corporation.....	1229
970. Corporate seal essential to Tennessee conveyances.....	1230
971. Assignment in treasurer's name and with corporate seal	1232
972. Statutory requirements—Pleading.....	1233
973. Informal change of name	1235
974. Notice of meeting at which contract is made.....	1236
975. Contracts made before incorporation.....	1237
976. Charter as contract with the state—Exclusive right not granted....	1239
977. Insurance policy as contract—Seal	1240
978. Corporation's contract with president's signature.....	1242
979. Chattel mortgage as the personal act and deed of the president.....	1243
980. Rule and test of <i>ultra vires</i> —Injunctions	1244
981. The same subject continued.....	1246
982. The Massachusetts doctrine.....	1247
983. Acts <i>ultra vires</i> —The Connecticut definition	1249
984. <i>Ultra vires</i> lease or sale of franchise—The remedy.....	1250
985. The same subject continued.....	1251
986. Act <i>ultra vires</i> —When stockholders estopped to attack.....	1252
987. Corporate sale in violation of charter.....	1254
988. Special illustrations of acts not <i>ultra vires</i>	1255
989. Voting trust agreements.....	1257

SECTION.	PAGE.
990. Guaranteeing contracts of other corporations.....	1257
991. Investing in the stock of another corporation—When prohibited..	1259
992. Holding stock of another corporation.....	1260
993. <i>Ultra vires</i> stock subscriptions in other companies.....	1261
994. The same subject continued— <i>Ultra vires</i> defense not favored.....	1262
995. Where benefits are received—Conflict of doctrine.....	1263
996. The same subject continued.....	1264
997. The rule in Georgia.....	1265
998. Contract to prevent competition—Acts of agents—Ratification.....	1267
999. Authority from by-laws—Limitations.....	1270
1000. Apparent authority—Ratification.....	1270
1001. Authority by resolution of board of directors.....	1271
1002. The same subject continued.....	1273
1003. Estoppel to deny officer's authority.....	1273
1004. Ratification of officer's unauthorized acts.....	1274
1005. Agents' authority from corporate acquiescence.....	1277
1006. Ratification of agents' contracts.....	1278
1007. The same subject continued.....	1279
1008. President to act as authorized by directors—Presumption.....	1281
1009. President's general authority.....	1282
1010. Contracts by the president or general manager—As to <i>cognovit</i>	1283
1011. Treasurer's implied power to make notes.....	1285
1012. Contracts made by principal stockholders.....	1286
1013. How far the corporation is bound by its officer's acts and knowl- edge.....	1288
1014. Directors as trustees—Contracts with themselves.....	1289
1015. Directors buying claims against the corporation.....	1290
1016. The same subject continued.....	1291
1017. Directors acting for or against the corporation.....	1292
1018. The same subject continued—Laches.....	1293
1019. Where contracts are beneficial.....	1295
1020. Corporation liable for benefits received despite irregularities.....	1296
1021. Whether directors may act in a foreign state.....	1297
1022. A director as seller to himself.....	1298
1023. Directors voting themselves salaries—Ratification.....	1299
1024. Contract for directors' benefit voidable not void—Assent.....	1300
1025. The same subject continued—Miscellaneous.....	1302
1026. Selling official influence.....	1303
1027. Signing receipt for own goods.....	1304
1028. Where contract is executed.....	1305
1029. Enjoining the directors at the suit of stockholders..	1306
1030. Contracts by promoters.....	1308
1031. The same subject continued.....	1309
1032. Personal liability of promoters.....	1310
1033. Corporations adopting promoter's contract.....	1312
1034. Officer's compensation for extra services.....	1316
1035. Employment of counsel by vice-president.....	1318
1036. Subscription for stock as contract—Shareholders' contract mutual.	1318
1037. Conditions precedent to subscribers' liability.....	1320

SECTION.	PAGE.
1038. Subscription before incorporation.....	1321
1039. Irregular incorporation—Subscriber's acquiescence.....	1322
1040. When subscriber is estopped.....	1323
1041. The Louisiana rule—Subscriber estopped.....	1325
1042. Withdrawal of subscription—By death or insanity—Notice.....	1327
1043. Subscriptions procured by fraud.....	1330
1044. The same subject continued—Laches.....	1331
1045. Transfer of shares.....	1332
1046. Disclosing corporate insolvency as between stockholders.....	1333
1047. <i>De facto</i> corporations—Liabilities arising therefrom.....	1334
1048. The same subject continued.....	1337
1049. <i>De facto</i> officers—Binding acts.....	1338
1050. Proving officer's authority where official minutes are lost.....	1339
1051. Making of notes, etc., by the president and secretary of the corporation.....	1340
1052. Corporate liability on stock certificates.....	1344
1053. The same subject continued.....	1345

CHAPTER XXVII.

DEBTS OF INCORPORATIONS.

1054. Implied authority to borrow, etc.....	1348
1055. Estoppel to deny indebtedness.....	1348
1056. Unauthorized notes and loans—Lender put on inquiry.....	1350
1057. Authority to issue notes not necessarily express.....	1351
1058. Implied power to make notes.....	1351
1059. Insolvent corporation's notes.....	1352
1060. Judgment note by insolvent corporation—The Illinois rule.....	1353
1061. President's power to make notes.....	1354
1062. His authority inferred from acquiescence—Banks more strict.....	1356
1063. Notes by the general agent of an industrial corporation.....	1356
1064. Notes by treasurer.....	1357
1065. Railroad manager's notes and checks—Powers of a foreign agent..	1358
1066. Ambiguous note signed by superintendent.....	1360
1067. Note in favor of church—Suit by trustees.....	1361
1068. Security for loan valid.....	1361
1069. Limited loans—Mortgages.....	1363
1070. Corporation mortgage to secure bank.....	1363
1071. Corporate mortgage in favor of director.....	1364
1072. Bonds—Mortgages—Ratification.....	1366
1073. The same subject continued.....	1368
1074. Agent to sell bonds may not pledge them.....	1369
1075. Primary liability of corporation.....	1370
1076. Stockholders' liability for corporate debts.....	1370
1077. The rule in Ohio.....	1372
1078. The rule in Tennessee.....	1374
1079. The rule under New York statutes.....	1375

SECTION.	PAGE.
1080. The same subject continued.....	1377
1081. Creditor's bill—Parties—Practice.....	1379
1082. Creditor's bill	1381
1083. The rule in Wisconsin.....	1383
1084. Stockholders' statutory liability contractual—Waiver	1384
1085. Statutory liability of corporate trustees.....	1386
1086. Corporate preference of creditors—Missouri statutes	1389
1087. Collusive preferences—Corporate debts left unpaid	1390
1088. Preference of directors—Arkansas doctrine.....	1392
1089. Bondholders as parties to foreclose.....	1393
1090. Incorporation not complete—Creditor <i>versus</i> purchaser.....	1394
1091. The trust fund doctrine.....	1395
1092. Capital stock as trust fund for creditors.....	1398
1093. The same subject continued—The rule in North Carolina.....	1399
1094. South Dakota trust fund doctrine	1401
1095. Corporators—When liable as partners.....	1402

CHAPTER XXVIII.

CONTRACTS OF RAILROAD COMPANIES.

1096. Railroad rules as contract—Railroad leases.....	1409
1097. Leases—The Illinois statute.....	1411
1098. Pennsylvania railroad leases.....	1413
1099. Merger and lease—The New Jersey rule.....	1414
1100. Railroad mortgages in Ohio.....	1415
1101. Mortgage, when void as to rolling stock.....	1416
1102. Mortgage liens on after-acquired rolling stock.....	1417
1103. Traffic agreements.....	1419
1104. Joint traffic contracts.....	1420
1105. Joint through rates.....	1423
1106. Pooling contracts.....	1424
1107. Competition considered.....	1425
1108. The same subject continued.....	1426
1109. Railroad bonds—Statutes affecting.....	1427
1110. Guaranty of another company's bonds.....	1429
1111. Enjoining purchase of another line.....	1430
1112. Reasonable contract with shipper—Protecting railroads.....	1432
1113. <i>De facto</i> railroad companies—Liability to creditors.....	1433
1114. Railroad operated by lessees or receiver.....	1435
1115. Receivers of railroads embracing leased lines—Liability.....	1436
1116. Railroad loans on mortgage bonds only.....	1437
1117. Compelling railroad to operate entire line.....	1439

CHAPTER XXIX.

REORGANIZATION AND CONSOLIDATION.

SECTION.	PAGE.
1118. Reorganization—Nature and purpose.....	1441
1119. Effect of reorganization.....	1443
1120. The same subject continued.....	1444
1121. Reorganization not unfavorably regarded.....	1445
1122. Merger distinguished from reorganization	1448
1123. Stockholders' rights after reorganization	1449
1124. Consolidation is statutory	1450
1125. Irregularities in consolidation.....	1451
1126. Residence of consolidated company	1452
1127. New corporation as successor of the old ones	1453
1128. The same subject continued—Evidence.....	1456
1129. Powers and liabilities of consolidated companies—Misjoinder	1457
1130. The same subject continued—The rule in New Jersey	1459
1131. Consolidated company's right to bonds.....	1460
1132. Stockholders' rights in case of consolidation.....	1461

CHAPTER XXX.

CONTRACTS OF MUNICIPAL CORPORATIONS.

1133. Municipal corporations not in contract relation with state.....	1465
1134. Compliance with city charter or statute	1466
1135. The same subject continued.....	1467
1136. Municipal agents to act as prescribed by statute.....	1468
1137. The same subject—Application to police board.....	1470
1138. Implied and incidental municipal powers.....	1471
1139. The same subject continued—Municipalities distinguished.....	1474
1140. Implied obligation to do justice—Allowed claims	1475
1141. Health ordinances and contracts.....	1477
1142. Municipal ordinances considered.....	1479
1143. Impairing contracts by subsequent ordinance—Police power.....	1481
1144. When resolution of council not a contract.....	1482
1145. Fraudulent contracts—Ratification	1484
1146. Contracts by township trustees—By committees	1485
1147. Proving school district contracts	1486
1148. Limitations as to time	1487
1149. Persons contracting with city put on inquiry.....	1488
1150. The same subject continued—Estoppel by use.....	1490
1151. Contractor's risk—Extra services.....	1492
1152. Contractor's enforcement of assessments for street improvement...	1493
1153. Liabilities to and for contractors.....	1495
1154. Contractor's bond—Assigned contract—City succeeding to village.	1497
1155. Authorized official action conclusive.....	1498
1156. Strict rule as to <i>ultra vires</i>	1499

SECTION.	PAGE.
1157. Property held for public use—Misappropriation.....	1501
1158. Franchise for private purpose—Monopoly.....	1503
1159. <i>Ultra vires</i> employment of physician by health board.....	1505
1160. Appropriating street for railroad.....	1506
1161. Ratifying <i>ultra vires</i> and informal contracts.....	1507
1162. The same subject continued.....	1509
1163. Retaining benefits as estoppel—Borough contract.....	1510
1164. Contracts with attorney for services.....	1511
1165. <i>Ultra vires</i> sewer contracts.....	1513
1166. Pleading <i>ultra vires</i>	1514
1167. <i>Ultra vires</i> payment recoverable.....	1514
1168. Debt restrictions—Charging debts on new territory.....	1515
1169. The same subject continued—The rule in Texas.....	1517
1170. The same subject continued—The rule in Missouri.....	1518
1171. The same subject continued—Injunctions.....	1520
1172. Unauthorized appropriations.....	1521
1173. Authorized municipal bonds in hands of <i>bona fide</i> purchaser.....	1524
1174. The same subject continued—The rule in Kansas.....	1528
1175. Raising money by issuing bonds—The rule in Indiana.....	1532
1176. Bonds in excess of authorized tax.....	1533
1177. Municipal bonds to aid railroads.....	1534
1178. The same subject continued.....	1537
1179. Railroad bonds violating state constitution.....	1538
1180. Void bonds—Joint bonds.....	1541
1181. Enjoining delivery of bonds where road not made—Fraud.....	1542
1182. Awarding contract to bidders—Fraud enjoined.....	1544
1183. Judicial control of—Discretion as to bids.....	1545
1184. Discretion as to bids for contracts—The rule in New Jersey.....	1547
1185. The same subject continued—Bids for lighting streets.....	1550
1186. The same subject continued—The rule in Pennsylvania.....	1551
1187. Advertising for bids.....	1553
1188. The same subject continued.....	1555
1189. Licenses.....	1556
1190. No power to license street nuisance—Invalid permits.....	1556
1191. Sewer contracts— <i>Mandamus</i> by contractor.....	1558
1192. Contracts for water and light—Vote of electors.....	1559
1193. The same subject continued—Limitations.....	1561
1194. The same subject continued—The rule in Indiana.....	1564
1195. Validity considered.....	1565
1196. Contracts for lighting streets.....	1568
1197. The same subject continued—The rule in New Jersey.....	1569
1198. Gas company's public obligation.....	1571
1199. The rule in Indiana and elsewhere.....	1572
1200. City contract to supply water—Damages.....	1574
1201. Contracts for safe keeping of streets.....	1575
1202. City contract with water company.....	1577
1203. Mutual liabilities.....	1578
1204. Contract with railroad and telegraph companies.....	1580
1205. Grants by city not to be impaired.....	1581

SECTION.	PAGE.
1206. City charter to street railroad as contract.....	1584
1207. Bridge contracts.....	1585
1208. The same subject continued—Expense exceeding revenue.....	1586
1209. Officer appointing himself.....	1587
1210. Corrupt municipal officers	1589

CHAPTER XXXI.

OF BUILDING AND LOAN ASSOCIATIONS.

1211. Nature and object—Mutuality— <i>Ultra vires</i>	1593
1212. Borrowers and non-borrowers—Assessments to meet losses.....	1597
1213. Constitutionality	1599
1214. Ambiguous by-laws—Loans only to members	1600
1215. Company, how far bound by officers' acts.....	1601
1216. Powers—As to stocks—Homesteads	1603
1217. Loans to other than members invalid.....	1604
1218. Applying stock payments on loans	1605
1219. The same subject continued.....	1606
1220. Fines—Interest on loans.....	1607
1221. Forfeiting stock for non-payment of dues.....	1609
1222. Relief from forfeiture.....	1611
1223. Withdrawal of members	1613
1224. Withdrawing members' rights—Set-off	1616
1225. Rules as to usury.....	1618
1226. Where usury sanctioned by statute.....	1620
1227. Devices to cover usury.....	1621
1228. The same subject continued—The rule in South Carolina.....	1622
1229. The Georgia doctrine.....	1624
1230. Conflicting laws	1626
1231. Premiums as related to usury—Conflict.....	1628

CHAPTER XXXII.

CONTRACTS FOR THE BENEFIT OF CREDITORS.

(a) COMPOSITION WITH CREDITORS.

1232. Consideration of the agreement.....	1630
1233. When all the creditors must join.....	1631
1234. Parol agreements—Seal.....	1633
1235. Performance of agreement by debtor.....	1633
1236. Compositions under Massachusetts statutes.....	1634
1237. Secret agreements with a creditor.....	1634
1238. The same subject continued—Effect of the composition.....	1635
1239. Acts of third party.....	1636
1240. Fraud in composition agreements—The rule in New York.....	1637

SECTION.	PAGE.
1241. The rule in Massachusetts.....	1639
1242. Notes in pursuance of secret agreement are void.....	1640

(b) ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1243. Nature—Construction—Acknowledgment.....	1641
1244. Distinguished from mortgages.....	1642
1245. Creditor's assent to assignment.....	1643
1246. Assignee's relation to assignor—To creditors.....	1644
1247. Fraudulent assignments—Use reserved.....	1645
1248. Fraudulent preferences—Fictitious debt—Pleading.....	1646
1249. The same subject continued—Illegal interest.....	1648

CHAPTER XXXIII.

CONTRACTS OF MARRIED WOMEN.

1250. Married woman's contracts void where no separate estate.....	1651
1251. The rule in New York	1652
1252. Married women's emancipation—Ratification thereafter	1653
1253. Ratifying void contracts after discoveriture.....	1655
1254. Necessaries for family—Who liable.....	1656
1255. The rule in New York and Indiana.....	1659
1256. Necessaries for wife living separate.....	1660
1257. Conveyances from husband to wife—Fraud.....	1661
1258. Sufficient consideration therefor.....	1662
1259. Debt to wife as consideration.....	1664
1260. Conveyance to wife by insolvent husband	1664
1261. Where land really belongs to the wife.....	1665
1262. Husband's transfers to wife scrutinized	1666
1263. Delivery of deed from husband to wife	1667
1264. Husband's gifts to wife.....	1668
1265. Where husband is in debt	1670
1266. Gifts by wife to husband—When in trust for her.....	1671
1267. Gift of rents or principal.....	1672
1268. Gifts between spouses in Louisiana—Alienation of dowry.....	1673
1269. Loan by wife to her husband.....	1675
1270. The same subject continued.....	1676
1271. Acquiring separate property—Profits from farm.....	1677
1272. The rule in Pennsylvania, Missouri and Vermont.....	1678
1273. The rule in Texas.....	1680
1274. The Texas presumption in favor of community property.....	1681
1275. Borrowed money as separate estate—Mortgage therefor.....	1683
1276. Earnings from keeping boarders.....	1684
1277. The rule in California, Montana, Virginia and New York.....	1686
1278. Wife's land—Wife's horses—The rule in Pennsylvania.....	1687
1279. Proceeds of separate property—Crops—Interest.....	1689
1280. As to cattle's increase.....	1691
1281. Legacy as separate estate—Products through husband's efforts.....	1691

SECTION.	PAGE.
1282. Evidence of wife's separate property.....	1692
1283. Further illustrations.....	1694
1284. Liability for improvements on separate estate.....	1694
1285. Suing wife on covenants as separate estate contract.....	1696
1286. Separate estate liable for expenses in divorce suit.....	1697
1287. Charging or disposing of separate estate.....	1698
1288. The rule in Florida.....	1699
1289. The rule in Virginia, North Carolina and Alabama.....	1701
1290. When separate estate must be expressly charged.....	1702
1291. The rule in New York.....	1704
1292. Separate estate notes—Effect of fraud.....	1704
1293. Wife's possession of chattels as notice—Her deed.....	1705
1294. Her chattels in husband's possession.....	1706
1295. Her agent—As to realty.....	1707
1296. The husband as the wife's agent.....	1708
1297. Evidence of husband's agency—Conflicting doctrines	1709
1298. Marriage settlements—Presumption of fraud—Writing required...	1710
1299. Liberal construction in wife's favor	1712
1300. Full disclosure required.....	1714
1301. Ratification of antenuptial contract after marriage.....	1715
1302. Post-nuptial settlement after antenuptial promise—Marriage as wife's part performance.....	1716
1303. Post-nuptial settlements presumed to be void as to creditors.....	1717
1304. Wife as husband's surety	1719
1305. Further illustrations.....	1721
1306. The wife as surety in Nebraska, Georgia and Kentucky	1723
1307. The rule in Indiana and Tennessee.....	1724
1308. Her suretyship a question of fact.....	1725
1309. Woman's conveyance in fraud of prospective husband	1727
1310. Wife's right of disposition	1727
1311. Wife's deed—Formal requisites	1729
1312. Conveying her real estate.....	1730
1313. The same subject continued.....	1732
1314. Wife's contracts to convey—Vendee's lien.....	1732
1315. Direct conveyances between husband and wife	1733
1316. The rule under the Oregon and California codes.....	1734
1317. The rule in New York	1735
1318. Florida conveyances by wife—Securing husband's debts.....	1737
1319. Texas conveyances of wife's separate realty—Husband's joinder...	1737
1320. Conveying property after separation from husband	1739
1321. Mortgages by the wife	1740
1322. The same subject continued.....	1741
1323. Mortgage in Louisiana of wife's separate paraphernal property....	1742
1324. Sale of wife's personalty—Of her equitable estate	1743
1325. Notes between husband and wife—Indorsements	1745
1326. Wife's indorsement of husband's note.....	1746
1327. Husband's note to wife—Under California code.....	1747
1328. Contracts of married women in trade	1747
1329. Partnership with others than her husband.....	1748

SECTION.	PAGE.
1330. The same subject continued.....	1750
1331. Her mutual account with partnership—In Pennsylvania.....	1751
1332. Wife's contracts in partnership with husband.....	1752
1333. The same subject continued.....	1754
1334. Stock dealings between husband and wife.....	1755
1335. Assignment of policy on husband's life.....	1757
1336. Wife's contracts of separation from her husband.....	1758
1337. Disposing of community property	1759
1338. The same subject continued.....	1760
1339. Community property charges and debts	1762
1340. Estate by entireties—Restrictions upon alienation	1762
1341. Price paid by wife—Tenancy in common.....	1765
1342. Effect of divorce on estate by entirety.....	1766
1343. Actions between husband and wife—Limitations.....	1769

CHAPTER XXXIV.

CONTRACTS OF INFANTS.

1344. As to executed and executory contracts.....	1770
1345. Contracts of infants void or voidable.....	1771
1346. Defense of infancy available for infants only.....	1773
1347. Ratification inferred from acts.....	1774
1348. The same subject continued.....	1775
1349. Ratifying mortgage by paying interest—Alabama doctrine.....	1776
1350. Ratifying mortgage by recitals.....	1777
1351. Ratifying deed—Attacking decree.....	1779
1352. Infant's acquiescence as ratification—Knowledge of facts.....	1780
1353. Restoring consideration by infant.....	1781
1354. The same subject continued.....	1782
1355. Infant's recovery of what he has paid—Fraud.....	1784
1356. Disaffirmance—Reasonable time.....	1785
1357. Reasonable time as applied to infant wife	1787
1358. Disaffirmance by action to rescind	1789
1359. Estoppel to disaffirm—Benefits received.....	1791
1360. Fraud as estoppel.....	1792
1361. Disaffirming deed within statutory limitation.....	1793
1362. Disaffirming mortgage of personalty	1795
1363. Disaffirming stock transactions.....	1795
1364. Disaffirming partnership contracts.....	1796
1365. Disaffirming contract to work.....	1797
1366. Necessaries furnished to an infant.....	1798
1367. The same subject continued— <i>Quantum meruit</i>	1799
1368. The rule in Connecticut, North Carolina and Massachusetts.....	1800
1369. Infancy as defense in torts.....	1801
1370. Tort in falsely representing age—Estoppel.....	1802
1371. Mechanic's lien on infant's property—Ratification	1803
1372. Burden of proving infancy.....	1804

SECTION.	PAGE.
1373. Guardian's appointment not retroactive	1804
1374. English relief act applied.....	1805
1375. Breach of marriage promise—The English " Infant's Relief Act ".....	1806
1376. Infant as party to settlements.....	1807
1377. Apprenticeship agreements.....	1807

CHAPTER XXXV.

OF LUNATICS AND PERSONS UNDER DURESS.

1378. Test of mental capacity.....	1810
1379. Evidence of mental capacity—Limit as to time.....	1811
1380. Inquisition in lunacy—Decree when conclusive.....	1812
1381. The finding upon an inquisition not conclusive.....	1813
1382. Lunacy adjudged—Contracts thereafter void.....	1814
1383. Taking commercial paper from lunatic.....	1816
1384. Settlement with lunatics for injuries.....	1816
1385. Gifts by person of unsound mind.....	1817
1386. Imbecility—Monomania	1818
1387. Delusions of the donor as to subject of gift.....	1819
1388. Instrument executed before notice of insanity or office found.....	1820
1389. Where the party is committed to asylum without inquisition.....	1821
1390. Deeds by insane person void at law.....	1823
1391. Undue influence—Deeds between parent and child.....	1823
1892. Dealings with persons known to be insane.....	1825
1393. Dealings with intoxicated persons.....	1826
1394. Contracts with feeble-minded persons.....	1827
1395. Duress to extort notes or receipts.....	1827
1396. Lawful threats—Where no warrant issued—Voluntary payment... ..	1828
1397. The same subject continued.....	1829
1398. Where the party threatened is guilty, but threats unrelated.....	1830
1399. Threat to prosecute third person—When duress—Estoppel—Ratification.....	1832
1400. Husband's duress of wife	1834
1401. Threatening old man as duress—Preventing bail.....	1835
1402. Where threat operates on affections.....	1836
1403. Restoring benefits by lunatic.....	1837
1404. Insane person—How far liable for torts.....	1837
1405. As to mental condition when married	1839
1406. Lunacy as ground for divorce—Incurable mania.....	1840
1407. Contracts for necessaries.....	1840
1408. The same subject continued.....	1842
1409. Sale of a lunatic's realty to pay his debts	1843
1410. The same subject continued.....	1845
1411. Control of lunatics by the court of chancery in Delaware.....	1846
1412. Contracts for support of insane poor.....	1847
1413. The same subject continued.....	1849
1414. Actions by and against lunatic—Committee as party—Limitations	1850

CHAPTER XXXVI.

ILLEGAL AND FRAUDULENT CONTRACTS.

SECTION.	PAGE.
1415. General rule as to enforcing illegal contracts.....	1852
1416. Where contract does not rest on original illegality.....	1853
1417. Pleading illegality—Evidence.....	1855
1418. Purchaser's knowledge of illegality of fraud.....	1855
1419. Agent buying or selling for himself.....	1856
1420. Where mortgagor retained possession not as mortgagee's agent....	1857
1421. Consideration illegal in part.....	1859
1422. The same subject continued.....	1861
1423. The rule in Texas.....	1862
1424. Illegality affecting whole contract.....	1863
1425. Where contract in part violation of statute.....	1864
1426. Where there are distinct engagements....	1867
1427. <i>Particeps criminis</i> left where found.....	1868
1428. Agent as <i>particeps criminis</i>	1869
1429. Where one party repents.....	1869
1430. Recovery of money paid on usurious contracts.....	1870
1431. Parties <i>in pari delicto</i>	1871
1432. The same subject continued—The effect of an injunction.....	1872
1433. Where parties not <i>in pari delicto</i>	1873
1434. Fraud as ground of action— <i>In pari delicto</i>	1874
1435. Gift of entire property fraudulent as to creditors.....	1874
1436. Privileged commercial fraud.....	1875
1437. What misrepresentations are actionable fraud.....	1876
1438. The same subject continued.....	1877
1439. Fraudulent allegations of value.....	1878
1440. Notes given to prevent prosecution.....	1880

CHAPTER XXXVII.

CONTRACTS ILLEGAL BY STATUTE.

1441. Contracts violating statutes void as against public policy.....	1882
1442. Contracts violating statutes—Negotiable instruments.....	1884
1443. Not enforceable although illegality not pleaded.....	1885
1444. Violations of federal statutes.....	1886
1445. Violations of penal laws—If contract not declared void.....	1887
1446. Contracts void, although not expressly made so by the statute.....	1888
1447. The same subject continued—Apparent conflict.....	1890
1448. Where the contract is declared void.....	1892
1449. Where the statute points out the consequence of its violation.....	1893
1450. Illustrations.....	1894
1451. Party pleading illegality not to retain benefits.....	1894
1452. Violations of liquor laws.....	1895

SECTION.	PAGE.
1453. Ratification	1897
1454. The same subject continued.....	1898
1455. Partnership with a licensed dealer	1899
1456. Where business not wholly in liquors	1900
1457. Knowledge of vendee's intent to violate law.....	1901
1458. The rule in New Hampshire.....	1902
1459. Sale of lottery tickets	1903
1460. When lottery not construed illegal	1905
1461. Unlawful consolidation of stock.....	1906
1462. Physicians and plumbers acting without licenses	1906
1463. The same subject continued.....	1907
1464. Non-resident physicians—Indiana statute	1909
1465. Minors working in factories.....	1911

CHAPTER XXXVIII.

STOCK EXCHANGE AND GAMBLING CONTRACTS.

1466. Gambling contracts void, although on indifferent matters.....	1913
1467. Kentucky wagers—Recovery.....	1914
1468. Not gambling if delivery contemplated	1915
1469. The rule applied in Illinois and Massachusetts.....	1917
1470. The rule elsewhere	1918
1471. Grain options	1919
1472. Gold coin—Optional delivery.....	1920
1473. Contracts void where delivery not intended, but only difference to be paid	1921
1474. Differences in Rhode Island.....	1922
1475. Differences under Missouri statute	1923
1476. Differences in Texas.....	1924
1477. Differences in Arkansas—Broker's advances and commissions.....	1925
1478. Futures illegal under Illinois code—Recovery by loser	1926
1479. Selling stock on margins in California—Recovery from broker.....	1927
1480. Notes for stock gambling consideration.....	1929
1481. Recovering profits of stock gambling from broker.....	1930
1482. Notes for loan to pay wager where lender not interested.....	1931
1483. Such loans further considered.....	1933
1484. The same subject continued.....	1934
1485. Bohemian oats speculation.....	1935
1486. Option dealing in grain.....	1936
1487. Selling pools under New York statute.....	1937
1488. Enforcing the New York law in other states.....	1938
1489. The Louisiana lottery in New York.....	1939
1490. Election bets.....	1940
1491. Games on behalf of charity.....	1943
1492. Check for money lost at cards —Ohio statute.....	1943
1493. Racing for premiums or purses—Pennsylvania strictness.....	1944
1494. Racing bets—Recovery.....	1946

SECTION.	PAGE.
1495. Recovery from stakeholder.....	1947
1496. The same subject continued.....	1948
1497. Where trust funds lost in gambling.....	1950

CHAPTER XXXIX.

CONTRACTS AGAINST PUBLIC POLICY.

1498. Public policy defined	1952
1499. Rules not arbitrary—Receiving benefits as estoppel.....	1953
1500. What contracts are contrary to public policy.....	1954
1501. Lottery schemes against public policy.....	1955
1502. Common carriers—Stipulations for non-liability.....	1956
1503. The rule in Wisconsin.....	1959
1504. The rule in Nebraska and Ohio.....	1961
1505. Carrier's stipulations against liability	1962
1506. The rule in Missouri.....	1964
1507. The rule in Indiana and the rule in the federal courts.....	1966
1508. The rule as to interstate shipments.....	1968
1509. Limiting time to exercise the remedy	1969
1510. Railroad exemptions for setting fires.....	1970
1511. Executor's assignment of fees.....	1971
1512. Marriage brokerage.....	1972
1513. Tempting agent or trustee to disloyalty to principal.....	1972
1514. The same subject continued—Railroad managers.....	1974
1515. Indemnifying executors against contemplated waste.....	1975
1516. Agreements of real estate agents to divide commissions.....	1975
1517. Contracts to build railroad stations at particular places.....	1976
1518. The same subject continued.....	1978
1519. Promoter's secret contracts.....	1978
1520. Combinations to increase prices.....	1980
1521. Violating federal statute against monopolies.....	1981
1522. Railroad agreements preventing competition	1982
1523. Railway rebates.....	1984
1524. Corruptly obtaining contracts or employment.....	1984
1525. The same subject continued.....	1985
1526. Personating physicians and other frauds on the public	1986
1527. Procuring appointment of administrator.....	1987
1528. Agreement to make stranger an heir.....	1988
1529. Contracts to procure legislation.....	1989
1530. Corrupt inducements to vote.....	1989
1531. Lobbying as against public policy.....	1990
1532. Lobbying in the federal congress.....	1993
1533. Contracts distinguished from lobbying	1994
1534. Contracts inconsistent with impartial justice.....	1995
1535. The same subject continued—As pleading usury.....	1996
1536. Contracts to procure testimony.....	1997
1537. The same subject continued.....	1999

SECTION.	PAGE.
1538. Preventing bidding at official sales.....	2000
1539. The same subject continued.....	2001
1540. Illustrations.....	2001
1541. Champerty and maintenance.....	2002
1542. Champertous agreements as against public policy.....	2005
1543. Contracts promoting family concord	2006
1544. Contracts relating to divorce.....	2006
1545. Inducing discontinuance of divorce proceedings.....	2007
1546. The same subject continued.....	2008
1547. Contract to pay divorced wife while unmarried.....	2009
1548. Compounding a felony.....	2010
1549. When contract compounding felony is not void.....	2011
1550. Agreements to stifle prosecution	2013
1551. The same subject continued—Restoring consideration.....	2013
1552. Promise not to prosecute witness.....	2014
1553. Immoral consideration—Illicit intercourse.....	2015
1554. The same subject continued—Past immoral acts.....	2016
1555. Letting house for brothel—Prostitute's board.....	2017
1556. The same subject continued.....	2017
1557. Recruiting business contracts.....	2018
1558. Contracts with public enemies.....	2020
1559. Circulation of confederate notes—Contracts relating to them.....	2021
1560. Contracts for slaves.....	2022
1561. <i>Particeps criminis</i> —Enforcing valid part.....	2023

CHAPTER XL.

CONTRACTS IN RESTRAINT OF TRADE.

1562. General considerations—Public policy.....	2025
1563. Considerations of policy—California code.....	2027
1564. Restraint—When valid.....	2028
1565. Two grounds of public policy.....	2031
1566. The earlier doctrine.....	2032
1567. The present English rule.....	2033
1568. The same subject continued—The federal doctrine.....	2034
1569. The modern and American rule.....	2035
1570. Consideration of such contracts, etc.—Liquidated damages.....	2038
1571. Contract limiting as to space.....	2038
1572. Contracts limiting as to time.....	2041
1573. Limit of time not essential.....	2042
1574. Contracts with employees.....	2045
1575. Protecting the purchaser of good-will.....	2046
1576. The same subject continued.....	2048
1577. The same subject continued.....	2049
1578. Such contracts divisible.....	2051
1579. Monopolies —Exclusive rights of way.....	2051
1580. Monopolies.....	2052

SECTION.	PAGE.
1581. Corporate partnerships	2053
1582. Contracts restraining sale of necessities.....	2055
1583. Trusts—Recent decisions.....	2057
1584. Trusts—Technical and legal monopolies.....	2058
1585. Combinations to limit production and control prices.....	2059
1586. The same subject continued.....	2060
1587. Decisions holding the contrary doctrine.....	2062
1588. The test question.....	2063
1589. When combination no defense to action for goods sold.....	2066
1590. Contracts void as preventing competition.....	2067
1591. The same subject continued—Illinois statute.....	2069
1592. The same subject continued—No relief to <i>particeps criminis</i>	2071
1593. Agreements for exclusive service and exclusive dealings	2072
1594. Protecting trade secrets and patent rights	2074
1595. By-law of the associated press	2076
1596. Restrictions in deeds and leases.....	2076
1597. Restrictions in deeds—Continued	2078

CHAPTER XLI.

CONTRACTS BY AND WITH PUBLIC OFFICERS.

1598. Agreements to control elections or appointments	2079
1599. The same subject continued.....	2080
1600. Mortgage to secure compensation for appointment.....	2080
1601. Influencing conduct of officers for gain	2082
1602. Where magistrate contracts for percentage of stolen property....	2083
1603. Assignment of official salary before it is earned.....	2084
1604. The same subject continued—Ratification	2085
1605. Illegal agreements regarding fees.....	2087
1606. The same subject continued.....	2087
1607. Deputy's agreement to divide fees with principal	2088
1608. The same subject continued.....	2089
1609. Contracts with government agents	2090
1610. Inducing sheriff to discharge from arrest	2091

CHAPTER XLII.

SUNDAY CONTRACTS.

1611. Contracts made on Sunday under the common law.....	2093
1612. The English statute.....	2094
1613. Sunday laws in the United States	2095
1614. Statutes prohibiting business on Sunday.....	2096
1615. Statutes prohibiting labor, but not business.....	2097
1616. The exceptions of necessity and charity	2099

SECTION.	PAGE.
1617. The same subject continued.....	2100
1618. Suits to enforce contracts made on Sunday	2100
1619. The same subject continued.....	2101
1620. Sales made on Sunday.....	2102
1621. The same subject continued.....	2103
1622. Telegrams on Sunday.....	2104
1623. Contracts of common carriers	2105
1624. Loaning money on Sunday.....	2106
1625. Deeds, mortgages and sealed instruments made on Sunday.....	2107
1626. Ratification of contracts made on Sunday.....	2108
1627. The same subject continued.....	2109
1628. Ratification of contract of sale by retention of property.....	2110
1629. Notes and bills	2111
1630. <i>Bona fide</i> holder of a note made on Sunday.....	2113

CHAPTER XLIII.

CONSTITUTIONAL PROVISIONS.

1631. State laws impairing the obligations of contracts.....	2116
1632. The same subject continued.....	2117
1633. Congress not prohibited by the constitution from passing such laws	2117
1634. Contracts of the United States with its citizens	2118
1635. Retroactive laws.....	2119
1636. Making invalid contracts valid.....	2120
1637. Vested rights.....	2121
1638. Marriage and divorce.....	2122
1639. Land grants deemed contracts	2123
1640. Laws relating to interest and usury	2124
1641. Effect of state insolvent laws on contracts	2125
1642. Contracts entered into by a state.....	2126
1643. Officers	2126
1644. Licenses	2128
1645. Bounties.....	2128
1646. Charters of private corporations—Dartmouth College <i>v.</i> Woodward.....	2129
1647. The same subject continued.....	2131
1648. When power to repeal or modify charter is reserved	2131
1649. Obligation of charter not impaired by state regulations.....	2132
1650. Exclusive privileges	2134
1651. Rule of construction	2135
1652. Stipulations in charters limiting the power of the state over taxation.....	2136
1653. The same subject continued.....	2137
1654. Consideration necessary	2138
1655. Immunity from taxation not transferable.....	2139

SECTION.	PAGE.
1656. Distinction between repealable and irrepealable statutory exemptions from taxations.....	2140
1657. The taxing power—State tax on foreign-held bonds.....	2141
1658. Public corporations.....	2141
1659. Municipal corporations	2142
1660. Contracts of municipalities.....	2143
1661. Effect of repeal of municipal charter on rights of creditors	2144
1662. The right of eminent domain.....	2145
1663. The police power of the state.....	2147
1664. Judicial decisions.....	2148
1665. Whether a judgment is a contract within the meaning of the prohibition	2149
1666. Change of interest on judgment	2151
1667. Laws affecting the remedy.....	2151
1668. The same subject continued.....	2153
1669. Laws delaying the collection of debts	2153
1670. Laws affecting the foreclosure of mortgages.....	2154
1671. Exemption laws.....	2156
1672. Statute of limitations	2157
1673. The Virginia coupon cases	2158
1674. The Fourteenth amendment	2160
1675. Limiting or forbidding the right of contract	2161

CHAPTER XLIV.

ACTIONS ON CONTRACTS—AT LAW.

1676. Whether action on contract or tort.....	2164
1677. Complaint to proceed on definite theory.....	2166
1678. Action <i>in assumpsit</i> on waiver of tort	2168
1679. What actions on contract survive the party's death.....	2169
1680. Action for money—Claim to be shown due.....	2170
1681. Where express contract not special—Recovery on implied promises	2171
1682. Action for commissions—Evidence.....	2173
1683. Recovery limited to cause of action sued on—Written contract....	2174
1684. The same subject continued	2175
1685. Pleading setting out contract.....	2176
1686. Alleging contract as written—Delivery of contract implied.....	2177
1687. Where written contract incomplete—Oral evidence to supply.....	2178
1688. Written contract controls legal conclusion—Pleading modification.	2180
1689. Written contract varied—Recovering <i>quantum meruit</i>	2181
1690. Written contract as importing consideration—Pleading consideration.....	2181
1691. When special averment of consideration unnecessary.....	2183
1692. When only parties to sealed contracts liable thereon—Ratification.....	2184
1693. Action on sealed instrument instead of <i>assumpsit</i>	2185

SECTION.	PAGE.
1694. No recovery on altered contract—Repudiating.....	2186
1695. Premature action on entire contract.....	2187
1696. Action against joint and joint and several obligors.....	2188
1697. The same subject continued.....	2188
1698. Complaint defective as being on wrong theory.....	2190
1699. Complain to allege plaintiff's performance—Rule as to non-suit...	2191
1700. The same subject continued.....	2193
1701. Conditional contracts—Suit on warranty.....	2195
1702. A demand as condition precedent—Action as demand.....	2195
1703. Cases in which a demand is necessary.....	2196
1704. When demand not necessary.....	2198
1705. Ability to pay as condition.....	2198
1706. Failure to show excuse for plaintiff's non-performance.....	2199
1707. Demurrer for ambiguity of complaint.....	2201
1708. Demurring to complaint which states a defense.....	2203
1709. Action against loan association—Sufficient complaint	2205
1710. Action on agreement to procure insurance.....	2206
1711. Actions against state—Effect of reversing former decisions.....	2206
1712. Action by one for another's use—Parties	2208
1713. Action by third person on promise to another.....	2209
1714. Action for breach at once—Two remedies.....	2211
1715. Breach where defendant makes performance impossible.....	2212
1716. Preventing performance—Damages sole remedy.....	2213
1717. Plaintiff's obligation to find other employment	2215
1718. When action for breach the only remedy—Averment of breach.....	2216
1719. The same subject continued—Requisites of contract—Venue.....	2216
1720. Damages for breach—Measure of.....	2217
1721. The same subject continued.....	2219
1722. Action for future profits on other's continued breach.....	2220
1723. Action on building contract—Florida statute.....	2222
1724. The same subject continued—Where arbitration stipulated—Plans as evidence.....	2223
1725. The same subject continued—Architect's certificate—Demurrer....	2225
1726. Recovery for work, etc., on house which is destroyed.....	2226
1727. The same subject continued—House destroyed by lightning.....	2227
1728. Where work accepted its value to be paid—Contract as evidence...	2229
1729. Recovery for part performance—For substantial performance.....	2230
1730. The same subject continued—In California—New York.....	2231
1731. General denials and issues.....	2233
1732. Demurrable plea—Plea admitting execution of contract.....	2234
1733. Defendant's performance as defense—Plaintiff's default as.....	2234
1734. Abandonment of contract as defense.....	2235
1735. Waiver of performance as defense.....	2236
1736. Act of God as defense—Impossibility as.....	2236
1737. Affidavit of defense—Requisites of	2238
1738. Plea that promise was voluntary	2239
1739. Pleading promise to forbear suit as bar.....	2239
1740. Pleading illegality of contract—Insanity.....	2240

SECTION.	PAGE.
1741. Illegal contract not actionable—Illegal bids.....	2241
1742. No action on champertous agreement.....	2242
1743. New matter in plaintiff's reply to the answer	2243
1744. Production of written contract—Same as evidence.....	2244
1745. What facts inadmissible to prove oral promise.....	2245
1746. Custom as evidence.....	2246
1747. Shipping book as evidence—Vouchers as.....	2247
1748. Expert's estimates and certificates as evidence.....	2248
1749. Where evidence conflicting, jury to decide.....	2251
1750. Existence of partnership when question for jury—Evidence of.....	2252
1751. Breach of parol contract for jury.....	2253

CHAPTER XLV.

ACTIONS ON CONTRACTS—IN EQUITY.

1752. Grounds of equity jurisdiction—Inconsistent causes of action.....	2254
1753. Where equitable better than legal remedy.....	2255
1754. Equity jurisdiction to avoid multiplicity of suits.....	2257
1755. Transferring action for damages to equity, etc.....	2258
1756. Impressing property conveyed with a trust.....	2260
1757. Enforcing contracts in restraint of trade—Injunction and damages.....	2261
1758. Enjoining breach of contract—Accounting.....	2262
1759. Enjoining physician.....	2264
1760. Contract for personal services—Enjoining breach.....	2265
1761. Injunction to compel contract with lowest bidder.....	2266
1762. Staying injunction by appeal—Contempt.....	2267
1763. Reforming deed for mutual mistake—Evidence.....	2268
1764. The same subject continued—Oral evidence.....	2269
1765. Specific performance—Requisite to jurisdiction.....	2270
1766. The same subject continued—Contract uncertain—Legal remedy... ..	2272
1767. Where contract not uncertain—Election.....	2274
1768. Rescission instead of ejectment—Equity of action at law.....	2276
1769. Rescinding deed for grantor's insanity	2277
1770. Rescinding for fraud—Accounting.....	2278
1771. The same subject continued—As to <i>bona fide</i> holder.....	2281
1772. The same subject continued—Under Dakota statute.....	2282
1773. Rescinding for less than technical duress.....	2283
1774. Where parties in fiduciary relations.....	2283
1775. The same subject continued.....	2285
1776. Action to rescind conveyance to wife.....	2286
1777. Rescinding where grantee refuses to perform—Exemption.....	2287
1778. Lapse of time as bar to suit to rescind.....	2288
1779. As to parties <i>in pari delicto</i>	2289

TABLE OF CASES CITED.

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Abbey v. Mace (Com. Pl. 1892), 19 N. Y. Supl. 373,	2251	Adams v. Kuehn, 119 Pa. St. 76,	238, 239
Abbot v. Johnson, 32 N. H. 9,	2257	Adams v. Lambard, 80 Cal. 426,	1792
Abbot v. Rubber Co., 33 Barb. 578,	1254	Adams v. Lindsell, 1 B. & Ald. 681,	56, 57, 82
Abbott v. Blossom, 66 Barb. 353,	781	Adams v. McMillan, 7 Port. (Ala.) 73,	628
Abbott v. Draper, 4 Denio, 51,	836	Adams v. Messenger, 147 Mass. 185,	1204, 1209
Abbott v. Gilchrist, 38 Maine, 260,	658	Adams v. Nichols, 19 Pick. 275,	289, 2227, 2237
Abbott v. Middleton, 7 H. L. C. 68,	884	Adams v. Orange County Bank, 17 Wend. 514,	194
Abbott v. New York and New England Railroad, 145 Mass. 450,	1455	Adams v. Otterback, 15 How. 539,	910, 941
Abbott v. Omaha, etc., Smelting Co., 4 Neb. 416,	1335, 1384,	Adams v. Palmer, 51 Maine, 480,	2122
Abbott v. Shepard, 48 N. H. 14,	76	Adams v. Patrick, 30 Vt. 516,	592
Abbott v. Wetherby, 6 Wash. 507,	1760	Adams v. Railroad Co., 2 Cold. 645,	1221
Abeel v. Radcliff, 13 Johns. 297,	99, 676	Adams v. Reed, 11 Utah, 480,	991
Abeeg v. Bishop, 142 N. Y. 286,	1647	Adams v. Reeves, 68 N. Car. 134,	803, 2206
Abell v. Chaffee, 154 Pa. St. 254,	1655, 1679, 1688,	Adams v. Rowan, 16 Miss. (S Smed. & M.) 624,	2022
Abell v. Munson, 18 Mich. 305,	689	Adams v. Schiffer, 11 Colo. 15,	441
Aber v. Clark, 10 N. J. Law, 217,	1513	Adams v. Thornton, 78 Ala. 489,	1003
Abercrombie v. Baxter, 44 Ga. 36,	2117	Adams v. Townsend, 1 Metc. 483,	836
Aberdeen, City of, v. Honey, 8 Wash. 251,	1507	Adams v. Warner, 23 Vt. 395,	883
Aberdeen R. Co. v. Blakie, 1 Macq. 461,	1293, 1308	Adams v. Williams, 2 Watts & Sergeant, 27,	378
Abernathy v. Seagle, 98 N. Car. 553,	2173	Adams v. Wood, 51 Mich. 411,	165
Abes v. Davis, 46 La. Ann. 818,	1674	Adams Co. v. Hunter, 75 Iowa, 328,	1512, 2088
Aborn v. Rathbone, 54 Conn. 444,	465, 521, 524	Adams, etc., Co. v. Doyette (S. Dak. Dec. 1895), 65 N. W. Rep. 471,	1401
Abrams v. Milwaukee, etc., R. Co., 87 Wis. 485,	1958, 1959	Adams Express Co. v. Reagan, 29 Ill. 21,	1968
Abrey v. Crux, L. R. 5 C. P. 37,	561	Aday v. Echols, 18 Ala. 353,	1118
Acebal v. Levy, 10 Bing. 376,	677	Adderley v. Dixon, 1 Sim. & S. 607,	2271
Acheson v. Miller, 18 Ohio, 1,	827	Adderly v. Storm, 6 Hill, 624,	1385
Acheson v. Western Union Tel. Co., 96 Cal. 641,	2183	Addyston, etc., Co. v. Copple, 94 Ky. 292,	578
Achilles v. Achilles, 151 Ill. 136,	1714	Ades v. Bigler, 81 N. Y. 349,	27
Achilles v. Achilles, 137 Ill. 589,	1714	Aderholt v. Embry, 78 Ala. 185,	477
Ackla v. Ackla, 6 Pa. St. 228,	626, 2009	Adkins v. Col. Ins. Co., 70 Mo. 27,	119
Acklen v. Hickman, 63 Ala. 494,	2250	Adler v. Milwaukee Manufacturing R. Co., 13 Wis. 57,	1375, 1398
Ackland v. Lutley, 9 Ad. & E. 879,	764	Administrators of Smith v. Wainwright, 24 Vt. 97,	757
Ackley v. Parmenter, 98 N. Y. 425,	594, 603, 604, 606	Adsit v. Butler, 87 N. Y. 585,	27
Adair v. Adair, 22 Ore. 115,	422	Ætna Ins. Co. v. Middleport, 124 U. S. 534,	361, 362
Adam Roth Grocery Co. v. Hopkins (Ky. 1895), 29 S. W. Rep. 293,	1804	Ætna Ins. Co. v. Norman, 12 Ind. App. 652,	318
Adams v. Adams, 26 Ala. 272,	98	Ætna Ins. Co. v. Resh, 40 Mich. 241,	1764
Adams v. Adams, 25 Minn. 72,	2007	Ætna Life Ins. Co. v. Nexsen, 84 Ind. 347,	876
Adams v. Adams, 91 N. Y. 381,	2006, 2008, 2009	Ætna Life Ins. Co. v. Pleasant Tp., 62 Fed. Rep. 718,	1540
Adams v. Adams' Admr., 23 Ind. 50,	795	Ætna Iron Works v. Kossuth County, 79 Iowa, 40,	135, 136, 144
Adams v. Beall, 67 Md. 53,	1783	Ætna National Bank v. Charter Oak Life Insurance Co., 50 Conn. 167,	1257
Adams v. Burbank, 103 Cal. 646,	2229	Agard v. Valencia, 39 Cal. 292,	1129
Adams v. Carey (N. J. Eq. 1895), 31 Atl. Rep. 600,	625	Agawam Bank v. South Hadley, 128 Mass. 503,	1508
Adams v. Cosby, 48 Ind. 153,	2229	Agnew v. Bell, 4 Watts (Pa.), 31,	827
Adams v. Cowles, 95 Mo. 501,	1161	Agnew v. Brail, 124 Ill. 312,	210, 1473
Adams v. Gay, 19 Vt. 358,	2109	Agnew v. McGill, 96 Ala. 496,	465, 466
Adams v. Goddard, 48 Maine, 212,	920	Agra Bank, <i>In re</i> , L. R. 5 Eq. Cas. 160,	491
Adams v. Grey, 154 Pa. St. 258,	1654, 1679, 1688,	Agra & Masterman's Bank, <i>In re</i> , L. R. 2 Ch. 391,	54
Adams v. Hackett, 27 N. H. 289,	2128	Agricultural Bank v. Rice, 4 How. (U. S.) 225,	1738
Adams v. Hamell, 2 Doug. (Mich.) 73,	2096	Agricultural, etc., R. Co. v. Winchester, 13 Allen, 29,	1462
Adams v. Hill, 16 Maine, 215,	868		
Adams v. Hull, 2 Denio, 306,	562		
Adams v. Irving Nat. Bank, 116 N. Y. 603,	1830, 1832, 1833, 1836		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Ahearn v. Ayres, 38 Mich. 692,	55	Alleghany City v. McClurkan, 14 Pa. St.	1536
Ah Lep v. Gong Choy, 13 Ore. 205,	835	81,	1764
Ahlstrom v. Fitzpatrick, 42 Pac. Rep. 757	—	Allen v. Allen, 47 Mich. 74,	2149
(Mont.)	—	Allen v. Allen, 95 Cal. 184,	230
Ahrend v. Odiorno, 125 Mass. 50,	2185	Allen v. Allen (Cal.), 27 Pac. Rep. 30,	1380
Ahrens v. United Growers Co., 31 N. Y.	510	Allen v. Arnold, 18 R. I. 809,	1142
Supl. 997,	133	Allen v. Atkinson, 21 Mich. 351,	890
Aiken v. Hyde, 99 Mass. 183,	366	Allen v. Brown, 43 Ga. 305,	1212
Aikon v. McDonald (S. Car.), 20 S. E.	646	Allen v. Burke, 2 Md. Ch. 534,	806
Rep. 796,	1031	Allen v. Burlington, 45 Vt. 202,	383
Aiken v. Nogle, 47 Kan. 96,	238	Allen v. Cheeyer, 61 N. H. 32,	4, 87
Aiman v. Stout, 42 Pa. St. 114,	2056	Allen v. Chouteau, 102 Mo. 309,	469
Ainsley v. Mead, 3 Lans. 116,	731	Allen v. Culver, 3 Denio, 284,	136, 138
Ainsworth v. Bentley, 14 Weekly Rep. 630,	455	Allen v. Curles, 6 Ohio St. 505,	15
Akers v. Demond, 103 Mass. 318,	454, 2096, 2101, 2113	Allen v. De Groodt, 105 Mo. 442,	197
Akin v. Peters, 45 Ark. 313,	1054, 1078	Allen v. Deming, 14 N. H. 133,	2098, 2099
Alabama, etc., R. Co. v. Brown, 98 Ala.	775	Allen v. Dermott, 80 Mo. 56,	1550
647,	318, 769	Allen v. Duffie, 43 Mich. 1,	1058
Alabama, etc., R. Co. v. Hill, 76 Ala. 303,	1611	Allen v. Dunbma, 92 Tenn. 257,	543
Alabama, etc., Insurance Co. v. John-	1110	Allen v. Elder, 7 Ga. 674,	641
ston, 80 Ala. 467,	2214	Allen v. Farrington, 2 Sneed, 528,	2094, 2096
Alabama, etc., Ins. Co. v. Thomas, 74	783	Allen v. Fiske, 42 Vt. 462,	508, 525, 526
Ala. 578,	1369	Allen v. Gardiner, 7 R. I. 22,	590
Alabama G. S. R. Co. v. South & N. A.	1060	Allen v. Harris, 1 Ld. Ray. 122,	892
R. Co., 84 Ala. 570,	133, 1404	Allen v. Hart, 72 Ill. 104,	744
Alamo Mills Co. v. Hercules Iron Works,	1364	Allen v. Holton, 20 Pick. 458,	12, 517
1 Texas Civ. App. 683,	553, 562	Allen v. Inhabitants of Cooper, 22 Maine,	1800
Albany City Nat. Bank v. Albany, 92 N. Y.	619	133,	581
363,	952	Allen v. Jaquish, 21 Wend. 628,	148, 152
Albany, etc., Insurance Co. v. Bay, 4	2044	Allen v. Lardner, 78 Hun (N. Y.), 603,	1772
N. Y. 9,	48	Allen v. Logan, 96 Mo. 591,	1375
Albany Savings Institution v. Burdick,	515	Allen v. McKibbin, 5 Mich. 449,	159
87 N. Y. 40,	316	Allen v. Minor, 2 Call (Va.), 70,	867
Alberger v. National Bank, 123 Mo. 313,	521	Allen v. Montgomery R. Co., 11 Ala. 437,	490
1530, 1404	1950	Allen v. Mutual Compress Co., 101 Ala.	1862
Alberger v. White, 117 Mo. 317,	781	574,	343
Albert v. Ziegler, 29 Pa. St. 50,	597, 616	Allen v. Nofsinger, 13 Ind. 494,	1398
Albert v. Winn, 5 Md. 66,	1823	Allen v. Parker, 27 Maine, 531,	631
Albrecht v. Kraisinger, 44 Ill. App. 313,	214	Allen v. Pearce, 84 Ga. 606,	785
Alcock v. Giberton, 5 Duer (N. Y.) 73,	372	Allen v. Pink, 4 M. & W. 140,	519, 524
Alcock v. Little, 9 N. H. 259,	2193	Allen v. Railroad Co., 11 Ala. 437,	896
Alcorn v. Morgan, 77 Ind. 14,	614	Allen v. Richard, 83 Mo. 55,	922
Alden v. Blague, Cro. Jac. 99,	573	Allen's Admx. v. Richmond College, 41	1018
Alden v. Hart, 161 Mass. 576,	390	Mo. 302,	345
Alden v. Thurber, 149 Mass. 271,	1065, 1066	Allen v. Roosevelt, 14 Wend. 101,	1728, 1744
Alderson v. Ennor, 45 Ill. 128,	1963	Allen v. St. Louis Ins. Co., 55 N. Y. 473,	1988, 2210
Aldine Manufacturing Co. v. Barnard, 84	19, 20	Allen v. St. Louis Bank, 12 U. S. 20,	609
Mich. 632,	416	Allen v. Snyder, 100 Mich. 220,	496
Aldrich v. Ames, 9 Gray, 76,	1062	Allen v. South Boston Railroad, 150 Mass.	442
Aldrich v. Bailey (Sup.), 8 N. Y. Supl.	1807	200,	543
435,	379	Allen v. Terry, 73 Ala. 123,	2273
Aldrich v. Lyman, 6 R. I. 98,	489	Allen v. Thomas, 3 Met. (K.) 198,	193
Aldrich v. Wilmarth (S. Dak.), 54 N. W.	125	Allen v. Thompson, 10 N. H. 32,	804
Rep. 811,	1942	Allen v. Thrall, 36 Vt. 711,	—
Aldrich v. Wilmarth, 3 S. Dak. 523,	252	Allen v. Wall, 7 Wash. 316,	12, 179, 181, 231, 234
Aldridge v. Ames, 9 Gray 76,	597, 607	Allen v. Wheatley, 3 Blackf. 322,	609
Alexander v. Alexander, 3 Pa. St. 56,	1807	Allen v. Winstandly, 135 Ind. 105,	496
Alexander v. Brown, 1 C. & P. 288,	379	Allen v. Woodward, 22 N. H. 544,	442
Alexander v. Caldwell, 55 Ala. 517,	1830	Allentown, Borough of, v. Saeger, 20 Pa.	543
Alexander v. Greene, 7 Hill (N. Y.), 533,	489	St. 421,	804
Alexander v. Jameson, 5 Bin. 235,	125	Aller v. Aller, 40 N. J. Law, 446,	—
Alexander v. Mills, L. R. 6 Ch. 124,	1942	12, 179, 181, 231, 234	—
Alexander v. Newton, 2 Gratt. (Va.) 266,	1807	Allerton v. Allerton, 50 N. Y. 670,	—
Alexander v. O'Donnell, 12 Kan. 608,	379	Allies v. Probyn, 2 Crompt. M. & R. 408,	—
Alexander v. Oneida County, 76 Wis. 56,	1830	627, 2240	—
Alexander v. Pierce, 10 N. H. 494,	489	Allin v. Shadburne's Executor, 1 Dana,	816
Alexander v. Sanders, 93 Ala. 315,	125	68,	1371, 1391
Alewyn v. Pryor, Ryan & Moody, 406,	1942	Alling v. Wenzel, 133 Ill. 264,	210, 1473
Alford v. Burke, 21 Ga. 46,	252	Allis v. Billings, 2 Cush. 19,	1232, 1405
Alger v. North End, etc., Bank, 146 Mass.	597, 607	Allis v. Jones, 45 Fed. Rep. 148,	457
418,	51, 1426, 2026, 2032, 2039, 2042, 2044, 2047, 2049, 2051	Allis v. Meadow Springs Co., 67 Wis. 16,	2262, 2263
Alger v. Scoville, 1 Gray, 391,	118	Allison's Appeal, 77 Pa. St. 221,	110, 424
Alger v. Thacher, 19 Pick. (Mass.) 51,	446	Allison v. Allison, 1 Yerg. 16,	1080
1426, 2026, 2032, 2039, 2042, 2044, 2047, 2049, 2051	324, 325, 328	Allison v. Allison, 144 N. Y. 21,	—
Alkan v. New Hampshire Ins. Co., 53	669, 670	Allison v. Bristol Ins. Co., L. R. 1 App.	—
Wis. 136,	2073	Cas. 209,	—
Allan v. Eldred, 50 Wis. 132,	—	Allison v. Burns, 107 Pa. St. 50,	—
Allan v. Lake, 18 Q. B. 560,	—	Allison v. Shelby R. Co., 10 Bush, 1,	—
Allard v. Greaser, 61 N. Y. 1,	—	Allister v. Smith, 17 Ill. 328,	—
Alleghany Baseball Club v. Bennett, 14	—	Allore v. Jewell, 94 U. S. 506,	—
Fed. Rep. 257,	—	Allshouse v. Ramsay, 6 Whart. 331,	—

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Allsopp v. Wheatecroft, L. R. 15 Eq. Cas. 59,	2045	Anderson v. Cranmer, 11 W. Va. 562,	1031
Alma, City of, v. Guaranty Sav. Bank, 60 Fed. Rep. 203,	1531	Anderson v. Davis, 9 Vt. 136,	609
Almon v. Hamilton, 100 N. Y. 527,	1637	Anderson v. Elsworth, 3 Giff. 154,	253, 1014
Alpass v. Watkins, 8 T. R. 516,	417	Anderson v. Fitzgerald, 4 H. L. Cas. 454,	314
Alpaugh v. Wood, 53 N. J. Law, 638,	510	Anderson v. Harold, 10 Ohio, 399,	676
Alpha Mills v. Watertown Engine Co., 116 N. Car. 797,	345	Anderson v. Hayman, 1 H. B. 120,	601
Alsabrooks v. State, 52 Ala. 24,	46	Anderson v. Imhoff, 34 Neb. 335,	127
Alsop v. Swathel, 7 Conn. 500,	15	Anderson v. Jett, 89 Ky. 375,	2042, 2058
Alston v. Richardson, 51 Texas, 1,	799	Anderson v. Kinley, 90 Iowa, 554,	1288
Altgelt v. City of San Antonio, 81 Texas, 436,	1567	Anderson v. Martindale, 1 East, 497,	828
Alvarez v. Brannan, 7 Cal. 503,	991, 992	Anderson, Matter of, 109 N. Y. 554,	1434
Alves v. Hodgson, 7 T. R. 237,	696	Anderson v. May, 50 Minn. 280,	295
Alvord v. Baker, 9 Wend. 323,	464	Anderson v. Moore, 145 Ill. 61,	415, 955
Alvord v. Marsh, 12 Allen, 603,	525	Anderson v. Nicholas, 28 N. Y. 600,	1346
Alvord v. Smith, 63 Ind. 58,	1945	Anderson v. Perkins, 10 Mont. 151,	476
Ambach v. Baltimore, etc., R. Co., 30 Wkly. Law Bulletin, 111,	1962	Anderson v. Rogge (Texas App. 1894), 28 S. W. Rep. 106,	942
Amedon v. Gannon, 6 Hun (N. Y.), 384,	32039	Anderson v. Santa Anna Township, 116 U. S. 356,	2207
American, etc., Co. v. Gillette, 88 Mich. 231,	150	Anderson v. Scott, 94 Mo. 637,	550
American Bank v. Doolittle, 14 Pick. 123,	573	Anderson v. Simpson, 21 Iowa, 399,	844
American Bridge Co. v. Murphy, 13 Kan. 35, 159,	463, 520	Anderson v. Speers, 21 Hun, 563,	1388
American Electric Co. v. Consumers' Co., 47 Fed. Rep. 43,	359, 360	Anderson v. Spence, 72 Ind. 315,	598, 613
American Exch. Nat. Bank v. Oregon Pottery Co., 55 Fed. Rep. 265,	1341, 1342, 1354	Anderson v. Strassburger, 92 Cal. 33,	419
American Express Co. v. Lesem, 39 Ill. 312,	925	Anderson v. Whittaker (1892), 11 So. Rep. 919,	923
American Express Co. v. Pinckney, 29 Ill. 392,	885	Anderson County Commissioners v. Beal, 113 U. S. 227,	1526
American Homestead Co. v. Linigan, 46 La. Ann. 1118,	1326	Andes, Town of, v. Ely, 158 U. S. 312,	1534
American Ins. Co. v. McAden, 109 Pa. St. 399,	2213	Anding v. Levy, 57 Miss. 51,	1798
American Insurance Co. v. Oakley, 9 Paige, 496,	1277, 1282, 1318	Andrew, <i>In re</i> , L. R. 1 Ch. Div. 358,	398
Ames Iron Works v. Richardson, 55 Ark. 612,	166	Andrews, <i>Ex parte</i> , 18 Cal. 673,	2094
American Lead Pencil Co. v. Wolfe, 30 Fla. 360,	602, 916	Andrews v. Andrews, 12 Ind. 348,	1079
American Manganese Co. v. Virginia, etc., Co. (Va. 1895), 21 S. E. Rep. 466,	881	Andrew v. Babcock, 63 Conn. 109,	419, 845, 1181
American Mortgage Co. v. Wright, 101 Ala. 653,	1776	Andrews v. German National Bank, 9 Heisk. 211,	451
American Oak Leather Co. v. Porter (Iowa 1895), 62 N. W. Rep. 653,	686	Andrews v. Herriot, 4 Cow. 508,	716
American Seamen's Friend Society v. Hopper, 33 N. Y. 619,	1820	Andrews v. Hyde, 3 Cliff. 516,	1066
American Sug. Ref. Co. v. Fancher, 145 N. Y. 552,	2279	Andrews v. Jones, 10 Ala. 400,	224, 620
American Sugar Ref. Co. v. Fancher, 81 Hun, 56,	1001, 1002	Andrews v. National Foundry Works, 61 Fed. Rep. 782,	1562
Ames v. Foster, 42 N. H. 381,	1746	Andrews v. O'Mahoney, 112 U. S. 567,	674
Ames v. Norman, 4 Sneed, 683,	1763, 1766, 1769	Andrews v. Pond, 13 Pet. 65,	708, 710, 713, 730, 1626
Amestoy v. Electric Rapid Transit Co., 95 Cal. 311,	1996	Andrews v. Pratt, 44 Cal. 309,	1304
Amherst, Inhabitants of, v. Shelburne, 11 Gray (Mass.), 107,	1849	Andrews v. Roach, 3 Ala. 590,	915
Amherst Academy v. Cows, 6 Pick. 427,	216, 217	Andrews v. Rue, 34 N. J. Law, 402,	425
Amiable Nancy, The, 3 Wheat. 546,	506	Andrews v. Sullivan, 2 Gilman, 327,	1107
Amis v. Kyle, 2 Yerg. (Tenn.) 31,	2096	Androscoggin, etc., Co. v. Metcalf, 65 Maine, 40,	781
Amis v. Smith, 16 Pet. 303,	830	Angel v. Simpson, 85 Ala. 53,	1117
Amkeney v. Hannon, 147 U. S. 118,	1653	Angell v. Duke, L. R. 10 Q. B. 174,	263
Ammidown v. Woodman, 31 Maine, 580,	385, 765	Angier v. Webber, 14 Allen (Mass.), 211,	2049
Amort v. Christofferson, 57 Minn. 234,	599	Anglo-Egyptian Co. v. Rennie, L. R. 10 C. P. 271,	293, 2228
Amory v. Meryweather, 2 B. & C. 573,	1929	Amherst Academy v. Cows, 6 Pick. 427,	256
Amson v. Manchester, 40 Barb. 158,	466	Anbeuser, etc., Ass'n v. Bond, 66 Fed. Rep. 653,	714
Amson v. Dreher, 35 Wis. 615,	662	Anheuser-Busch Brewing Ass'n v. Mason, 44 Minn. 318,	1901
Amy v. Watertown, 130 U. S. 301,	2145	Ankeny v. Clark, 1 Wash. St. 549,	1138
Anchor Line v. Dater, 68 Ill. 369,	738	Anna Maria, The, 2 Wheat. 327,	506
Anderson v. Cleburne, etc., Association (Texas App.), 16 S. W. Rep. 298,	1801, 1605	Annas v. Milwaukee, etc., R. Co., 67 Wis. 46,	1959, 1960
		Ann Berta Lodge v. Laverton, 42 Texas, 18,	842, 1199
		Anonymous, 1 Esp. 349,	401
		Anonymous, 1 Lord Ray. 182,	638
		Anthony v. Boyd, 15 R. I. 495,	212
		Anthony v. County of Jasper, 101 U. S. 693,	1516
		Anthony Hitchcock, 71 Fed. Rep. 659,	2047
		Anthony v. Hutchins, 10 R. I. 165,	1020
		Anthony v. Jasper Co., 101 U. S. 693,	1529
		Anthony v. Leftwich (1825), 3 Rand. (Va.) 238,	1179
		Anthony v. Perciful, 8 Ark. 494,	443
		Anthony v. Price, 92 Ga. 170,	1646
		Antoine v. Smith, 40 La. Ann. 560,	209
		Automarchi v. Russell, 63 Ala. 356,	907
		Antoni v. Greenhow, 107 U. S. 769,	32, 2159

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Antoni v. Wright, 22 Gratt. 833,	32, 2159	Armstrong v. Chicago, etc., R. Co., 53	1967
Antrobus v. Smith, 12 Ves. 39,	556	Minn. 183,	828
Anvil Mining Co. v. Humble, 153 U. S.	958	Armstrong v. Harshman, 61 Ind. 52,	541
540,	1384	Armstrong v. Hayward, 6 Cal. 183,	637, 638
Anvil Mining Co. v. Sherman, 74 Wis. 226,	614, 616	Armstrong v. Lawson, 73 Ind. 498,	263
Appeal, Barclay's, 64 Pa. St. 69,	196	Armstrong v. Prentice, 86 Wis. 210,	543
Appeal, Brice's, 95 Pa. St. 145,	197	Armstrong v. School District, 28 Mo. App.	1738
Appeal, Candor's, 27 Pa. St. 119,	182, 231, 234	169,	543
Appeal, Hacker's, 121 Pa. St. 192,	19, 180	Armstrong v. Stovall, 26 Miss. 275,	543
Appeal, Jones', 62 Pa. St. 324,	224	Armstrong v. Toler, 11 Wheat. 258,	2108
Appeal, Lukens', 143 Pa. St. 386,	209	1304, 1854, 1862, 1891, 1902, 1933, 2016,	2108
Appeal, Slemmer's, 58 Pa. St. 155,	234	Armstrong v. United States Express Co.,	1959
Appeal of Borough of Verona, 108 Pa. St.	1577	159 Pa. St. 640,	674
83,		Armstrong v. Vrooman, 11 Minn. 220,	1161
Appeal of the City of Erie, 91 Pa. St. 398,	563, 1519, 1520, 1523,	Arndt v. Griggs, 134 U. S. 316,	1755
563,	1565	Arndt v. Harshaw, 53 Wis. 269,	902
Appeal of Cornwall, etc., R. Co., 11 Am.	898	Arndt v. Bailey, 21 S. Car. 493,	2186
St. Rep. 893,	398	Arnold v. Bernard, 8 Abb. (N. Y.) Pr. N. S.	2211
Appeal of Forest Oil Co., 118 Pa. St. 138,	966, 1208	116,	540
Appeal of Goodwin Gas Stove and Meter	1577	Arnold v. Blabon, 147 Pa. St. 372,	478
Co., 117 Pa. St. 514,	1685	Arnold v. Camp, 12 Johns. 409,	2063
Appeal of Howard, 162 Pa. St. 374,	1446	Arnold v. Clark, 45 N. Y. Sup. Ct. 252,	237
Appeal of Rhodes, 156 Pa. St. 337,	1746	Arnold v. Johnson, 1 Scam. 196,	471
Appeal of Shaaaber (Pa. Sup.), 17 Atl.	423,	Arnold v. Kreutzer, 67 Iowa. 214,	243
Rep. 209,	2138	Arnold v. Lyman, 17 Mass. 400,	730
Appeal of Roop v. Real Estate, etc., Co.,	476	Arnold v. Mayor, 4 M. & G. 860,	1710
132 Pa. St. 496,	432	Arnold v. Nichols, 64 N. Y. 117,	605
Appeal Tax Court v. Grand Lodge, 50 Md.	489	Arnold v. Potter, 22 Iowa, 194,	761
423,	2228	Arnold v. Spurr, 130 Mass. 347,	770
Apperson v. Exchange Bank (Ky.), 10 S.		Arnold v. Stedman, 45 Pa. St. 186,	1705
W. Rep. 809,	1311	Arnold v. United States, 9 Cranch, 104,	1212
Apperson v. Moore, 30 Ark. 56,	476	Arnold v. United States, 147 U. S. 494,	1705
Applebee v. Percy, L. R. 9 C. P. 657,	432	Arnold v. Wilt, 86 Ind. 367,	1705
Appleby v. Myers, L. R. 2 C. P. 651,	489	Arnott v. Alexander, 44 Mo. 25,	1212
293, 294,	2228	Arnott v. Pittston, etc., Co., 68 N. Y. 555,	2069
Applegate v. Koons, 74 Ind. 247,	1161	1125, 1864, 1893, 2058, 2060,	1409
Applegate v. Mining Co., 117 U. S. 255,	165	Arnott v. Prudential Ins. Co., 63 Hun. 623,	118
Appleton v. Norwalk, 53 Conn. 4,	2257	Arrington v. Arrington, 114 N. Car. 116,	1671
Appleton v. Phoenix, etc., Ins. Co., 59 N.	800	Arrington v. Bell, 94 N. Car. 247,	1703
H. 237,	1311	Arrington v. Porter, 47 Ala. 714,	844, 951
Appleton Bank v. McGilvray, 4 Gray, 518,	476	Arrington v. Sneed, 18 Texas, 135,	1899
Arapahoe Ins. Co. v. Platt, 5 Colo. App.	1311	Arrowsmith v. Hamering, 39 Ohio St. 573,	770
515,	2084	Archer v. Zeh, 5 Hill. 200,	654, 672
Arbuckles v. Chadwick, 146 Pa. St. 393,	1458	Arthur v. Caverly, 98 Mich. 82,	1696
Arbuckle v. Cowtan, 3 Bos. & P. 321,	727, 2102, 2112	Artisans' Bank v. Park Bank, 41 Barb.	728
Arbuckle v. Illinois, etc., R. Co., 81 Ill.	878	599,	1754, 1755
429,	180, 2044	Artman v. Ferguson, 73 Mich. 146,	1632
Arbuckle v. Smith, 74 Mich. 568,	30	Arton v. Booth, 4 J. B. Moore, 192,	548
Archer v. Marsh, 6 A. & E. 595,	1056	Asbrook v. Dale, 27 Mo. App. 643,	2017
Archer v. State, 74 Md. 410,	452	Asburn v. Poulter, 35 Conn. 553,	379, 390
Archer v. California Lumber Co., 24 Ore.	1713	Ashburner v. Parrish, 81 Pa. St. 52,	2080
341,	1056	Ashbury Railway, etc., Co. v. Riche, L. R.	1246
Archibald v. Argall, 53 Ill. 307,	452	7 H. L. 653,	677
Ardis v. Printup, 39 Ga. 618,	1713	Ashcroft v. Butterworth, 136 Mass. 511,	1760
Argenbriht v. Campbell, 3 Hen. & M.	619, 1179	Ash v. Yungst, 65 Texas, 631,	960
(Va.) 144,	1536	Ashenbroedel Club v. Finlay, 53 Mo. App.	1200
Argenti v. City of San Francisco, 16 Cal.	944	256,	1200
255,	675	Asber v. Brock, 95 Ky. 270,	1289, 1307, 1406, 1447
Argus Co., <i>In re</i> , 128 N. Y. 557,	962	Ashhurst's Appeal, 60 Pa. St. 290,	1331
Argus Co. v. Mayor, etc., of Albany, 55	675	1289, 1307, 1406, 1447	1428
N. Y. 495,	962	Rep. 65,	465
Argyle Co. v. McNeill, 153 Ill. 669,	1059	Ashley v. Hendee, 56 Vt. 209,	440
Arkansas Val. Smelting Co. v. Belden	805	Ashley v. Ryan, 6 Ohio Cir. Ct. 208,	1817, 1850
Min. Co., 127 U. S. 379,	430	Ashmead v. Reynolds, 127 Ind. 441,	802
Arkell v. Commerce Ins. Co., 69 N. Y. 191,	1672	Ashmole v. Wainwright, 2 Q. B. 837,	155, 157
Arlin v. Brown, 44 N. H. 102,	224	Ashtabula R. Co. v. Smith, 15 Ohio St.	557
Armocost v. Lindley, 116 Ind. 295,	1902	328,	259, 1329
Armfield v. Armfield, Freeman Ch.	514	Ashton v. Pye, 5 Ves. 350,	1528
(Miss.) 311,	170, 964	Ashuelot, etc., Co. v. Hoit, 56 N. H. 543,	2132
Armfield v. Tate, 7 Ired. L. (N. Car.) 258,	1058	Ashuelot Nat. Bank v. School District, 56	1213
Armijo v. Abeytia, 25 Pac. Rep. 777,	452	Fed. Rep. 197,	1773
Armington v. Houston, 38 Vt. 448,	1904, 1933	Ashuelot Railroad v. Elliot, 58 N. H. 451,	873
Armistead v. Bozeman, 1 Ired. Eq. 117,	425	2104	
Armistead v. Ward, 2 Pat. & H. 512,			
Armstrong v. American, etc., Bank, 133			
U. S. 433,			
Armstrong v. Brownfield, 32 Kan. 116,			

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Aspinwall v. Sacchi, 57 N. Y. 331,	826	Atwater v. American Nat. Bank, 152 Jll.	1354
Astley v. Reynolds, 2 Str. 916,	395, 2233	Atwater v. Hough, 29 Conn. 508,	657
Astor v. Union Insurance Co., 7 Cow. 202,	926	Atwater v. Manchester Bank, 45 Minn.	341,
Astley v. Weldon, 2 B. & P. 354,	757		23
Astley v. Weldon, 2 Bos. & Pul. 630,	761	Atwater v. Schenck, 9 Wis. 160,	101, 1176
Aston v. Aston, Ves. Sen. (Belt.) 134,	561	Atwell v. Zeluff, 26 Mich. 113,	806
Asylum v. New Orleans, 105 U. S. 362,	2136	Atwood v. Cobb, 16 Pick. 227,	679, 684, 853, 1096
Atcheson v. Mallon, 43 N. Y. 147,	2020		
Atchison v. Bruff, 50 Barb. (N. Y.) 381,	1799	Atwood v. Dolan, 34 W. Va. 553,	1678
Atchison R. Co. v. Atchison, 47 Kan. 712,	461	Atwood v. Impson, 20 N. J. Eq. 150,	1662, 1856
Atchison, etc., R. Co. v. Grant, 6 Texas C.	App. 674,	Auburn Academy v. Strong, Hopkins Ch.	(N. Y.) 278,
Atchison, etc., R. Co. v. Lawler, 40 Neb.	356,		1412
Atchison R. Co. v. Washburn, 5 Neb. 117,	1961	Auburn, etc., Road Co. v. Douglas, 9	N. Y. 444,
	1961		1240
Atchison, etc., v. Roach, 35 Kan. 740,	736	Auburn Bolt, etc., Co. Works v. Shultz,	143 Pa. St. 256,
Atchison Board, etc., v. De Kay, 148 U. S.	591,		374, 1329
Atchison, etc., R. Co. v. English, 38 Kan.	110,	Auditor v. Ballard, 9 Bush, 572,	60
	649, 655	Auditorial Board v. Arles, 15 Texas, 72,	33
Atchison R. Co. v. Lindley, 42 Kan. 714,	1432	Auffmordt v. Rasin, 102 U. S. 620,	2119
Aten v. Brown, 14 Ill. App. 451,	831	Augusta Bank v. Fogg, 82 Maine, 538,	251
Athens, City of, v. Hemerick, 89 Ga. 674,	1534	Aultman v. Henderson, 32 Ill. App. 331,	123
Atthol Music Hall Co. v. Carey, 116 Mass.	471,	Aultman v. Olsen, 43 Minn. 409,	163
	259, 1322	Aultman v. Waddle, 40 Kan. 195,	2003, 2004
Atthol Music Hall Co. v. Carey, 116 Mass.	471,	Aultman Co. v. Case, 68 Wis. 612,	365
	1328	Aultman Co. v. Shelton, 90 Iowa, 238,	338
Atkins v. Barnwell, 2 East, 505,	183, 184, 197	Aultman, Taylor & Co. v. Hetherington,	42 Wis. 622,
Atkins v. Busby, 25 Ark. 176,	2022		364
Atkins v. Sleeper, 7 Allen, 487,	764	Aultman & Taylor Co. v. Frasure, 95 Ky.	429,
Atkins v. Van Buren School Tp., 77 Ind.	447,		1742
	95	Aultman & Taylor Co. v. Obermeyer, 6	Neb. 260,
Atkinson v. Chicago Tire & Spring Works	(Ill. 1891), 27 N. E. Rep. 919,		1652, 1666
	2245	Anrbach v. Le Sueur Mill Co., 28 Minn.	291,
Atkinson v. Cox, 54 Ark. 444,	468		1603
Atkinson v. Denby, 6 H. & N. 778,	802, 2014	Aurora, City of, v. West, 22 Ind. 88,	1532, 1885
Atkinson v. Denby, 7 Hurl. & N. 933, 1640,	1641	Aurora Horticultural Society v. Paddock,	80 Ill. 263,
Atkinson v. Dunlap, 50 Maine, 111,	2120		1221
Atkinson v. Farrington Co. (N. J. 1894),	28 Atl. Rep. 315,	Aurora Insurance Co. v. Eddy, 55 Ill. 213,	317
	1064	Aurora Turnpike Co. v. Holthouse, 7 Ind.	59,
Atkinson v. Linden Steel Co., 138 Ill. 178,	2245		2132
Atkinson v. Morse, 63 Mich. 276,	506	Aurora Water Co. v. City of Aurora, 129	Mo. 540,
Atkinson v. Pack, 114 N. Car. 597,	2219		1472, 1485
Atkinson v. Philadelphia (Pa. 1894), 30	Atl. Rep. 383,	Austin v. Austin, 9 Vt. 420,	490
	1553	Austin v. Barnum, 52 Minn. 136,	418
Atkinson v. Richie, 10 East, 534,	279, 2237	Austin v. Brown, 37 W. Va. 634,	1731
Atkinson v. Stewart, 2 B. Mon. 348,	443	Austin v. Davis, 123 Ind. 472,	849
Atkinson v. Taylor, 34 Mo. App. 442,	416, 417, 419	Austin v. Hall, 13 John. 286,	540, 543, 877
	2216	Austin v. Imus, 23 Vt. 286,	606
Atkinson v. Truesdell, 127 N. Y. 230,	2216	Austin v. Murray, 16 Pick. (Mass.) 121,	2148
Atkinson v. Whitney, 67 Miss. 655,	1111	Austin v. Rawdon, 44 N. Y. 63,	2166, 2168
Atkyns v. Kinnier, 4 Exch. 776,	2039	Austin v. Sawyer, 9 Cow. 30,	637
Atlanta, etc., R. Co. v. Speer, 32 Ga. 550,	2271	Austin v. Seligman, 18 Fed. Rep. 519,	236
Atlantic Bank v. Franklin, 55 N. Y. 235,	200	Austin v. Wacks, 30 Minn. 335,	752
Atlantic Co. v. Mayor, 53 N. Y. 64,	543	Austin Real Estate Co. v. Bahn, 87 Texas,	582,
Atlantic City Water Works v. Read, 50	N. J. Law, 665,		207
	1438, 1519	Austria, Emperor of, v. Day, 2 Giff. 628,	392
Atlantic, etc., Bank v. Harris, 118 Mass.	147,	Austrian v. Springer, 94 Mich. 343,	914
	345	Averbeck v. Hall, 14 Bush (Ky.), 505,	2011
Atlantic and Pacific Telegraph Co. v.	Union Pacific Ry., 1 McCrary, 541, 1412,	Avery v. Bowden, 5 E. & B. 714,	497
Atlee v. Bartholomew, 69 Wis. 43,	650, 1182	Avery v. Fisher, 28 Hun (N. Y.), 508,	1773
Atlas National Bank v. Savery, 127 Mass.	75,	Avery v. Johann, 27 Wis. 246,	1856
	1249	Avery v. Latimer, 14 Ohio, 542,	181
Attleborough, etc., Bank v. Rogers, 125	Mass. 339,	Avery v. Stewart, 2 Conn. 69,	385, 386, 764, 766, 882, 899
	1249		
Attorney-General v. Board, 64 Mich. 607,	1523	Avery v. Wetmore, Kirby, 49,	475
Attorney-General v. Chicago & N. W. R.	Co., 35 Wis. 425,	Avery v. Willson, 81 N. Y. 341,	145, 2233
Attorney-General v. Day, 1 Ves. Sen. 218,	674	Avoy v. Long, 13 Ill. 147,	903
Attorney-General v. Ewelme Hospital, 17	Beav. 366,	Awalt v. Eutaw, etc., Assn., 34 Md. 435,	807
Attorney-General v. Parnter, 3 Brown	Ch. 441,	Awdley v. Awdley, 2 Vern. 192,	1844
	2278	Awkright v. Newbold, L. R. 17 Ch. Div.	320,
Attorney-General v. Railway Co., 5 App.	Cas. 473,		990
	1226	Axtel v. Chase, 83 Ind. 546,	1081
Attorney-General v. Rumford Chemical	Works, 22 Fed. Rep. 608,	Axtell v. Chase, 77 Ind. 74,	1081
Attorney-General v. Tudor Ice Co., 104	Mass. 239,	Axtell's Petition, <i>In re</i> , 95 Mich. 244,	2256
	1248	Aycock v. Braun, 66 Texas, 201,	1988
		Aycock v. Kimbrough, 71 Texas, 330,	1720
		Ayer v. Ashmead, 31 Conn. 447,	521, 524, 541, 572
		Ayer v. Hutchins, 4 Mass. 370,	1854
		Ayers, <i>In re</i> , 123 U. S. 443,	32
		Ayers v. Newark, 49 N. J. Law, 170,	1549

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Ayers v. Staley (N. J. Eq.), 18 Atl. Rep. 1046,	474	Bailey v. Parbridge, 134 Ill. 188,	448
Aylesford's Case, Earl of, 2 Stra. 783,	844	Bailey v. Rutjes, 86 N. Car. 517,	778
Ayliffe v. Tracy, 2 P. Wms. 65,	619	Bailey v. Woods, 17 N. H. 365,	138, 2181
Aymar v. Astor, 6 Cow. (N. Y.) 266,	2247	Baillett v. Wheeler, 44 Barb. 162,	646
Aymar v. Sheldon, 12 Wend. 439,	712	Baillie v. Moore, 8 Q. B. 489,	527
Ayres v. Chicago, etc., Railway Co., 71 Wis. 372,	1960	Bain v. Whitehaven, etc., R. Co., 3 H. L. Cas. 1,	717
Ayres v. Chicago, etc., R. Co., 52 Iowa, 478,	187, 198, 199	Baines v. Geary, L. R. 35 Ch. Div. 154,	2028
Ayres v. Dutton, 87 Mich. 528,	375	Baines v. Jevons, 7 Car. & P. 288,	668
Ayres v. Jack, 7 Utah, 249,	628	Baird v. Patillo (Texas 1894), 24 S. W. Rep. 813,	1657
Ayres v. Mitchell, 3 Smedes & M. 683,	409, 2281	Baird v. United States, 96 U. S. 430,	519, 522
		Baily's Case, L. R. 5 Eq. 428,	62
		Baily v. De Crespigny, L. R. 4 Q. B. 180,	280, 282
B			
Babbitt v. Morrison, 58 N. H. 419,	1721	Baker v. Arnot, 67 N. Y. 448,	362
Babcock v. Chase, 92 Hun. 264,	229	Baker v. Baker, 2 S. Dak. 261,	453
Babcock v. Clear, 17 N. Y. Suppl. 664,	500	Baker v. Baker, 28 N. J. Law, 13,	475
Babcock v. Goodrich, 47 Cal. 488,	1873	Baker v. Boston, 12 Pick. (Mass.) 184,	2147
Babcock v. Hawkins, 23 Vt. 561,	529, 531	Baker v. City of Fairbury, 33 Neb. 674,	461
Babcock v. Kuntsch, 32 N. Y. Suppl. 663,	202	Baker v. Connell, 1 Daly (N. Y.), 469,	466
Babcock v. Read, 99 N. Y. 609,	644, 645	Baker v. Cordon, 86 N. Car. 110,	2044
Babcock v. Schuykill R. R. Co., 133 N. Y. 420,	1462	Baker v. Denning, 8 A. & E. 94,	687
Babcock v. Utter, 1 Keyes, 397,	613	Baker v. Dewey, 1 B. & C. 704,	552
Babcock v. Wilson, 17 Maine, 372,	214	Baker v. Dibrow, 3 Redf. (N. Y.) 348,	1780
Bach v. Levy, 101 N. Y. 511,	555	Baker v. Guarantee, etc., Co., 31 Atl. Rep. 174 (N. J. Eq. 1895),	1438
Bach v. Tuck, 126 N. Y. 53,	1010, 2275	Baker v. Higgins, 21 N. Y. 397,	146
Bachelor v. Fiske, 17 Mass. 464,	827	Baker v. Holt, 56 Wis. 100,	68, 69
Backer v. Meyer, 43 Fed. Rep. 702,	1699	Baker v. Holtzaffel, 4 Taunt. 45,	292
Backhouse v. Mohun, 3 Swanst. 434,	1108	Baker v. Johnson, 42 N. Y. 126,	280
Backus v. Lebanon, 11 N. H. 19,	2130	Baker v. Johnson Co., 87 Iowa, 186,	71
Backus v. McCoy, 3 Ohio, 211,	369	Baker v. Jordan, 73 N. Car. 145,	1727
Bacon v. Cobb, 45 Ill. 52,	2237	Baker v. Kansas City R. Co., 91 Mo. 152,	214
Bacon v. Dyer, 12 Maine, 19,	402	Baker v. Kennett, 54 Mo. 82,	1781
Bacon v. Eccles, 43 Wis. 227,	665	Baker v. Lauterbach, 6 Md. 64,	653, 692
Bacon v. Miss. Insurance Co., 31 Miss. 116,	1341	Baker v. Maxwell, 99 Ala. 55,	992, 993
Bacon v. Johnson, 56 Mich. 182,	1278	Baker v. Morton, 12 Wall. 150,	803
Bacon v. Kentucky Central R. Co., 95 Ky. 373,	1108	Baker v. Mott, 78 Hun. 141,	26, 170
Bacon v. Wayne Co., 1 Mich. 461,	1471	Baker v. Neff, 73 Ind. 68,	1335
Badart v. Foulon, 80 Md. 579,	43	Bakeman v. Pooler, 15 Wend. 637,	389
Badcock, <i>In re</i> , L. R. 17 C. D. 361,	226	Baker v. Rowell, 3 Stro. 25,	395
Badders v. Davis, 88 Ala. 367,	655	Baker v. Stone, 136 Mass. 405,	1797
Badger v. Badger, 2 Wall. 87,	1169	Baker v. Stonebaker, 36 Mo. 338,	717
Badger v. Phinney, 15 Mass. 359,	1793	Baker v. Wheaton, 5 Mass. 309,	399
Badgett v. Frick, 28 S. Car. 176,	1048	Baker v. Whiteside, 1 Ill. 174,	954
Badische, etc., Fabrik v. Schoot, L. R. (1892) 3 Ch. 447,	2034, 2041, 2045	Baker v. Wiswell, 17 Neb. 52,	842
Badlam v. Tucker, 1 Pick. 389,	667	Balcom v. Craggin, 5 Pick. 295,	186
Badlam v. Tucker, 18 Mass. 284,	281	Bald Eagle, etc., R. Co. v. Nittany, etc., R. Co., 171 Pa. St. 284,	1419
Bad River Lumbering Co. v. Kaiser, 82 Wis. 166,	120	Baldry v. Parker, 2 B. & C. 37,	663, 668
Bagaley v. Waters, 7 Ohio St. 359,	244	Baldwin v. Bangor, 36 Maine, 518,	1576
Bagley v. Peddie, 16 N. Y. 469,	753	Baldwin v. Carter, 17 Conn. 201,	900
Bagnall v. Carlton, L. R. 6 Ch. Div. 271,	1980	Baldwin v. Fletcher, 48 Mich. 604,	1156
Baggs v. Baggs, 55 Ga. 590,	1768	Baldwin v. Hale, 1 Wall. (U. S.) 223,	2125
Bailey v. Bailey, 56 Vt. 398,	263, 608, 609	Baldwin v. Hutchinson, 8 Ind. App. 454,	1834, 1835
Bailey v. Bensley, 87 Ill. 556,	913	Baldwin v. Kerlin, 46 Ind. 426,	1176, 1177, 1178, 1484
Bailey v. Bussing, 28 Conn. 455,	826, 827	Baldwin v. National Hedge Co., 67 Fed. Rep. 553,	1068
Bailey v. County of Buchanan, 115 N. Y. 297,	399, 400	Baldwin v. Rosenman, 49 Conn. 105,	1636
Bailey v. Cromwell, 3 Scam. (Ill.) 71,	868	Baldwin v. Salter, 8 Paige, 473,	955
Bailey v. Day, 26 Maine, 88,	520	Baldwin v. Society, etc., 9 Sim. 393,	1212
Bailey v. De Crespigny, L. R. 4 Q. B. 597,	273	Baldy v. Stratton, 11 Pa. St. 316,	2015
Bailey v. Gibbs, 9 Mo. 45,	146	Baldwin v. Van Vorst, 10 N. J. Eq. 577,	749
Bailey v. Harris, 8 Iowa, 331,	664	Baldenberg v. Warden, 14 W. Va. 397,	1179
Bailey v. Hemenway, 147 Mass. 326,	615	Baldwin v. Williams, 3 Metc. (Mass.) 365,	661
Bailey v. Hervey, 135 Mass. 172,	165	Baldwin v. Van Deusen, 37 N. Y. 487,	338
Bailey v. Inglee, 2 Paige, 278,	1215	Ball v. Gilbert, 12 Metc. (Mass.) 397,	1941, 1947, 1948, 2072
Bailey v. Insurance Co., 114 Mass. 177,	1211	Ball v. Doud, 26 Ore. 14,	2192, 2223, 2224
Bailey v. Irwin, 72 Ala. 505,	694	Ball v. McGeech, 81 Wis. 160,	545
Bailey v. Methodist Episcopal Church, 71 Maine, 472,	1576	Ball v. Stanley, 5 Yarger, 199,	393, 411
Bailey v. Milner, 1 Abb. U. S. 261,	2021	Ball, etc., Fastener Co. v. Ball Glove Fastener Co., 58 Fed. Rep. 518,	1129
Bailey v. New England Ins. Co., 114 Mass. 177,	2184	Ballard v. Ballard, 25 W. Va. 470,	1179
Bailey v. Ogden, 3 John. 399	667, 675	Ballard v. Lippman, 32 Fla. 481,	1737
		Ballard v. Noaks, 2 Ark. 45,	525
		Ballard v. Ward, 89 Pa. St. 358,	850
		Ballentine v. Clark, 38 Mich. 395,	1077

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Ballentine v. North Mo. R. Co., 40 Mo.		Bank of Commonwealth v. Mayor of New York, 43 N. Y. 189,	458, 460, 1805
491,	275	Bank of Cumberland v. Mayberry, 48 Maine, 198,	2114
Ballou v. Billings, 136 Mass. 307,	954, 1044	Bank of England v. Newman, 1 Ld. Raym. 442,	456
Ballou v. Earle, 17 R. I. 441,	1965	Bank of Bellows Falls v. Rutland & B. R. Co., 28 Vt. 470,	968
Ballou v. Sherwood, 32 Neb. 666,	417	Bank of Gallipolis v. Trimble, 6 B. Mon. 599,	719
Bally v. Wells, 3 Wils. 25,	1102	Bank of Genesee v. Patchin Bank, 13 N. Y. 309,	1285
Balme v. Wambaugh, 16 Minn. 116,	398, 401, 402	Bank of Kentucky v. Adams Ex. Co., 93 U. S. 174,	64, 273
Baloo v. Hale, 47 N. H. 347,	621	Bank of Louisiana v. Williams, 46 Miss. 618,	714
Baltimore v. Gill, 31 Md. 375,	1521	Bank of Middlebury v. Rutland & W. R. Co., 30 Vt. 159,	1269
Baltimore, City of, v. City of New Orleans, 45 La. Ann. 526,	1469	Bank of Mobile v. Dunn, 67 Ala. 381,	1611
Baltimore, etc., Co. v. Western Union, etc., Co., 24 Fed. Rep. 319,	2052	Bank of Monroe v. Gifford, 79 Iowa, 300,	452
Baltimore, etc., R. Co. v. Brydon, 65 Md. 198,	134	Bank of Montgomery v. Buggy Co., 100 Ala. 626,	1631
Baltimore, etc., R. Co. v. Campbell, 36 Ohio St. 647,	736	Bank of Montreal v. J. E. Potts Salt and Lumber Co., 90 Mich. 345,	1393, 1404, 1642
Baltimore, etc., R. Co. v. Ragsdale (Ind. App.), 42 N. E. Rep. 1106,	1966	Bank of New Orleans v. New Orleans, 12 La. Ann. 421,	460
Baltimore and Ohio R. v. Glenn, 28 Md. 287,	724	Bank of New York Nat. B. Assn. v. American Dock Co., 143 N. Y. 559,	1304, 1350
Baltimore Trust, etc., v. Baltimore, 64 Fed. Rep. 153,	1582	Bank of North America v. Sturdy, 7 R. I. 109,	1879
Baltzer v. Railroad Co., 115 U. S. 634,	1068	Bank of Orange v. Brown, 3 Wend. 158,	776, 781
Balance v. Taylor, 138 Ind. 368,	969, 979, 1013, 2166	Bank of Pennsylvania v. Commonwealth, 19 Pa. St. 144,	2130, 2137
Bament v. LaDow, 66 Fed. Rep. 185,	1010	Bank of River Falls v. German Am. Ins. Co., 72 Wis. 535,	2244
Bampton v. Paulin, 4 Bing. 264,	608	Bank of San Luis Obispo v. Wickersham, 99 Cal. 655,	971
Banbury v. Arnold, 91 Cal. 606,	120, 1187	Bank of Toledo v. City of Toledo, 1 Ohio St. 622,	2130
Banchorf v. Mansel, 47 Maine, 120,	709, 1902	Bank of Troy v. Topping, 9 Wend. 273,	593
Bancroft v. Winspear, 44 Barb. 209,	874	Bank of United States v. Dandridge, 12 Wheat. 64,	783, 1277, 1283, 1323
Bane v. Detrick, 52 Ill. 19,	803	Bank of United States v. Daniel, 12 Pet. 34,	458
Banfield v. Banfield, 24 Ore. 571,	1063	Bank of U. S. v. Donally, 8 Pet. 381,	21, 696, 715
Bang v. Brett (Minn.), 63 N. W. Rep. 1067,	—	Bank of United States v. Owens, 2 Pet. 527,	1265, 1888, 1897
Bangert v. Bangert, 13 Mo. App. 144,	1734	Bank of Washington v. Triplett, 1 Pet. 25,	731, 891
Bangor Electric Light Co. v. Robinson, 52 Fed. Rep. 520,	1346	Bank of West Tennessee v. Citizen's Bank, 21 La. Ann. 18,	2021, 2022
Bangs v. Dunn, 66 Cal. 72,	2084	Banks v. Goodfellow, L. R. 5 Q. B. 549,	1812
Bangs v. Hall, 2 Pick. 368,	194	Banks v. Harris Mfg. Co., 20 Fed. Rep. 667,	677, 692, 2270
Bank v. Albee, 64 Vt. 571,	251	Banks v. New York Club, 68 Hun, 92,	1366
Bank v. Crary, 1 Barb. 542,	638	Banks v. Searles, 2 McMul. 356,	1880
Bank v. Daniel, 12 Pet. 32,	452	Banks v. Werts, 13 Ind. 203,	2110
Bank v. Davis, 8 Conn. 191,	1231, 1234	Banner, <i>Ex parte</i> , L. R. 17 Ch. Div. 480,	210, 1473
Bank v. Davis, 2 Hill. 451,	427	Barbee v. Barbee, 108 N. Car. 581,	122
Bank v. Deming, 17 Vt. 366,	1643	Barber v. Burrows, 51 Cal. 404,	12
Bank v. Earle, 13 Pet. 587,	1219	Barber v. Harris, 15 Wend. (N. Y.) 615,	1766, 1768
Bank v. Fordyce, 9 Pa. St. 275,	899	Barber Asphalt Co. v. Hunt, 100 Mo. 22,	1473
Bank v. Fulmer, 31 N. J. Law, 55,	955	Barbier v. Connolly, 113 U. S. 27,	2147, 2160
Bank v. Gilstrap, 45 Mo. 419,	1187	Barclay, <i>Ex parte</i> , 7 Ves. 597,	457
Bank v. Hagner, 1 Pet. 455,	1242	Barclay's Appeal, 64 Pa. St. 69,	196
Bank v. Hiatt, 53 Cal. 234,	992	Barclay v. Culver, 30 Hun, 1,	412
Bank v. Kennedy, 17 Wall. 19,	859	Barclay v. Lucas, 1 T. R. 291,	566
Bank v. Letcher, 3 J. J. Marsh. 195,	532	Bardart v. Foulon, 80 Md. 579,	45
Bank v. Levitt, 5 Ohio, 207,	1372	Bargett v. Orient, etc., Ins. Co., 3 Bos. (N. Y.) 385,	897
Bank v. Lowrey, 36 Neb. 290,	1364	Barhite's Appeal, 126 Pa. St. 404,	791
Bank v. Norton, 1 Hill. 501,	1283	Barhydt v. Ellis, 45 N. Y. 107,	872, 885
Bank v. Owens, 2 Pet. (U. S.) 526,	1894	Barickman v. Kukkendall, 6 Blackf. (Ind.) 21,	677
Bank v. Town of Chillicothe, 7 Ohio, pt. 2, pp. 31, 35,	1499	Barker, <i>In re</i> , L. R. 17 Ch. Div. 241,	1844
Bank of Washington v. Triplett, 1 Pet. 25,	941	Barker v. Birt, 10 Mees. & W. 61,	610
Bank v. Weaver (Cal.), 31 Pac. Rep. 160,	1310	Barker v. Bradley, 42 N. Y. 316,	238, 562
Bank v. Wheeler, 72 N. Y. 201,	1550	Barker v. Brink, 4 Greene (Iowa), 59,	2198
Bank v. Wray, 4 Strob. 87,	1189	Barker v. Buklin, 2 Denio, 45,	237, 260, 597, 607
Bank of British America v. Simpson, 24 U. C. C. P. 357,	688		
Bank of California v. Webb, 94 N. Y. 467,	473		
Bank of Cape Fear v. Edwards, 5 Ired. (N. Car.) L. 516,	2136		
Bank of Catskill v. Messenger, 9 Cow. 37,	574		
Bank of Chenango v. Osgood, 4 Wend. 607,	569		
Bank of Chillicothe v. Dodge, 8 Barb. 233,	802		
Bank of Chillicothe v. Swayne, 8 Ohio, 257,	1260		
Bank of Chillicothe v. Town of Chillicothe, 7 Ohio, 31 (part 2),	1260		
Bank of Columbia v. Patterson, 7 Cranch, 299,	20, 780, 782		
Bank of Columbia v. Hagner, 1 Pet. 455,	743		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Barker v. Cobb, 36 N. H. 344,	490	Barrett v. Barrett, 5 Ore. 411,	792
Barker v. Cory, 15 Ohio, 9,	781, 2168	Barrett v. Carden, 65 Vt. 431,	1952, 2006
Barker v. Frye, 75 Maine, 29,	252	Barrett v. Geisinger, 148 Ill. 98,	839, 1190, 1191, 1197
Barker v. Hibbard, 54 N. H. 539,	1798	Barrett v. Goddard, 3 Mason, 107,	668
Barker v. Lynch, 75 Wis. 624,	1755	Barrett v. Hall, 1 Aik. 269,	325, 328
Barker v. Northern Pac. R. Co., 65 Fed. Rep. 460,	580	Barrett v. Henrietta, etc., Bank, 78 Texas, 222,	236, 244
Barker v. Troy, etc., Railroad Co., 27 Vt. 766,	875, 878	Barrett v. Lewis, 106 Ind. 120,	1720
Barker v. Walbridge, 14 Minn. 469,	394	Barrett v. Markat St. R. Co., 81 Cal. 296,	413
Barkwell v. Swan, 69 Miss. 907,	454	Barreda v. Silsbee, 21 How. (U. S.) 146,	874
Barkworth v. Young, 42 Drewry, 1,	301, 619, 675	Barrett v. Third Ave. R. Co., 45 N. Y. 628,	574
Barlow v. Gregory, 31 Conn. 261,	767	Barrell v. Trussell, 4 Taunt. 117,	608, 610
Barlow v. Lambert, 28 Ala. 704,	907, 920	Barrett v. Weber, 125 N. Y. 18,	2012
Barlow v. Myers, 64 N. Y. 41,	243	Barrick v. Buba, 2 C. B. (N. S.) 563,	498
Barlow v. Ocean Ins. Co., 4 Metc. 270,	210, 1473	Barrick v. Gifford, 47 Ohio St. 180,	1382
Barlow v. Scott, 24 N. Y. 40,	859, 883	Barril v. Calendar, etc., Water-Proofing Co., 2 N. Y. Supl. 758,	1316
Barlow v. Smith, 4 Vt. 139,	192	Barringer v. Warden, 12 Cal. 311,	214
Barlow v. Stalworth, 27 Ga. 517,	781	Barron v. Barron, 24 Vt. 575,	1680
Barnaby v. Barnaby, 1 Pick. (Mass.) 221,	1776	Barron v. Burrill, 86 Maine, 66,	1319, 1343
Barnard v. Backhaus, 52 Wis. 593,	1914	Barrow v. Ker, 10 La. Ann. 120,	68
Barnard v. Campbell, 58 N. Y. 73,	2280	Barron v. Mullin, 21 Minn. 374,	356
Barnard v. Gantz, 140 N. Y. 249,	21, 1018, 1019, 1064	Barron v. Tucker, 53 Vt. 338,	1853
Barnard v. Graves, 16 Pick. 41,	447	Barrow v. Barrow, 2 Dick. 504,	221, 223
Barnard v. Kellogg, 10 Wall. 383,	167, 915, 917, 926, 891, 2247	Barrow v. Pike, 21 La. Ann. 14,	2022
Barnard v. Lee, 97 Mass. 92,	75, 752	Barrowman v. Free, L. R. 4 Q. B. D. 500,	497
Barnard v. Lloyd, 85 Cal. 131,	2173	Barry v. Coombe, 1 Pet. 640,	688, 691, 1175
Barnard v. Russell, 19 Vt. 334,	95, 101	Barry v. Edmunds, 116 U. S. 550,	32, 2159
Barnard v. Tomson, L. R. 1 Ch. 374,	174, 175	Barry v. Lambert, 93 N. Y. 300,	549
Barnard Mfg. Co. v. Galloway, 5 S. Dak. 205,	951	Barry v. Ransom, 12 N. Y. 462,	596, 599, 827
Barnes v. Barnes, 50 Conn. 572,	1801	Barstow v. Savage Mining Co., 64 Cal. 388,	1346
Barnes v. Boston & Maine R. Co., 130 Mass. 388,	836, 844	Bartel v. Lope, 6 Ore. 321,	408
Barnes v. Brown, 80 N. Y. 527,	1306, 1307	Barter v. Wheeler, 49 N. H. 9,	738
Barnes v. Brown, 32 Mich. 146,	1030, 1041	Barth v. Backus, 140 N. Y. 230,	725, 732
Barnes v. District of Columbia, 91 U. S. 540,	34	Bartholomew v. Bentley, 1 Ohio St. 37,	1260
Barnes v. Kornegay, 62 Fed. Rep. 671,	2136	Bartholomew v. Jackson, 20 Johns. 28,	186, 268, 784
Barnes v. Lloyd, 1 How. (Miss.) 581,	532	Bartles v. Gibson, 17 Fed. Rep. 273,	1856
Barnes v. McAllister, 18 How. Pr. (N. Y.) 534,	2073	Bartlett v. Bailey, 59 N. H. 408,	1790, 1797
Barnes v. McMullins, 78 Mo. 260,	2168	Bartlett v. Drake, 100 Mass. 174,	1797, 1803
Barnes v. Moore's Estate, 86 Mich. 585,	1685	Bartlett v. Farrington, 120 Mass. 284,	453
Barnes v. Smith, 159 Mass. 314,	1917	Bartlett v. Robbins, 5 Metc. 184,	828
Barnes v. Perine, 12 N. Y. 18,	256	Bartlett v. Smith, 13 Fed. Rep. 263,	2072
Barnes v. Toye, L. R. 13 Q. B. D. 410,	1799	Bartlett v. Stanchfield, 145 Mass. 394,	344
Barnes v. Trenton Gas Light Co., 27 N. J. Eq. 33,	1288	Bartlett v. Vinor, Carth. 251,	1886
Barnes v. Ward, Busbee's Eq. 93,	553	Bartlett v. Wheeler, 44 Barb. 162,	649, 656
Barnet v. Patterson, 45 N. J. Law, 395,	1470	Bartlett v. Wyman, 14 Johns. 259,	187, 193
Barnett v. Barnes, 73 Ill. 216,	957	Barton v. Fitzgerald, 15 East, 530,	864
Barnett v. Denison, 145 U. S. 135,	1537	Barton v. Gray, 57 Mich. 622,	902, 950
Barnett v. Franklin College, 10 Ind. App. 403,	137, 215	Barton v. McElway, 22 N. J. Law, 165,	919, 2246
Barnett v. Juday, 38 Ind. 86,	810	Barton v. Port Jackson, etc., Plank Road Co., 17 Barb. (N. Y.) 397,	1973
Barnett v. Kinney, 147 U. S. 476,	724	Barton v. Spinning, 8 Wash. 458,	102
Barnett v. Washington Glass Co., 12 Ind. App. 631,	629, 637	Barton v. Wells, 5 Wharton, 225,	2009
Barney v. Giles, 120 Ill. 154,	126	Barwick v. Reade, 1 H. Bl. 627,	2084
Barney & Smith Co. v. County Com'rs, 29 Weekly Law Bul. (Cin.) 366,	461	Bascom v. Cannon, 158 Pa. St. 225,	914
Barnhart v. Fulkert, 90 Cal. 159,	1301	Bascom v. Smith, 164 Mass. 61,	857
Barnhart v. Riddle, 20 Pa. St. 92,	2264	Basford v. Pearson, 7 Allen, 504,	1753
Barnum v. Frost, 17 Gratt. (Va.) 398,	1411	Bash v. Culver Gold Mining Co., 7 Wash. 122,	1308
Barnum v. Young, 10 Neb. 309,	1652, 1723	Bashore v. Whisler, 3 Watts. 490,	356
Baron v. Placide, 7 La. Ann. 229,	531	Baskin v. Moss, 115 N. Car. 448,	1872, 2081
Barr v. Glass Co., 51 Fed. Rep. 33,	1452	Baskin v. Andrews, 53 Hun, 95,	823
Barr v. New York, etc., R. Co., 125 N. Y. 263,	1301, 1306	Bason v. Mining Co., 90 N. Car. 417,	1244
Barr v. Plate Glass Co., 6 C. C. A. 260; 57 Fed. Rep. 86,	1446	Bass v. Walsh, 39 Mo. 192,	668, 671
Baradaile v. Hunter, 5 Man. & Gr. 639,	119	Bassett v. Bassett, 55 Maine, 127,	2198
Barreda v. Silsbee, 21 How. 146,	875	Basset v. Beam (Idaho 1894), 36 Pac. Rep. 501,	1695
Barrett, <i>Ex parte</i> , 31 L. J. Ch. 558,	160	Bassett v. Camp, 54 Vt. 232,	663
Barrett v. Allen, 10 Ohio, 426,	385, 386, 766	Bassett v. Hughes, 43 Wis. 319,	236, 237, 247, 2210

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Batchelder v. Sanborn (N. H.), 22 Atl. Rep. 535,	168	Beadles v. McElrath, 85 Ky. 230,	1922
Bates v. American Mortgage Co., 37 S. Car. 88,	1683	Beadles, Wood & Co. v. McElrath & Co., 85 Ky. 230,	1915
Bates v. Babcock, 95 Cal. 479,	644	Beagle v. Harby, 73 Hun. 310,	46, 47
Bates v. Chesebro, 32 Wis. 594,	670	Beal v. Chase, 81 Mich. 490,	2041, 2042, 2044, 2047, 2069
Bates v. Coronado Beach Co., 109 Cal. 160,	1221, 1257	Beal v. City of Roanoke, 90 Va. 77,	1469, 1486
Bates v. Herrick, 82 Mich. 295,	501	Beal v. Harrington, 116 Ill. 113,	428
Bates v. Keith Iron Co., 7 Met. 224,	1358	Beale v. Thompson, 3 Bos. & P. 405,	2237
Bates v. Kelly, 80 Ala. 142,	1156	Beales v. See, 10 Pa. St. 56,	1838
Bates v. Lewis, 3 Ohio St. 459,	1325	Beall v. Clark, 71 Ga. 818,	850
Bates v. Railroad Co., 147 Mass. 255,	1432	Beals v. Beals, 20 Ind. 163,	2210
Bates v. Swiger (W. Va. 1895), 21 S. E. Rep. 874,	1161	Beals v. Olmstead, 24 Vt. 114,	325
Bates v. Thompson, 61 Texas. 335,	2087	Beam v. Barnum, 21 Conn. 200,	521, 524
Bates v. Wilson, 14 Colo. 140,	1452	Beamman v. Russell, 20 Vt. 205,	597, 614
Bath Sav. Institution v. Hathorn, 83 Maine —, 33 Atl. Rep. 836,	249, 251	Bean v. Edge, 84 N. Y. 510,	162, 241
Batson v. King, 4 H. & N. 739,	596	Bean v. Hyde Park, 143 Mass. 245,	1492
Battall v. Matot, 58 Vt. 271,	694	Bean v. Inhabitants of Jay, 23 Maine, 117,	1473
Battelle v. Northwestern Pavement Co., 37 Minn. 89,	1313, 1316, 1452	Bean v. Jay, 23 Maine, 117,	210
Batsford v. Every, 44 Barb. (N. Y.) 618,	2098	Bean v. Parker, 17 Mass. 591,	172
Batterbury v. Vyse, 2 Hurl. & C. 42,	129	Bean v. Patterson, 122 U. S. 496,	1696
Batterman v. Pierce, 3 Hill, 171,	46	Bean v. Western, etc., R. Co., 107 N. Car. 731,	583
Battle v. McArthur, 49 Fed. Rep. 715,	209, 211, 565	Beard v. Arbuckle, 19 W. Va. 135,	415
Battle v. Rochester City Bank, 3 N. Y. 83,	465	Beard v. Beard, 3 Atk. 72,	2257
Batton v. Allen, 5 N. J. Eq. 99,	555	Beard v. City of Hopkinsville, 96 Ky. 239,	1519
Baubichon, Estate of, 49 Cal. 19,	1713	Beard v. Dennis, 6 Ind. 200,	2032, 2039, 2043, 2045, 2264
Bauk v. Swan, 146 Pa. St. 444,	1676	Beard v. Horton, 86 Ala. 202,	75
Baughman v. Louisville, etc., R. Co., 94 Ky. 150,	1962	Beard v. Lintchum, 1 Md. Ch. 345,	1105
Baum v. Birchall, 150 Pa. St. 164,	720	Beard v. Lofton, 102 Ind. 408,	866
Baum v. Grigsby, 21 Cal. 172,	120	Beard v. St. Louis, etc., Ry. Co., 79 Iowa, 527,	736, 738
Baum v. Parkhurst, 21 Atl. Rep. 497,	238	Beardsley v. Davis, 52 Barb. (N. Y.) 159,	2206
Baum v. Parkhurst, 26 Ill. App. 128,	244	Beardsley v. Duntley, 69 N. Y. 577,	435, 2274
Baum v. Stone, 12 N. Y. Wkly. Dig. 353,	1800	Beardsley v. Hotchkiss, 96 N. Y. 201, 1771, 1775	1232
Baum v. Sweeney, 5 Wash. 712,	1544	Beardsley v. Knight, 10 Vt. 185,	1232
Baumann v. James, L. R. 3 Ch. 508,	684	Beardstown, City of, v. City of Virginia, 76 Ill. 34,	1587
Baumann v. James, L. R. 3 Ch. 508,	691	Beares v. Ford, 108 Ill. 16,	854
Baumann v. Pinckney, 118 N. Y. 604,	1143	Beasley v. Huyett, etc., Mfg. Co., 92 Ga. 273,	351
Baumgarten v. Broadway, 77 N. Car. 8,	2014	Beattie v. Delaware, etc., R. Co., 90 N. Y. 643,	1278
Bausman v. Credit Co., 47 Minn. 377,	453	Beatty v. Coble, 142 Ind. 329,	2041, 2045
Bavington v. Clarke, 2 Penrose & Watts (Pa.), 115,	1802	Beaty v. Lessee of Knowler, 4 Pet. (U. S.) 152,	2131
Baxter v. Aubrey, 41 Mich. 13,	1141	Beaumont v. Brengeri, 5 C. B. 301,	668
Baxter v. Burfield, 2 Strange, 1266,	288	Beaumont v. Reeve, 8 Q. B. 483,	183
Baxter v. Bishop, 65 Iowa, 582,	68	Beaupre v. Pacific & A. Tel. Co., 21 Minn. 155,	55
Baxter v. Bush, 29 Vt. 465,	432	Beavan v. Eldridge, 2 Miles (Pa.), 353,	3-5
Baxter v. Earl of Portsmouth, 5 B. & Cr. 170,	1842	Beavan v. McDonnell, 9 Exch. 300,	1842
Baxter National Bank v. Talbot, 154 Mass. 213,	696, 728	Beaver v. Beaver, 117 N. Y. 4-1,	249, 250
Baxter v. State, 9 Wis. 38,	869	Beaver v. Fulp, 136 Ind. 595,	198
Baxter v. West, 5 Daly, 460,	776	Beebe v. Moore, 3 McLean, 3-7,	594
Bay City v. State Treasurer, 23 Mich. 499,	1536	Beck v. Allison, 56 N. Y. 306,	2271
Bayha v. Webster Co., 18 Neb. 131,	1512	Beck v. Haas, 31 Mo. App. 130,	472
Bayley v. Greenleaf, 7 Wheat. 46,	120	Beck v. Haas, 111 Mo. 264,	1690
Bayley v. Homan, 5 Bing. N. C. 915,	525	Beck v. Kantorowicz, 3 Kay & J. 230,	1980
Bayley v. Williams, 4 Giff. 638,	1832	Beck v. Pounds, 20 Ga. 36,	815, 817
Baylis v. Pettyplace, 7 Mass. 325,	281	Beck v. Seanson, 8 Rich. Eq. 130,	1020
Bayliffe v. Butterworth, 1 Exch. 425,	940	Beck v. Snyder, 167 Pa. St. 234,	537
Baylis v. Dineley, 3 M. & S. 476,	1772	Beck v. Tarrant, 61 Texas. 402,	2189
Bayly v. Merrel, Cro. Jac. 386,	1377	Beck, etc., Co. v. Colorado, etc., Co., 52 Fed. Rep. 700,	748
Baynard v. Eddings, 3 Strobb. 374,	110	Becker v. Anderson, 6 Neb. 499,	1048
Bayne v. United States, 93 U. S. 642,	472	Becker v. Boon, 61 N. Y. 317,	381, 383, 407
Baywater v. Richardson, 1 Ad. & E. 508,	891	Becker v. Holm, 87 Wis. 80,	904
Beach v. Allen, 7 Hun, 441,	643	Becker v. Keokuk Water-Works, 79 Iowa, 419,	1514
Beach v. Andress, 51 Barb. 570,	562	Becker v. Mason, 93 Mich. 336,	1302
Beach v. First, etc., Church, 96 Ill. 177,	258, 1329	Becker v. Northway, 44 Minn. 61,	2168, 2169
Beach v. Miller, 130 Ill. 162,	1298, 1334, 1354, 1365	Becker v. Riverside, etc., Turnpike Co., 65 Ind. 468,	153
Beach v. Miller, 51 Ill. 206,	424	Becker v. Ten Eyck, 6 Paige (N. Y.), 68,	2089
Beach v. Stearns, 1 Aik. 325,	156	Becker v. Torrance, 31 N. Y. 631,	603
Beach v. Vandenberg, 10 Johns. 360,	156	Beckwith v. Talbot, 2 Colo. 627,	2253
Beadle v. Seat (Ala. 523), 15 So. Rep. 243,	1157	Beckwith, Matter of, 3 Hun (N. Y.), 443,	1322

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Beckwith v. Talbot, 95 U. S. 289,	543, 568
	624, 633, 684, 686
Bedell v. Bedell, 3 Hun, 580,	554
Bedford v. Hunt, 1 Mason, 302,	233
Bee Printing Co. v. Hichborn, 4 Allen, 63,	146
Beebe v. Johnson, 19 Wend. 500,	279, 2237
Beebe v. Knapp, 28 Mich. 53,	392, 401
Beecher v. Bush, 45 Mich. 188,	2253
Beecher v. Conradt, 13 N. Y. 108,	1142
Beecher v. Wilson, 84 Va. 813, 1677, 1701, 1718	
Beeble v. State, 62 Ind. 26,	48
Beene v. Collenberger, 38 Ala. 647,	800
Beer v. Landman (Texas 1895), 31 S. W. Rep. 805,	1042
Beer Company v. Massachusetts, 97 U. S. 25,	2147
Beerle v. Edwards, 55 Iowa, 750,	535
Beers v. Haughton, 9 Pet. (U. S.) 329,	2153
Beers v. St. John, 16 Conn. 322,	502
Beeston v. Collyer, 12 Moore, 552,	653
Begbie v. Levi, 1 Cromp. & J. 180,	2112, 2114
Begg v. Forbes, 30 Eng. L. & Eq. 508,	904
Begole v. McKenzie, 26 Mich. 470,	145
Behaly v. Hatch, 1 Walker (Miss.), 369,	299
Beham v. Ghio, 75 Texas 87,	1990, 2098
Beharrell v. Quimby, 162 Mass. 571,	129
Behl v. Schuett, 88 Wis. 471,	1836
Behn v. Molly, 133 Pa. St. 614,	1775
Behn v. Burness, 3 B. & S. 751,	135, 556
Behrley v. Behrley, 93 Ind. 255,	2203
Beioley v. Carter, L. R. 4 Ch. 230,	416
Beitenman's Appeal, 55 Pa. St. 183,	2107
Beitman v. Steiner, 98 Ala. 247,	1854
Belassis v. Hester, 1 Lord Ray. 280,	704
Belau v. Bryan, 89 Iowa, 348,	1000
Belch v. Miller, 32 Mo. App. 387,	94, 95, 853, 864
Belcher v. Costello, 122 Mass. 189,	180
Belcher v. Reynolds, 2 Keny. pt. 2, p. 87,	1131
Belcher Sugar Refinery Co. v. St. Louis Grain Elevator Co., 82 Mo. 1211,	1581
Belden v. Burke, 72 Hun. 51,	872, 883, 1288
Belding v. Smythe, 138 Mass. 530,	1827
Belger v. Dinsmore, 51 N. Y. 166,	1063
Belknap v. Sealey, 14 N. Y. 143,	110
Bell's Case, 22 Beav. 35,	260
Bell v. Bean, 75 Cal. 86,	201
Bell v. Boyd, 76 Texas, 133,	443
Bell v. Bruen, 1 How. 163,	52, 869, 871
Bell v. Buckley, 11 Ex. 631,	439
Bell v. Campbell, 123 Mo. 1, 468, 970, 1038,	1039
Bell v. Chaplain, Hardres 321,	815
Bell v. Clarke, 70 Miss. 603,	1013
Bell v. Holtby, L. R. 15 Eq. 178,	416
Bell v. Hudson, 73 Cal. 287,	1162
Bell v. Indian Live Stock Co. (Texas), 11 S. W. Rep. 341,	1587
Bell v. Leggett, 7 N. Y. 176,	2032
Bell v. Locke, 8 Paige, 75,	1987
Bell v. Lycoming, etc., Ins. Co., 19 Hun, 238,	117
Bell v. Merrifield, 109 N. Y. 202,	1064
Bell v. Morrison, 1 Pet. 351,	194
Bell v. Parks, 18 Kan. 152,	201
Bell v. Pelt, 51 Ark. 434,	433
Bell v. Offutt, 10 Bush (Ky.), 632,	4
Bell v. Romaine, 30 N. J. Eq. 24,	955
Bell v. State, 7 Blackf. (Ind.) 33,	832
Bell v. Thompson, 3 Mo. 84,	1389
Bell v. Western, etc., Ins. Co., 5 Robinson (La.) 423,	895
Bell v. Woodward, 46 N. H. 315,	893, 901
Bell's, etc., R. Co. v. Christy, 79 Pa. St. 54,	1308
Bellamy v. Bellamy, 6 Fla. 62,	2285
Belleville Savings Bank v. Winslow, 30 Fed. Rep. 43,	834
Bellows v. Rosenthal, 31 Ind. 116,	1690
Bellows v. Smith, 9 N. H. 265,	394
Bellows v. Sowles, 57 Vt. 161,	593, 594
Belo v. Commissioners, 76 N. Car. 489,	1516
Belobradsky v. Kuhn, 63 Ill. 547,	1013
Belshaw v. Bush, 11 C. B. 191,	543, 568
Belt v. Robinson, 63 Fed. Rep. 90,	1645
Belton Compress Co. v. Saunders, 70 Texas, 609,	154
Beman v. Rufford, 1 Sim. (N. S.) 550,	1255
Bement v. LaDow, 66 Fed. Rep. 185,	989
Bemis v. Leonard, 118 Mass. 502,	763
Benavides v. Hunt, 79 Texas, 383,	500
Benbow v. Southsmith, 76 Iowa, 154,	595
Bend v. Hoyt, 13 Pct. 263,	807
Bender v. Been, 78 Iowa, 283,	180
Bender v. Bender, 88 Hun, 448,	21
Benedict v. Beebe, 11 John. 145,	635
Benedict v. Field, 16 N. Y. 595,	125
Benedict v. Lynch, 1 John. Ch. 370,	749
Benedict v. Ocean Ins. Co., 31 N. Y. 389,	872
Benedict v. Williams, 48 Hun (N. Y.), 123,	2280
Benford v. Gibson, 15 Ala. 521,	2127
Benford v. Scheell, 55 Pa. St. 393,	667
Benham v. Bishop, 9 Conn. 330,	1777
Benham v. State, 116 Ind. 112,	1910
Benjamin v. Covert, 47 Wis. 375,	1759
Benjamin v. Hillard, 23 How. 149,	571
Benjamin v. McConnell, 9 Ill. 539,	550, 572
Bennett v. Allen, 10 Pa. Co. Ct. 256,	20
Bennett v. Bennett, 37 W. Va. 396,	1676, 1677
Bennett v. Brooks, 9 Allen (Mass.), 118,	2096
Bennett v. Filyaw, 1 Fla. 403,	737
Bennett v. Fisher, 26 Iowa, 497,	2120
Bennett v. Hayden, 145 Pa. St. 586,	1845
Bennett v. Hull, 10 John. 364,	657
Bennett v. Judson, 21 N. Y. 238,	90
Bennett v. McIntire, 121 Ind. 231,	979, 2167
Bennett v. Montgomery, 3 Texas Civ. App. 222,	1739
Bennett v. Morse (Colo. App.), 39 Pac. Rep. 582,	278, 820
Bennett v. Scutt, 18 Barb. 347,	638
Bennett v. Shipley, 82 Mo. 448,	428
Bennett v. Stephens, 8 Ore. 444,	786
Bennett v. Stout, 93 Ill. 47,	1023
Bennett v. Virginia Ranch Co., 1 Texas Civ. App. 321,	1730
Bennett v. Wolverton, 24 Kan. 284,	1066
Benoist v. Murrin, 58 Mo. 307,	1819
Benseik v. Thomas, 66 Fed. Rep. 104,	1221, 1253, 1292
Bensel v. Gray, 38 N. Y. Super. Ct. Rep. 417,	368
Bensinger Co. v. Cain (Texas App.), 18 S. W. Rep. 130,	165
Bensinger v. Wren, 100 Pa. St. 500,	1656
Benson v. Carmel, 8 Maine, 110,	391
Benson v. Drake, 55 Maine, 555,	2112
Benson v. Howe, 45 Minn. 40,	408
Benson v. Miller, 56 Minn. 410,	142
Benson v. Monroe, 7 Cush. 125, 440, 460, 807, 1829	
Benson v. Phipps, 87 Texas, 578,	207, 539
Benson v. Shotwell, 87 Cal. 49,	418
Bent v. Alexander, 15 Mo. App. 181,	859, 864
Bent v. Wakefield Bank, L. R. 4 C. P. D. 1,	54
Bentall v. Burn, 3 B. & C. 423,	63
Bentley v. Harris, 2 Gratt. 357,	224
Bentley v. Lamb (Pa. St.) 25 Am. Law Reg. (N. S.) 632,	185
Bentley v. O'Bryan, 111 Ill. 53,	1023
Bentley v. Whittemore, 19 N. Y. Eq. 462,	724
Benton v. Mullen, 61 N. H. 125, 573, 574, 577, 819	
Berdell v. Bissell, 6 Colo. 162,	438
Berg v. Atchison, etc., R. Co., 30 Kan. 561, 738	
Bergeron v. Pamlico, etc., Banking Co., 111 N. Car. 45,	2206
Bergey's Appeal, 60 Pa. St. 408,	1671
Bergmeier v. Eisenmenger, 59 Minn. 175,	2195
Berkeley, etc., School v. Jarvis, 32 Conn. 412,	255, 257
Berlien v. Bieler, 96 Mo. 491,	1038
Berlin v. Gorham, 34 N. H. 266,	2142
Berlin, Inhabitants of, v. New Britain, 9 Conn. 1249,	—

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

- Berlin Machine Works v. Perry, 71 Wis.
495, 2026, 2030, 2047
- Berlin Bridge Co. v. San Antonio, 62 Fed.
Rep. 882, 1504, 1586
- Berly v. Taylor, 5 Hill, 577, 237, 782, 2168
- Bermondsley, Vestry of v. Ramsey, L. R.
6 C. P. 247, 833
- Bernard v. Taylor, 23 Ore. 416, 1869, 1913, 1924
- Bernards Township v. Stebbins, 109 U. S.
341, 1058, 1082
- Bernier v. Cabot Mfg. Co., 71 Maine, 506, 652
- Bernstein v. Meech, 130 N. Y. 351, 945
- Bernstein v. Nealis, 141 N. Y. 347, 28
- Berrigan v. Fleming, 2 Lea, 271, 1763
- Berrisford v. Woodroff, Cro. Jac. 404, 226
- Berry v. American Central Co., 132 N. Y.
49, 884
- Berry v. Anderson, 22 Ind. 36, 15, 90, 91
- Berry v. Broach, 65 Miss. 450, 1557
- Berry v. Brown, 1 Silvernail (N. Y. App.),
542, 243
- Berry v. Brown, 107 N. Y. 659, 238
- Berry v. City of Tacoma, 12 Wash. 3, 1545
- Berry v. Clary, 77 Maine, 482, 2106
- Berry v. Doremus, 30 N. J. Law, 399, 655
- Berry v. Gillis, 17 N. H. 1, 540, 574, 818
- Berry v. Hall, 105 N. Car. 154, 1811
- Berry v. Hartzell, 91 Mo. 132, 11, 33
- Berry v. Kansas City, etc., R. Co., 52 Kan.
774, 1458
- Berry v. Kansas City, etc., R. Co., 52 Kan.
759, 1454
- Berry v. Knights Templar, etc., Co., 46
Fed. Rep. 439, 119, 733
- Berry v. Kowalsky, 95 Cal. 134, 2202
- Berry v. Nall, 54 Ala. 446, 388
- Berry v. Roberts, 40 N. Y. 432, 243
- Berry v. Whidden, 62 N. H. 473, 32
- Berry v. Woodburn (Cal. 1895), 40 Pac.
Rep. 802, 1115
- Berry Bros. v. Davis, 77 Texas, 191, 379
- Berryhill v. Byington, 10 Iowa, 223, 378
- Berryman v. Trustees of Cincinnati
Southern Ry., 14 Bush (Ky.), 755, 1978
- Berthold v. Seevers Manufacturing Co.,
89 Iowa, 506, 339
- Bertles v. Nunan, 92 N. Y. 152, 1736, 1765, 1766, 1768
- Berwick v. Horsfall, 4 C. B. N. S. 450, 902
- Berwick, Mayor of, v. Oswald, 1 E. & B.
295, 515
- Berwick-on-Tweed, Mayor of, v. Oswald,
3 E. & B. 653, 273
- Besshears v. Rowe, 46 Mo. 501, 597
- Bosson v. Eveland, 26 N. J. Eq. 468, 1675
- Bessonies v. City of Indianapolis, 71 Ind.
189, 1557
- Best v. Crall, 23 Kan. 482, 399
- Best v. Gohison, 89 Ill. 465, 1061
- Bestor v. Wathen, 60 Ill. 138, 1977, 2083
- Beswick v. Swindells, 3 A. & E. 868, 300
- Bothelem v. Annis, 40 N. H. 34, 490
- Bethell v. Bethell, 92 Ind. 818, 1001
- Betterbee v. Davis, 3 Camp. 70, 394
- Bettini v. Gye, L. R. 1 Q. B. D. 183, 117
- Bettis v. Reynolds, 12 Iredell (N. Car.),
344, 1889
- Bett's Appeal, 10 W. N. Cas. (Pa.) 431, 2039
- Betts v. Farmers', etc., Trust Co., 21 Wis.
80, 1959
- Bevan v. Carr, 1 Cababe & Ellis, 499, 635
- Bevans v. Rees, 5 M. & W. 306, 394, 400
- Beveridge v. N. Y. R. Co., 112 N. Y. 1,
241, 1411
- Beverly v. Blackwood, 102 Cal. 83, 751
- Bevil v. Hix, 12 B. Monroe (Ky.), 140, 1889
- Bianchi v. Maggini, 17 Nev. 322, 2234
- Bibb v. Allen, 149 U. S. 481, 685, 1916, 1919
- Bibb v. Miller, 11 Bush (Ky.), 306, 2024
- Bibb v. Snodgrass, 97 Ala. 457, 452
- Bibb County Loan Assn. v. Richards, 21
Ga. 592, 1621
- Bice v. Marquette, etc., Building Co., 96
Mich. 24, 596, 599, 601
- Bick v. Seal, 45 Mo. App. 475, 1304
- Bickart v. Hoffman, 19 N. Y. Supl. 472, 8
- Bickel v. Sheets, 24 Ind. 1, 1902
- Bickford v. First National Bank, 42 Ill.
238, 451
- Bickhart v. Hoffman, 19 N. Y. Supl. 472, 187
- Bickle v. Beseko, 23 Ind. 18, 398
- Bicknell v. Waterman, 5 R. I. 43, 1878
- Biddle v. Boyard, 13 Pa. St. 150, 1346
- Biddle v. City of Terrell, 82 Texas, 335,
1522, 1533, 1586, 1587
- Biddle v. Hall, 99 Pa. St. 116, 1853
- Biddle v. Ramsey, 52 Mo. 153, 1212
- Bidleon v. Whytel, 3 Burr. 1545, 2150
- Bidwell v. Overton (Com. Pl. N. Y.), 13
N. Y. Supl. 274, 2192
- Bierbauer v. Wirth, 10 Biss. (U. S.) 60, 1853
- Bierce v. Stocking, 11 Gray, 174, 233
- Bierrer's Appeal, 92 Pa. St. 248, 1714
- Bigge v. Parkinson, 7 Hurl. & N. 955, 339
- Bigelow v. Benedict, 70 N. Y. 202,
1920, 1921, 1927, 1935
- Bigelow v. Berkshire Ins. Co., 93 U. S. 284,
118, 119
- Bigelow v. Colton, 13 Gray, 309, 40
- Bigelow v. Gregory, 73 Ill. 197, 1335
- Bigelow v. Rommelt, 24 N. J. Eq. 115, 954
- Bigelow v. Wilson, 87 Iowa, 628, 2280
- Bigelow v. Willson, 1 Pick. 465, 763
- Biggers v. Owen, 79 Ga. 653, 2176
- Bigler v. Baker, 40 Neb. 825, 845, 1110
- Bigler v. Morgan, 77 N. Y. 312, 411
- Bigony v. Tyson, 75 Pa. St. 157, 2039
- Bilbie v. Lumlie, 2 East, 463, 800
- Bilborough v. Holmes, 5 Ch. Div. 255, 962
- Bill v. Bament, 9 M. & W. 36, 663
- Billage v. Southee, 9 Hare, 534, 1024
- Billings v. Accident Ins. Co., 64 Vt. 78, 119
- Billings v. Ames, 32 Mo. 265, 2033
- Billings v. A-pen, etc., Smelting Co., 52
Fed. Rep. 250, 974
- Billings v. Hall, 7 Cal. 1, 716
- Billings v. Kankakee Coal Co., 67 Ill. 489, 1176
- Billings v. Vanderbeck, 23 Barb. 546, 531, 532
- Billingslea v. State, 85 Ala. 323, 2250
- Billingslea v. Ward, 33 Md. 46, 1146
- Billingsley v. Stratton, 11 Ind. 396, 949
- Billington v. Cahill, 51 Hun, 132, 651, 652
- Billott v. Robinson, 13 La. Ann. 529, 402
- Bingham v. Barley, 55 Texas, 281, 1773
- Bingham v. Carlisle, 78 Ala. 243, 694
- Bingham v. Mazzy, 15 Ill. 295, 360
- Bingham v. Mulholland, 25 U. C. C. P. 210, 492
- Bingham v. Weiderwax, 1 N. Y. 504, 485
- Binghamton Bridge, The, 3 Wall. 51, 853, 2134
- Bininger, *In re*, 7 Blatch. 262, 153
- Binney v. Annan, 107 Mass. 94, 1210
- Binney v. Delmar, 17 N. Y. Supl. 524, 578
- Binney v. Globe Nat. Bank, 150 Mass. 574, 1745
- Birch v. Earl of Liverpool, 9 Barn. & C.
392, 652
- Bird v. Boulter, 4 B. & Ad. 443, 674
- Bird v. Calvert, 22 S. Car. 1381, 1358
- Bird v. Daggett, 97 Mass. 494, 608, 610
- Bird v. Gamman, 3 Bing. (N. C.) 883, 2152
- Bird v. Keller, 77 Maine, 270, 644, 645
- Bird v. Morrison, 12 Wis. 138, 593, 694
- Bird v. Munroe, 66 Maine, 337, 2263
- Bird v. Railroad Co., 8 Rich. Eq. (S. Car.)
46, 538
- Birdsall v. Birdsall, 52 Wis. 208, 505
- Birdsall v. Coolidge, 93 U. S. 64,
Birge v. Bock, 44 Mo. App. 69, 419, 420, 421, 422
- Birge v. Bock, 24 Mo. App. 330, 421
- Birkbeck v. Ackroyd, 74 N. Y. 356, 1659, 1687
- Birkett v. Chatterton, 13 R. I. 299, 1912
- Birkmyr v. Darnell, 1 Salk. 27, 596, 598, 609
- Birks v. French, 21 Kan. 238, 2098

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Birmingham, etc., Mfg. Co. v. Gross, 97	949
Ala. 220,	942
Bisbee v. Ham, 47 Maine, 543,	554
Bish v. Johnson, 21 Ind. 299,	1462
Bishop v. American Preservers Co., 157	
Ill. 284,	2053, 2059, 2071
Bishop v. Bishop, 11 N. Y. 123,	639
Bishop v. Brainerd, 28 Conn. 289,	1462
Bishop v. Fletcher, 43 Mich. 555,	676
Bishop v. Honey, 34 Texas, 245,	1902, 2018
Bishop v. Moorman, 98 Ind. 1,	2256
Bishop v. Palmer, 146 Mass. 469,	
1853, 1859, 2026, 2049, 2050	
Bishop v. Small, 63 Maine, 12,	1878
Bisland v. Provosty, 14 La. Ann. 169,	1742
Bi-Spool Machine Co. v. Acme Mfg. Co.,	
153 Mass. 404,	1243
Bissell v. Balcom, 39 N. Y. 275,	296
Bissell v. Harrington, 18 Hun, 81,	644
Bissell v. Heath, 98 Mich. 472,	1319
Bissell v. City of Jeffersonville, 24 How.	
287,	1524
Bissell v. Railroad Co., 22 N. Y. 259,	1230
Bissell v. Taylor, 41 Mich. 702,	1207
Bissig v. Britton 59 Mo. 204,	614
Bixby v. Dunlap, 56 N. H. 456,	2177
Bixby v. Moor, 51 N. H. 402,	23, 774, 1900
Blachford v. Preston, 8 T. R. 89,	1883
Black v. Ashley, 80 Mich. 90,	935
Black v. Black, 62 Texas, 296,	1739
Black v. Black, 15 Ga. 445,	644
Black v. Black, 30 N. J. Eq. 215,	1017
Black v. Canal Co., 22 N. J. Eq. 415,	1255
Black v. Chicago, B. & Q. R. Co., 30 Neb.	
193,	275
Black v. City of Columbia, 19 S. Car. 412,	1514
Black v. Del. & Rar. Can Co., 24 N. J. Eq.	
455,	1415
Black v. Goodrich Transportation Co., 55	
Wis. 319,	1960
Black v. Lurk, 69 Ill. 70,	1061
Black v. Moseley, 99 Ala. 447,	1728
Black v. Ostrander, 1 Colo. App. 272,	376
Black v. Pratt, etc., Co., 85 Ala. 504,	900
Black v. Richards, 95 Ind. 184,	2245
Black v. Ridgway, 131 Mass. 546,	2288
Black v. State, 83 Ala. 81,	46
Black v. Tennessee C. I. & R. Co., 93 Ala.	
109,	1117
Black v. Woodrow, 99 Mich. 194,	280, 498
Blackburn v. Mann, 85 Ill. 222,	617, 616
Blackburn v. Randolph, 33 Ark. 119,	1076
Blackburn v. Reilly, 47 N. J. Law. 290,	
150, 152, 1049	
Blackburne, <i>Ex parte</i> , 10 Ves. 204,	456
Blackett v. Royal Exchange Co., 2 Crompt.	
& J. 214,	167, 892, 926
Blackman v. Nearing, 43 Conn. 56,	703
Blackman v. Striker, 142 N. Y. 555,	25
Blackmore v. Fairbanks, Morse & Co., 79	
Iowa, 282,	342
Black River Lumber Co. v. Warner, 93 Mo.	
374,	930, 2217
Blackshire v. Iowa Homestead Co., 39	
Iowa, 621,	1228
Blackstock v. New York R. Co., 20 N. Y.	
48,	296
Blackwell v. Bainbridge, 19 N. Y. Supl.	
681,	209
Blackwell v. Ryan, 21 S. Car. 112,	1152
Blackwood v. Borrowes, 2 Con. & L. 478,	564
Bladen v. The City of Philadelphia, 60 Pa.	
464,	1486
Blades v. Free, 9 B. & C. 167,	61
Blagborne v. Hunger, 101 Mich. 375,	952, 1035
Blagden v. Bradbear, 12 Ves. 466,	674, 677
Blake's Case, 6 Coke, 41,	515, 516
Blake v. Blake, 7 Iowa, 46,	234
Blake v. Brown, 80 Iowa, 277,	157
Blake v. Buffalo, etc., R., 56 N. Y. 485,	1307
Blake v. Exchange Mut. Ins. Co., 12 Gray,	
265,	897
Blake v. Garwood, 42 N. J. Eq. 276,	949
Blake v. Niles, 13 N. H. 450,	280
Blake v. Voight, 134 N. Y. 69,	653
Blakeley v. El Paso Building Association	
(Texas 1894), 26 S. W. Rep. 292,	1611
Blakely v. Bennecke, 59 Mo. 193,	1189, 1311
Blakemore v. Jones, 5 Texas Civ. App. 516,	568
Blakeney v. Goode, 30 Ohio St. 350,	653
Blakeslee v. Holt, 42 Conn. 226,	139
Blair v. Chicago, etc., Railroad Co., 89	
Mo. 383,	579, 581
Blair v. Chicago, etc., Railroad, 89 Mo.	
334,	588
Blair v. Corby, 37 Mo. 313,	930
Blair v. Rankin, 11 Mo. 440,	368
Blair v. Reed, 20 Tex. 310,	2240
Blain v. Wait, 69 N. Y. 113,	533, 938
Blair v. Williams, 4 Lill. (Ky.) 34,	2154
Blair v. Wilson, 28 Gratt. 163,	447
Blair, etc., Co., The, v. Walker, 39 Iowa,	
406,	647
Blaisdell v. Ahern, 144 Mass. 393,	2003
Blaisdell v. Holmes, 48 Vt. 492,	1843
Blalock v. Jackson, 94 Ga. 469,	202
Blalock v. Kernersville Manf. Co., 110	
N. Car. 103,	1383
Blanchard v. Cooke, 147 Mass. 215,	165
Blanchard v. Cooke, 144 Mass. 207,	163
Blanchard v. Detroit, etc., R. Co., 31	
Mich. 43,	2271
Blanchard v. Dyer, 21 Maine, 111,	829
Blanchard v. Inhabitants of Ayer, 148	
Mass. 174,	1492
Blanchard v. Nestle, 3 Denio (N. Y.), 37,	1518
Blanchard v. Russell, 13 Mass. 1,	708, 2125
Blanchard v. Trim, 38 N. Y. 225,	667, 2274
Blanchard v. Weeks, 34 Vt. 589,	653
Blanchor v. Cilley, 38 Maine, 553,	708
Blanchor v. Mansel, 47 Maine, 58,	708
Blanc v. Littell, 9 Daly (N. Y.), 268,	651
Bland v. Umstead, 23 Pa. St. 316,	287
Blanding v. Sargent, 33 N. H. 239,	651, 653, 655
Blaney v. Hoke, 14 Ohio St. 292,	4
Blaney v. Rice, 20 Pick. 62,	110
Blank v. Nohl, 112 Mo. 159,	2007
Blankenship v. Douglas, 26 Texas, 225,	
1680, 1682	
Blankenship v. Spencer, 31 W. Va. 510,	1179
Blanton v. Knox, 3 Mo. 342,	631
Blasdel v. Locke, 52 N. H. 238,	559
Blasdell v. Souther, 6 Gray, 149,	954
Blazo v. Gill, 69 Hun, 69,	2251
Blazo v. Gill, 23 N. Y. Supl. 373,	2243
Blazo v. Gill, 143 N. Y. 232,	141
Blaxton v. Pye, 2 Wils. 309,	1944
Blakley v. White, 4 Paige, 654,	442, 445, 543
Bledsoe v. Thompson, 6 Rich. L. (S. Car.)	
44,	1942, 1947
Blennerhassett v. Sherman, 105 U. S. 100,	1366
Blenkinsop v. Clayton, 7 Taunt. 597,	672
Bless v. Jenkins, 129 Mo. 647,	631
Bletz v. Willis, 19 D. C. 449,	122, 123
Blewett v. Gaynor, 77 Wis. 378,	543
Bliss v. Brainard, 41 N. H. 256,	708
Bliss v. Couch, 46 Kan. 400,	1859
Bliss v. Kaweah, etc., Irrigation Co., 65	
Cal. 502,	1341
Bliss v. Lawrence, 58 N. Y. 442,	
286, 1971, 2084, 2085	
Bliss v. Matteson, 45 N. Y. 22,	
1307, 1636, 1638, 1639, 1986	
Bliss v. Negus, 8 Mass. 46,	233, 1860
Bliss v. New York, etc., Railroad Co., 160	
Mass. 447,	579, 581
Bliss v. Schwartz, 65 N. Y. 444,	190, 537, 1631
Blitz v. Union Steamboat Co., 51 Mich.	
558,	859
Biven v. New England Screw Co., 23	
How. 420,	892, 912, 920
Block v. McMurry, 56 Miss. 217,	2102
Blodgett v. Morris, 14 N. Y. 482,	835
Blodgett v. Durgin, 32 Vt. 361,	731

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Blodgett v. Perry, 97 Mo. 283,	1657	Board of Metropolitan Police v. Board of	
Blood v. Goodrich, 9 Wend. 68,	689, 630	Auditors, 93 Mich. 806,	1471
Blood v. Hardy, 15 Maine, 61,	620	Board of Supervisors v. Bowen, 4 Lans. 24,	210
Blood v. La Serena Land Co. (Cal. 1895),		Boast v. Firth, L. R. 4 C. P. 1,	284
41 Pac. Rep. 1017,	1274, 1294	Bockenham v. Thacker, 2 Vent. 71,	226
Bloodgood v. Meissner, 84 Wis. 452,	1085	Bodenhamer v. Welch, 89 N. Car. 78,	1185
Bloom v. Hazzard, 104 Cal. 310,	66	Bodine v. Killeen, 53 N. Y. 93,	1748
Bloom v. Noggle, 4 Ohio St. 45,	1643	Bodine v. Morgan, 37 N. J. Eq. 426,	1828
Bloom v. Richards, 2 Ohio St. 387,		Bodwell v. Bodwell, 66 Vt. 101,	1204
	1894, 2096, 2098	Boehl v. Railway Co., 44 Minn. 191,	1958, 1962
Bloom v. Saberski, 28 N. Y. Supl. 731,	1907	Boehm v. City of Baltimore, 61 Md. 259,	1479
Bloomer v. Bernstein, L. R. 9 C. P. 588,		Boffinger v. Taves, 120 U. S. 198,	548
	150, 152	Bogan v. Daughdrill, 51 Ala. 312,	1116, 1118
Bloomer v. Nolan, 36 Neb. 51,	1784, 1798, 1803	Bogardus v. New York Life Ins. Co., 101	
Bloomer v. Waldron, 3 Hill, 361,	1369	N. Y. 328,	411
Bloss v. Adams & Bloomer, 23 Barb. 604,		Bogardus v. Young, 64 Hun, 398,	231
	1987	Bogart v. Nan Velsor, 4 Edw. Ch. 718,	465
Bloss & Plymale, 3 W. Va. 393,	542, 576	Bogness v. Bogness, 127 Mo. 305,	2278
Blossom v. Lycoming, etc., Ins. Co., 64		Boggs v. Bodkin, 32 W. Va. 566,	1179
N. Y. 162,	117	Boggs v. Lakeport, etc., Assn. (Cal. 1896),	
Blount v. Guthrie, 99 N. Car. 93,	775	43 Pac. Rep. 1106,	1339
Blow v. Maynard, 2 Leigh (Va.) 29,	620, 1718	Bogie v. Bogie, 35 Wis. 659,	92
Bloxam v. Sanders, 4 B. & C. 941,	491	Bog Lead Mining Co. v. Montague, 10 C.	
Blosome v. Williams, 3 B. & C. 232,	2095	B. (N. S.) 481,	662
Bluefields, etc., Co. v. Wolfe (Tex. App.),		Bohanan v. Bohanan, 96 Ill. 591,	1192
22 S. W. Rep. 269,	561	Bohanan v. Pope, 42 Maine, 93,	2210
Bluestone Coal Co. v. Bell (W. Va. 1893),		Bohannon v. Travis, 94 Ky. 59,	1727
18 S. E. Rep. 493,	994, 995	Bohm v. Locwer's, etc., Brewery Co. (Com.	
Blumer v. Phoenix Ins. Co., 45 Wis. 622,	896	Pl. N. Y.), 9 N. Y. Supl. 514,	1350
Blumer v. Pollak, 18 Fla. 707,	1737, 1748	Bohn, etc., Co. v. Lewis, 45 Minn. 164,	258
Blunt v. Boyd, 3 Barb. 209,	607	Bohrer v. Stumpff, 31 Ill. App. 139,	373
Bluntzer v. Dewees, 79 Texas, 272,	415	Boice v. Boice, 27 Minn. 371,	2155
Bly v. Second Nat. Bank, 79 Pa. St. 453,		Boice v. Hodge, 51 Ohio St. 236,	1873
	1854, 1863, 2024	Boies v. Vincent, 24 Iowa, 387,	214
Blydenburgh v. Cotheal, 4 N. Y. 418,	762	Boiler Co. v. Duncan, 87 Wis. 120,	339, 351
Blymire v. Boistle, 6 Watts, 182,	239	Boland v. Industrial, etc., Association, 74	
Blythe v. Denver & R. G. R. Co., 15 Colo.		Hun, 385,	313
333,	275	Bold v. Hutchinson, 5 De G. M. & G. 558,	223
Blythe v. Richards, 10 Serg. & R. (Pa.)		Bolen v. Crosby, 49 N. Y. 183,	576
211,	1779	Bolles v. Lachs, 37 Minn. 315,	92
Boals v. Nixon, 26 Ill. App. 128,	238, 517	Bolling v. Kirby, 90 Ala. 215,	123
Board v. Gillies, 138 Ind. 667,	13	Bollinger v. Gallagher, 163 Pa. 245,	1706
Board v. Miller, 87 Ind. 257,	1483	Bollman v. Burt, 61 Md. 415,	150
Board v. Ristine, 124 Ind. 242,	1848	Bolman v. Lohman, 79 Ala. 63,	885
Board v. Schmoke, 51 Ind. 416,	1848	Bolton v. Madden, L. R. 9 Q. B. 55,	231
Board v. Shipley, 77 Ind. 553,	1483	Bommer v. American, etc., Manufactur-	
Boardman v. Cutter, 128 Mass. 388,	661	ing Co., 81 N. J. 468,	1308, 1316
Boardman v. Davidson, 7 Abb. Fr. N. S.		Bonce v. Dubuque, etc., R. Co., 53 Iowa,	
(N. Y.) 439,	2176	278,	274
Boardman v. Gaillard, 1 Hun, 217,	465	Bond v. Clark, 35 Vt. 577,	327
Boardman v. Gaillard, 60 N. Y. 614,	2247	Bond v. Manufacturing Co., 82 Texas, 309,	1511
Boardman v. Lessees of Reed, 6 Peters,		Bond v. Mayor, etc., of Newark, 19 N. J.	
328,	101, 864	Eq. 376,	128
Boardman v. Reed, 6 Pet. 328,	864	Bond v. McMahon, 94 Mich. 557,	446
Boardman v. Spooner, 95 Mass. 353,	667, 687	Bond v. Quattlebaum, 1 McCord, 584,	366
Boardman v. Thompson, 25 Iowa, 487,	1954	Boner v. Mahle, 3 La. Ann. 600,	813
Boardman v. Ward, 40 Minn. 399,	785	Bonesteel v. Mayor of New York, 22 N. Y.	
Board, etc., v. Hildebrand, 1 Ind. 555,	1848	162,	2242
Board, etc., v. Lomax, 5 Ind. App. 567,	1485	Bonesteel v. Todd, 9 Mich. 371,	835
Board, etc., Kingman County v. Cornell		Boney v. Hollingsworth, 23 Ala. 690,	1014
University, 57 Fed. Rep. 149,	1535	Bonner v. Bynum, 72 Miss. 442,	1011
Board, etc., Lawrence Co. v. McLahlon,		Bonner v. Illinois Land Co., 75 Ill. 315,	1789
10 Ind. App. 95,	1485	Bonner v. Bonney, 29 Iowa, 448,	543, 574
Board, etc., of Hamilton County v. New-		Bonney v. Haydock, 40 N. J. Eq. 513,	793
lin, 132 Ind. 27,	2248	Bonnell v. Jenkins, L. R. 8 Ch. Div. 70,	
Board, etc., Warren Co. v. Osburn, 4 Ind.			4, 5, 87
App. 590,	1485	Boody v. McKenney, 23 Maine, 517,	1780
Board of Commissioners v. Cin. Steam		Boody v. Rutland, etc., Railroad, 24 Vt.	
Heating Co., 128 Ind. 240,	1483	660,	808
Board of Comrs. of Adams Co. v. Cole, 9		Booker v. Wingo, 29 S. Car. 116,	180
Ind. App. 474,	1910	Bool v. Mix, 17 Wend. (N. Y.) 119,	1771, 1795
Board of Commissioners of Tippecanoe		Boom Company v. Patterson, 98 U. S. 403,	
Co. v. LaFayette M. & B. R. Co., 50 Ind.			2145
85,	1281	Boone v. Eyre, 1 H. Bl. 273,	116
Board of Comrs. v. Lomax, 5 Ind. App.		Boone v. Stover, 66 Mo. 430,	635
567,	1910	Boor v. Lowrey, 103 Ind. 463,	2169, 2170
Board of Commissioners v. National Land		Boorman v. Nash, 9 B. & C. 145,	491, 498
Co., 23 Kan. 196,	460	Booske v. Gulf Ice Co., 24 Fla. 550,	104, 1408
Board of Comrs. v. State, 109 Ind. 596,	468	Booth v. Campbell, 15 Md. 569,	540, 572
Board of Finance v. Jersey City, 31 Atl.		Booth v. City of Pittsburgh, 154 Pa. St.	
Rep. 625,	1571	482,	1495

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Booth v. Clark, 17 How. U. S. 322,	725	Bostwick v. Leach, 3 Day (Conn.), 476,	635, 640
Booth v. Cleveland, etc., Mill Co., 74 N. Y. 15,	1271	Boteler v. Roy, 40 Mo. App. 234,	149, 370
Booth v. Cottingham, 126 Ind. 431,	1843	Botkin v. McIntyre, 81 Mo. 557,	779
Booth v. Eighmie, 60 N. Y. 238,	598, 609	Botsford v. McLean, 45 Barb. 478,	1060
Booth v. Farmers', etc., Bank, 74 N. Y. 223,	826	Bottomley's Case, L. R. 16 Ch. Div. 681,	1339
Booth v. Farmers' & M. N. Bank, 50 N. Y. 396,	1237	Bottoms v. Dyke, 102 Ala. 582,	1117
Booth v. Hoskins, 75 Cal. 271,	422	Botts, etc., v. Simpsonville Road Co., 88 Ky. 54,	1450
Booth v. Hynes, 54 Ill. 363,	466	Boughner v. Meyer, 5 Colo. 71,	1948
Booth v. Robinson, 55 Md. 419,	1307	Boughton v. Knight, L. R. 3 P. & D. 64,	1812, 1820
Booth v. Smith, 3 Wend. 66,	536	Boughton v. Smith, 142 N. Y. 674,	501
Booth v. Spuyten Duyvil Mill Co., 60 N. Y. 487,	296	Bouc v. Maught, 76 Md. 440,	790
Booth v. Succession of Smith, 3 Wood's C. C. 19,	562	Bourland v. Gibson, 7 Ill. App. 227,	878
Booth, etc., Granite Co. v. Baird, 87 Hun. 452,	915, 935	Bourne v. Gatcliffe, 3 M. & G. 643,	124
Boothby v. Scales, 27 Wis. 626,	339	Bourne v. Seymour, 16 C. B. 337,	109, 306
Boothe v. Fitzpatrick, 36 Vt. 681,	194	Bournique v. Arnold, 33 Ill. App. 303,	128
Boozer v. Teague, 27 S. Car. 348,	842	Boutell v. Cowdin, 9 Mass. 254,	254
Borcherling v. Katz, 37 N. J. Eq. (10 Stew.) 150,	2185	Boutelle v. Melendy, 19 N. H. 196,	2111
Borchsenius v. Canutson, 100 Ill. 82,	610	Boutelle v. Smith, 116 Mass. 111,	2049
Bordelon v. CoCo, 21 La. Ann. 671,	2022	Bouvey v. McNeal, 126 Ind. 541,	1720
Borders v. Murphy, 125 Ill. 577,	1032	Bowdell v. Parsons, 10 East, 359,	488
Borel v. Rollins, 30 Cal. 408,	1275	Bowden v. Achor, 95 Ga. 243,	970
Borell v. Dann, 2 Hare, 440,	234, 235	Bowdre v. Carter, 64 Miss. 221,	1885
Born v. First Nat. Bank, 123 Ind. 78,	446, 450, 721	Bowen v. Bell, 20 Johnson, 338,	465
Borough of Allentown v. Saeger, 20 Pa. St. 421,	804	Bowen v. Conner, 6 Cush. 132,	26
Borough of Milford v. Milford Water Co., 124 Pa. St. 610,	1578	Bowen v. Hastings, 47 Wis. 232,	832
Borrekins v. Bevan, 3 Rawle, 23,	324	Bowen v. Holly, 38 Vt. 574,	551
Borrowscale v. Bosworth, 99 Mass. 378,	671	Bowen v. Lincoln Bldg and Loan Assn. 51 N. J. Eq. 272,	1629
Borst v. Corey, 16 Barb. 136,	620	Bowen v. McCarthy, 85 Mich. 26,	61
Borst v. Empie, 6 N. Y. 33,	95	Bowen v. Newell, 13 N. Y. 290,	731
Boruff v. Hudson, 138 Ind. 280,	1183, 1215	Bowen v. Owen, 11 Q. B. 130,	399
Bosanquet v. Dashwood, 2 Doug. 698,	1870	Bower v. Jones, 8 Bing. 65,	919
Bosanquet v. Wray, 6 Taunt. 597,	471	Bowers v. Bowers, 95 Pa. St. 477,	639
Bosher v. Richmond Land Co., 89 Va. 455,	1331	Bowers v. Bowers, 29 Gratt. (Va.) 697,	1712
Bosley v. National, etc., Co., 123 N. Y. 550,	1002	Bowers v. Bowers, 26 Pa. St. 74,	1988
Boster v. Chesapeake and Ohio Ry. Co., 36 W. Va. 318,	776, 781	Bowers v. Smith, 28 N. Y. St. Rep. 346,	1659
Bostick v. Winton, 1 Sneed, 525,	366	Bowery, etc., Bank v. Mayor, 63 N. Y. 339,	127, 131, 2225
Boston v. District of Columbia, 19 Ct. of Cl. 31,	784	Bowes v. Pontifex, 3 F. & F. 739,	473, 1971, 2085
Boston v. Henderson, 92 Mich. 606,	2214	Bowes v. Shand, 2 L. R. App. Cas. 455, 902, 956	666
Boston v. Nichols, 47 Ill. 353,	120, 694	Bowker v. Bradford, 140 Mass. 521,	1754
Boston. City of, v. Simmons, 9 Cush. 373,	375	Bowly v. Bell, 3 C. B. 284,	660
Boston Bank v. Chamberlin, 15 Mass. 220,	1779	Bowling v. Harrison, 6 How. 248,	935
Boston Duck Co. v. Dewey, 6 Gray, 446,	694	Bowman v. Boyd, 21 Nev. 281,	462, 806
Boston Electric Co. v. City of Cambridge, 163 Mass. 64,	1492	Bowman v. Branson, 111 Mo. 343,	2209
Boston Glass Co. v. Boston, 4 Metc. 181,	805	Bowman v. Cunningham, 78 Ill. 48,	951, 1107, 1197, 2272
Boston, etc., Iron Works v. Montague, 108 Mass. 243,	383	Bowman v. First Nat. Bank, 9 Wash. 614,	941
Boston, etc., Light Co. v. Cambridge, 163 Mass. 64,	1491	Bowman v. Gonegal, 9 La. Ann. 328,	1128
Boston, Barre & Gardner R. Co. v. Wellington, 113 Mass. 79,	155	Bowman v. Gork (Mich.), 63 N. W. Rep. 998,	17
Boston, etc., R. Co. v. Bartlett, 3 Cush. 224,	57	Bowman v. Long, 89 Ill. 19,	864
Boston and Montreal R. Co. v. Boston and Lowell R. Co., 65 N. H. 393,	1411	Bowman v. Neely, 137 Ill. 443,	1047
Boston and Providence Railroad v. Midland Railroad, 1 Gray, 340,	1455	Bowmar v. Peine, 64 Miss. 99,	195
Boston & P. R. Corp. v. New York & N. E. R. Co., 13 R. I. 260,	1255, 1264	Bowman v. Phillips, 41 Kan. 364,	1899
Boston, etc., R. Co. v. Portland, etc., R. Co., 119 Mass. 498,	573	Bowman v. Stewart, 165 Pa. St. 394,	831
Boston Rubber Co. v. Peerless Wringer Co., 58 Vt. 551,	510, 512, 522	Bowman v. Teall, 23 Wend. 306,	274
Boston Water Power Co. v. Boston and Worcester Railroad Corporation, 23 Pick. (Mass.) 360,	2115, 2146	Bowmar v. Peine, 64 Miss. 99,	194
Bostwick v. Chapman, 60 Conn. 553,	1237	Bowser v. Bliss, 7 Blackf. 344,	106, 2039, 2043, 2045

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Boyd v. Jones, 96 Ala. 305,	468	Bradlee v. Warren Five Cents Savings	
Boyd v. Lett, 1 C. B. 222,	123	Bank, 127 Mass. 107,	1358
Boyd v. Moyle, 2 C. B. 644,	220	Bradley v. Wheeler, 44 N. Y. 495,	2247
Boyd v. Peachbottom R. Co., 90 Pa. St.		Bradshaw v. Atkins, 110 Ill. 323,	1052
169,	155	Bradshaw v. Davis, 12 Texas, 336,	387
Boyd v. Sappington, 4 Watts, 247,	788	Bradshaw v. McLoughlin, 39 Mich. 430,	299
Boyd v. Siffkin, 2 Camp. 326,		Bradshaw v. Thomas, 7 Yerg. 497,	162
Boyd v. Slayback, 63 Cal. 493,	17	Bradstreet v. Baer, 41 Md. 19,	1755
Boyd v. Stone, 11 Mass. 342,	591, 837, 1111	Bradstreet v. Heron, Abb. Adm. 209,	124
Boyd v. Turpin, 94 N. Car. 137,	1741	Bradt v. Scott, 63 Hun, 632,	518
Boyd v. Vanderbilt Insurance Co., 90		Brady v. Bayonne (N. J. Eq. 1895), 30 Atl.	
Tenn. 212,	308	Rep. 968,	1484
Boydell v. Drummond, 11 East, 142,	646	Brady v. Brennan, 25 Minn. 210,	2168
Boyd v. Moore, 5 Mass. 365,	395	Brady v. Cassidy, 145 N. Y. 171,	
Boyer v. Berryman, 123 Ind. 451, 1817, 1820, 1850		40, 41, 159, 902, 2283	
Boyer v. Soules (Mich. 1895), 62 N. W. Rep.		Brady v. City of New York, 132 N. Y. 415, 1559	
1000,	599	Brady v. Harper (Ky. 1895), 90 S. W. Rep.	
Boykin v. Buie, 109 N. Car. 501,	513	664,	990
Boykin v. Dohlonde, 37 Ala. 497,	606	Brady v. Hennion, 8 Bosw. 528,	110
Boykin v. Watson's Admrs., 1 Const. Tr.		Brady v. Mayor, etc., 20 N. Y. 312, 1552, 2242	
(S. Car.) 157,	821	Brady v. Northwestern Insurance Co., 11	
Boyle v. Agawam Canal Co., 22 Pick.		Mich. 425,	702
(Mass.) 381,	2237	Brady v. Smith, 8 Misc. R. 465,	107
Boyle v. Guysinger, 12 Ind. 273,	2229	Brady v. United Life Ins. Assn., 60 Fed.	
Boylston Nat. Bank v. Richardson, 101		Rep. 727,	310
Mass. 287,	800	Bragg v. Pierce, 53 Maine, 65,	525, 526
Boynton v. Andrews, 63 N. Y. 93,	1372	Brainard v. Colchester, 31 Conn. 407,	2138
Boynton v. Champlin, 42 Ill. 57,	430	Brainard v. Holsapple, 4 G. Greene, 485,	969
Boynton v. Curle, 4 Mo. 599,	1948	Braithwaite v. Alkin, 3 N. D. 305,	2168
Boynton v. Hatch, 47 N. Y. 225,	1372	Bramberry's Estate, <i>In re</i> , 156 Pa. St. 628,	
Boynton v. Hubbard, 7 Mass. 112,	1853		1763, 1764
Boynton v. Page, 13 Wend. (N. Y.) 425,	2098	Bramhall v. Van Campen, 8 Minn. 13,	2112
Boynton v. Veazie, 24 Maine, 286,	667	Branch v. Canandaigua R. Co., 3 Woods,	
Brabin v. Hyde, 32 N. Y. 519,	673	481,	1435
Brabook v. Boston, etc., Bank, 104 Mass.		Branch v. Jesup, 106 U. S. 468,	1226
228,	251	Branch v. Palmer, 65 Ga. 210,	489
Bracegirdle v. Heald, 1 B. & Ald. 722,	652	Branch of Bank v. Collins, 7 Ala. 95,	1300
Braceville Coal Co. v. People, 147 Ill. 66,	2161	Brand v. Lawrenceville Ry. Co., 77 Ga. 506, 157	
Bracewell v. Williams, L. R. 2 C. P. 196,	212	Brand v. Whelan, 18 Ill. App. 189,	614
Brackett v. Blake, 7 Met. (Mass.) 335,	2085	Brande v. Grace, 154 Mass. 210,	1102
Brackett v. Evans, 1 Cush. (Mass.) 79,	635	Brandeis v. Neustadt, 13 Wis. 158,	645
Brackett v. Harvey, 91 N. Y. 214,	1646	Branding v. Sargent, 33 N. H. 239,	647
Brackett v. Norton, 4 Conn. 517,	716, 772	Brandon v. Brown, 106 Ill. 513,	1781
Bradburne v. Botfield, 14 M. & W. 559,	814	Brandon v. Newington, 3 Q. B. 915,	397
Bradbury v. Butler, 1 Colo. App. 430,	927	Brandon Mfg. Co. v. Morse, 48 Vt. 322,	688
Bradbury v. Marbury, 12 Ala. 520,	904	Branham v. Johnson, 62 Ind. 259,	2229
Bradbury v. Wild (1893), L. R. 1 Ch. 377,	174	Brannon v. County Court, 33 W. Va. 789,	1521
Bradford v. Chicago, 25 Ill. 411,	459	Brantley v. Mayo, 85 Ga. 606,	2257
Bradford v. Frankfort, etc., R. Co., 142		Brantley v. Wolf, 60 Miss. 420,	1793
Ind. 383,	1451, 1452	Brashear v. City of Madison, 142 Ind. 685, 1520	
Bradford v. French, 110 Mass. 365,	1797	Brashear v. Moran, 1 Ky. Law Rep. 417,	615
Bradford v. Manly, 13 Mass. 139,	324	Brassell v. Williams, 51 Ala. 349,	536
Bradford v. Neill, 46 Minn. 347,	334, 335	Bratton v. Lowry, 39 S. Car. 383,	1684
Bradford v. Prescott, 85 Maine, 482,	40, 573	Braun v. Weller, L. R. 2 Ex. 183,	30
Bradford v. Roulston, 8 Irish Com. L.		Braun v. Winans, 37 Ill. App. 248,	127, 128
Rep. 468,	193	Brawley v. Catron, 8 Leigh, 522,	430
Bradford v. South Carolina Railroad, 7		Brawley v. United States, 96 U. S. 168,	
Rich. L. 201,	737	110, 305, 306, 873, 874	
Bradish v. Gibbs, 3 Johns. Ch. (N. Y.) 523,		Braxton v. State, 25 Ind. 82,	823
	1702	Bray v. Comer, 82 Ala. 183,	969
Bradley v. Anglo-Amer. Gas Co., 102 Cal.		Bray v. Farwell, 81 N. Y. 600,	154, 1321
627,	984	Bray v. Loomer, 61 Conn. 456,	951
Bradley v. Ballard, 55 Ill. 413,		Brazee v. Bryant, 50 Mich. 136,	2103
1249, 1268, 1275, 1348, 1536		Bream v. Marsh, 4 Leigh, 21,	285
Bradley v. Bosley, 1 Barb. Ch. (N. Y.) 279,	2073	Breastwit v. Bank of Fordyce, 60 Ark. 26,	17
		Breasted v. Farmers', etc., Co., 4 Hill, 73,	118
Bradley v. Burwell, 3 Den. 61,	777, 821, 823, 827	Breasted v. Farmers', etc., Co., 8 N. Y. 229, 119	
		Breaux v. Negroitto, 43 La. Ann. 426,	414
Bradley v. King, 44 Ill. 339,	152	Breck v. Cole, 4 Sandf. (N. Y.) 79,	1630, 1638
Bradley v. Long, 2 Strobb. 160,	560	Breckenridge v. Brooks, 2 A. K. Marsh.	
Bradley v. Marshall, 54 Ill. 173,	868	(Ky.) 335,	2259
Bradley v. Pratt, 23 Vt. 378,	1772	Breckenridge v. Ormsby, 1 J. J. Marsh.	
Bradley v. Rea, 103 Mass. 188,	2108	(Ky.) 236,	1772, 1773, 1795, 2276
Bradley v. Rhea, 14 Allen, 20,	333	Breckinridge v. Crocker, 78 Cal. 529,	2216
Bradley v. Richardson, 23 Vt. 720,	613	Breckinridge County v. McCracken, 61	
Bradley v. Saddler, 54 Ga. 681,	618	Fed. Rep. 191,	1542
Bradley v. Town of Hammononton, 38 N. J.		Brecknock Co. v. Pritchard, 6 T. R. 750, 2237	
Law, 430,	1570	Bredin v. Dwen, 2 Watts (Pa.), 95,	1841
Bradley v. Walker, 138 N. Y. 291,	1730, 1731	Breed v. Cook, 15 Johns. 241,	455
Bradley v. Washington, etc., Co., 13 Pet.		Breed v. Hillhouse, 7 Conn. 523,	206, 594
89,	853, 893	Breed v. Hurd, 6 Pick. 356,	890

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Breed v. Judd, 1 Gray (Mass.), 455,	1783	Brine v. Insurance Co., 96 U. S. 627,	2154
Breen v. Moran, 51 Minn., 350, 351,	928	Bringham v. Dana, 29 Vt. 1,	510
Breitenbach v. Bush, 44 Pa. St. 313,	2154	Brink v. Merchants' Ins. Co., 49 Vt. 442,	896
Breitenbach v. Turner, 18 Wis. 140,	384	Brinkley v. Bethel, 9 Heisk. (Tenn.) 786,	
Bremond v. McLean, 45 Texas, 10,	965		1082, 1232
Breneman's Appeal, 121 Pa. St. 641,	785	Brinley v. Mann, 2 Cush. 337	1231, 1233
Brenham v. German, etc., Bank, 144 U. S. 173,	1528, 1532	Brinkman v. Eisler, 7 N. Y. Supl. 193,	1886
Brenham, City of, v. Brenham Water Co., 67 Texas, 542,	1566	Brinkman v. Jones, 44 Wis. 498,	422, 1856
Brennan v. Balton, 2 Dru. & War. 349,	846	Brintnall v. Briggs, 87 Iowa, 538,	957, 1085
Brennan v. Clark, 29 Neb. 385,	758, 759	Brinton v. Van Cott, 8 Utah, 480,	1210
Brennan v. Ostrander, 50 N. Y. Super. Ct. 426,	526	Brisbane v. Dacres, 5 Taunt. 143,	800, 802, 988
Brenner v. Brenner, 48 Ind. 262,	618	Brisban v. Boyd, 4 Paige, 17,	73, 76
Brenner v. Luth, 28 Kan. 581,	40	Briscoe v. Allison, 43 Ill. 291,	1539
Brenton v. Davis, 8 Blackf. 317,	331	Briscoe v. Anketell, 23 Miss. 361,	716
Breslin v. Brown, 24 Ohio St. 555,	2002	Brisendine v. Martin, 1 Ired. 286,	443
Brett v. Monarch Society, L. R. 1 Q. B. 367,	174, 175	Brison v. Brison, 75 Cal. 525,	1747, 1792
Breunich v. Weselman, 100 N. Y. 609,	373	Brison v. Brison, 90 Cal. 323,	1747
Brewer v. Cropp, 10 Wash. 136,	615	Bristol v. Scranton, 57 Fed. Rep. 70,	1446
Brewer v. Dyer, 7 Cush. 337,	237, 240	Bristol, etc., R. Co. v. Collins, 7 H. L. Cas. 194,	736
Brewer v. Marshall, 19 N. J. Eq. 537,	2032	Bristow v. Lane, 21 Ill. 194,	2210
Brewer v. Maurer, 38 Ohio St. 543,	246, 247	Britain v. Rossiter, L. R. 11 Q. D. Div. 123,	656
Brewer v. Stone, 11 Gray (Mass.), 228,	2189	Britain v. Rossiter, 48 L. J. Q. B. 362,	837
Brewer v. Union Pac. R. Co., 31 Hun, 545,	465	British, etc., Mortgage Co. v. Tibbals, 63 Iowa, 468,	450
Brewster v. Bowers, 8 Cal. 501,	447	British, etc., Mortgage Co. v. Long, 116 N. Car. 77,	1083
Brewster v. Brewster, 33 N. J. Law, 119,	3	British Seamless Paper Box Co., <i>In re</i> , L. R. 17 Ch. Div. 467,	1980
Brewster v. Burnett, 125 Mass. 68,	1834	Brittain v. Crowther, 54 Fed. Rep. 295,	1685, 1689
Brian v. Melton, 125 Ill. 647,	1033	Britton v. Angier, 48 N. H. 420,	683
Brice's Appeal, 95 Pa. St. 145,	197	Britton v. Lewis, 8 Rich. Eq. 271,	543
Brice v. Brice, 5 Barb. 533,	1022, 1824	Britton v. McDonald, 43 N. J. Law, 591,	1549
Brice v. Hamilton, 12 S. Car. 32,	478	Britton v. Turner, 6 N. H. 451,	138, 147, 148, 779
Brick v. Gannar, 36 Hun, 52,	654	Broadwell v. Getman, 2 Denio, 87,	648, 649, 656
Brick v. Plymouth Co., 63 Iowa, 462,	523	Brock v. Cox, 38 Mo. App. 40,	792
Brickley v. Walker, 68 Wis. 563,	1755	Brock v. O'Dell (S. Car. 1895), 21 S. E. Rep. 976,	1071
Briddon v. Great Northern R. Co., 28 L. J. Ex. 51,	275	Brockway v. Thomas, 36 Ark. 518,	836
Bride v. Clark, 161 Mass. 130,	1939	Brockwell v. Bullock, L. R. 22 Q. B. D. 567,	1843
Bridge v. Wain, 1 Starkie, 419,	324, 325, 328		264, 961
Bridge Co. v. Hamilton, 110 U. S. 108,	342	Broden v. Conklin, 77 Cal. 330,	2177
Bridge Proprietors v. Hoboken Co., 1 Wall. (U. S.) 116,	2134	Brodie v. St. Paul, 1 Ves. Jr. 326,	836
Bridgefield R. Co. v. Reynolds, 46 Conn. 375,	1322	Broden v. Metropolitan Ry. Co., L. R. 2 App. Ca. 666,	74, 76, 87
Bridenbecker v. Lowell, 32 Barb. 9,	1277	Bromley v. Goff, 75 Mich. 213,	2211
Bridgeport Land and Improvement Co. v. American Fire-Proof Steel Car Co., 94 Ala. 592,	1051	Bromley v. Jefferies, 2 Vern. 215,	101
Bridget v. Cornish, 1 Mackey, 29,	163	Bronson v. Fitzhugh, 1 Hill, 185,	543, 574
Bridger v. Goldsmith, 143 N. Y. 424,	21	Bronson v. Kuzkie, 1 How. (U. S.) 311,	2151, 2154
Bridger v. Pierson, 45 N. Y. 601,	26, 52		324
Bridgers v. Hutchins, 11 Ired. 68,	559	Bronson v. Leach, 74 Mich. 713,	394
Bridges v. Phillips, 17 Texas, 128,	573	Bronson v. Rhodes, 7 Wall. 229,	553
Bridges v. Russell, 30 Mo. App. 258,	465	Brooke v. Haymes, L. R. 6 Eq. Cas. 25,	1660
Bridgewater Academy v. Gilbert, 2 Pick. 579,	254	Brookfield, Inhabitants of, v. Allen, 6 Allen (Mass.), 585,	1239
Bridgford v. Riddell, 55 Ill. 261,	1664	Brooklyn, City of, <i>In re</i> , 143 N. Y. 596,	342
Brien v. Williamson, 8 Miss. (7 How.) 14,	2022	Brooklyn Bank v. DeGrauw, 23 Wend. 342,	381, 398, 525, 526
Brigg v. Hilton, 99 N. Y. 517,	46, 47, 504	Brooklyn, etc., Road Co. v. Slaughter, 33 Ind. 155,	1281
Briggs v. Beach, 13 Vt. 115,	490	Brooklyn Life Ins. Co. v. Bledsoe, 52 Ala. 538,	499
Briggs v. First Nat. Bank, 41 Neb. 17,	1723	Brooks v. Cooper, 50 N. J. Eq. 761,	1883
Briggs v. Hubbard, 19 Vt. 86,	2129	Brooks v. Eskins, 24 Mo. App. 296,	1524
Briggs v. Munchon, 56 Mo. 467,	1176, 1177	Brooks v. Martin, 2 Wall. 70,	1306, 1854, 1895, 1904, 1983, 2066
Briggs v. Partridge, 64 N. Y. 357,	2184	Brooks v. McMeekin, 37 S. Car. 285,	227
Briggs v. Sutton, Spencer (N. J. Law), 681,	183	Brooks v. Moore, 67 Barb. 393,	518
Briggs v. Tillotson, 8 Johns. 304,	214	Brooks v. Morgan, 1 Har. (Del.) 123,	684, 1132
Brigham v. Bigelow, 12 Metc. 268,	717	Brooks v. Rogers, 101 Ala. 111,	561, 578
Brigham v. Home Ins. Co., 131 Mass. 319,	895	Brooks v. White, 2 Metc. 233,	525, 534, 536
Brigham v. Martin (Mich.), 61 N. W. Rep. 276,	102	Brookville, etc., Bank v. Kimble, 76 Ind. 195,	1733
Bright v. Bright, 41 Ill. 97,	1194	Brookville, etc., Turnpike Co. v. McCarty, 8 Ind. 392,	1434
Bright v. Coffman, 15 Ind. 371,	189, 520	Brosnan v. McKee, 63 Mich. 454,	615
Brill v. Rack (Ky. 1893), 23 S. W. Rep. 511,	999	Brouncker v. Scott, 4 Taunt. 1,	2172
Brinckerhoff v. Bostwick, 88 N. Y. 52, 1394,	2284	Broussard v. Broussard, 45 La. Ann. 1085,	699, 1743
Brinckerhoff v. Bostwick, 99 N. Y. 185,	2284		
Brinckerhoff v. Lawrence, 2 Sandf. Ch. 400,	556		
Brindley v. Lawton (N. J. Eq. 1895), 31 Atl. Rep. 394,	1040		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Brower v. Fisher, 4 Johns. Ch. (N. Y.) 441,	1815	Brown v. Mayor, 9 C. B. (N. S.) 726,	281
Brown's Appeal, 94 Pa. St. 362,	1735	Brown v. McCune, 5 Sandf. (N. H.) 224,	1785, 1793
Brown v. Allen, 35 Iowa, 306,	658	Brown v. McGran, 14 Pet. 479,	904
Brown v. Anderson, 19 Pac. Rep. 487,	104	Brown v. McIntosh, 39 N. J. Law, 22,	1870
Brown v. Bailey, 159 Pa. St. 151,	632	Brown v. Miles, 16 N. Y. Supl. 251,	1823
Brown v. Baldwin & Gleason Co., 13 N. Y. Supl. 893,	922	Brown v. Muller, L. R. 7 Ex. 319,	494
Brown v. Barngrover, 82 Iowa, 204,	28	Brown v. Neunger, 42 Minn. 482,	1120
Brown v. Beatty, 34 Miss. 227,	2145	Brown v. Nealley, 161 Mass. 1,	1640
Brown v. Bellows, 4 Pick. 179,	108, 1142	Brown v. Norton, 50 Hun. 248,	3, 84, 146
Brown v. Bennett, 75 Pa. St. 420,	1656	Brown v. Olmstead, 50 Cal. 162,	447, 455
Brown v. Bigelow, 10 Allen, 242,	325, 328, 332, 365	Brown v. Orland, 36 Maine, 376,	904
Brown v. Brine, 1 L. R. Exch. D. 5,	2008	Brown v. Parish, 2 Dana, 6,	421
Brown v. Brown, 33 N. J. Eq. 650,	843	Brown v. Peck, 2 Wis. 261,	1834
Brown v. Brown, 8 Metc. (Mass.) 573,	869	Brown v. Pollard, 89 Va. 696,	836
Brown v. Brown (S. Car. 1895), 22 S. E. Rep. 412,	1020	Brown v. Proffit, 53 Miss. 649,	205
Brown v. Brown, 154 Ill. 85,	2286, 2289	Brown v. Ransey, 74 Ga. 210,	1713
Brown v. Brown, 61 Texas, 56,	1667	Brown v. Rogers, etc., Ins. Co., 5 R. I. 394, 117	2063
Brown v. Brown, 124 Mo. 79,	1690	Brown v. Rounsavell, 78 Ill. 589,	658, 689
Brown v. Brown, 34 Barb. (N. Y.) 533,	1993, 1994	Brown v. School District, 55 Vt. 43,	1533
Brown v. Butchers' Bank, 6 Hill, 443,	687	Brown v. Shelby, 4 Ind. App. 477,	2240
Brown v. Cambridge, 3 Allen, 474,	542	Brown v. Slater, 16 Conn. 162,	863, 872
Brown v. Campbell, 1 Serg. & Rawle, 176,	194	Brown v. Smart, 145 U. S. 454,	2125, 2149
Brown v. Carter, 5 Ves. 862,	224	Brown v. Speyers, 20 Gratt. (Va.) 296,	1921
Brown v. City of Pomona, 103 Cal. 533,	1514	Brown v. State, 82 Ga. 224,	2128
Brown v. College Corner, etc., Co., 56 Ind. 110,	799	Brown v. State, 12 Wheat. (U. S.) 419,	2160
Brown v. Combs, 29 N. J. Law, 36,	1668	Brown v. Strait, 19 Ill. 88,	597
Brown v. Conger, 8 Hun, 625,	618	Brown v. Sutton, 129 U. S. 238,	848, 1183
Brown v. Covillaud, 6 Cal. 566,	751	Brown v. Symmes, 31 N. Y. Supl. 629,	510
Brown v. Cronise, 21 Cal. 386,	447	Brown v. Thompson, 31 S. Car. 436,	1683
Brown v. Crump, 1 Marsh. C. P. 567,	193, 194	Brown v. Tinsley (Ky. 1892), 21 S. W. Rep. 535,	1537
Brown v. Delano, 12 Mass. 370,	281	Brown v. Todd (Ky. 1895), 29 S. W. Rep. 621,	707
Brown v. Desmond, 100 Mass. 267,	1173	Brown v. Toledo, etc., R. Co., 35 Fed. Rep. 21,	1436
Brown v. Duncan, 10 B. & C. 93,	1891	Brown v. Tuttle, 80 Maine, 162,	791
Brown v. Dysinger, 1 Rawle, 408,	393, 404	Brown v. Tuttle, 27 Ill. App. 389,	831
Brown v. Eastern Slate Co., 134 Mass. 590,	1386	Brown v. United States, 8 Cranch (U. S.), 110,	2030
Brown v. Edgington, 2 Man. & G. 279,	352	Brown v. Wabash, etc., R. Co., 18 Mo. App. 568,	117
Brown v. Elkington, 8 M. & W. 132,	333	Brown v. Watson, 6 B. Monroe (Ky.), 588,	1889
Brown v. Fales, 139 Mass. 21,	779	Brown v. Watson, 47 Maine, 161,	1576
Brown v. Farnham, 55 Minn. 27,	1633	Brown v. Weber, 38 N. Y. 187,	603, 598
Brown v. Farmers', etc., Bank (Texas 1895), 31 S. W. Rep. 285,	595	Brown v. Weldon, 27 Mo. App. 251,	1705
Brown v. First Nat. Bank, 137 Ind. 655,	1953, 1995, 2083	Brown v. Whipple, 58 N. H. 229,	1676
Brown v. Fitch, 33 N. J. Law (4 Vr.), 418,	2191	Brown v. Winehill, 3 Wash. St. 524,	127
Brown v. Foster, 108 N. Y. 387,	340, 504	Brown v. Witter, 10 Ohio, 143,	417
Brown v. Foster, 113 Mass. 136,	130, 167, 932	Brown v. Wood, 121 Mass. 137,	1707
Brown v. Gilmore, 8 Maine, 107,	391	Brown v. Woodworth, 5 Barb. 550,	643
Brown v. Godfrey, 33 Vt. 120,	189	Browne v. Garbrough, Cro. Eliz. 63,	226
Brown v. Grand Rapids Furniture Co., 58 Fed. Rep. 286,	1642	Browne v. McDonald, 129 Mass. 66,	287
Brown v. Guarantee Trust Co., 128 U. S. 403,	—	Browne v. Mount Holly Bank, 45 N. J. Law, 360,	568
Brown v. Hall, 5 Lan. (N. Y.) 177,	1921	Brownell v. Old Colony R. Co., 164 Mass. 29,	1439
Brown v. Hare, 3 H. & N. 484,	2	Brownfield v. Brownfield, 43 Ill. 148,	1022
Brown v. Harris, 2 Gray (Mass.), 359,	2228	Browning v. Board of Comrs. Owen County, 44 Ind. 11,	378
Brown v. Hatton, 9 Ired. L. (N. Car.) 319,	904	Browning v. Crouse, 43 Mich. 489,	1633
Brown v. Haynes, 52 Maine, 578,	165	Browning v. Home, etc., Ins. Co., 71 N. Y. 508,	117
Brown v. Heathcote, 1 Atk. 160,	1644	Browning v. Morris, Cowp. 790,	1870
Brown v. Hitchcock, 36 Ohio St. 667,	1333	Browning v. Stallard, 5 Taunt. 450,	608
Brown v. Hoag, 35 Minn. 373,	839, 1201	Browning v. Wright, 2 B. & P. 13,	883
Brown v. Howe, 9 Gray, 84,	1838	Brownlie v. Russell, L. R. 8 App. Cas. 235, 1624	—
Brown v. Inhabitants of Chesterville, 63 Maine, 241,	543	Brua's Appeal, 55 Pa. St. 294,	1922, 1923, 1930, 1946, 2016
Brown v. Inhabitants of Winterport, 79 Maine, 305,	1477	Bruce v. Bruce, 95 Ala. 563,	1745
Brown v. Insurance Co., 117 Mass. 479,	972	Bruce v. Burdet, 1 J. J. Marsh. (Ky.) 80,	2259
Brown v. Jones, 1 Atk. 188,	226	Bruce v. Slempp, 82 Va. 352,	43, 900
Brown v. Kling, 101 Cal. 235,	2027, 2028	Bruce v. Smith, 44 Ind. 1,	214
Brown v. Knapp, 79 N. Y. 136,	795	Bruce v. Tilson, 25 N. Y. 194,	1126, 1144
Brown v. Latham (Ga.), 18 S. E. Rep. 421,	183	Bruell v. Colell, 1 City Ct. Rep. (N. Y.) 308,	2211
Brown v. Leach, 35 Maine, 89,	490	Bruen v. Marquand, 17 John. 58,	577
Brown v. Leach, 107 Mass. 364,	1878	Bruffett v. Great Western R. Co., 25 Ill. 353,	2130
Brown v. Leckie, 43 Ill. 497,	451	Bruin v. Sasser, 25 La. Ann. 224,	2023
Brown v. Lord, 7 Ore. 302,	844		
Brown v. Marsh, 7 Vt. 320,	543, 572		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Brum v. Insurance Co., 16 Fed. Rep. 140,	1454	Bucklin v. Davidson, 125 Pa. St. 362,	2253
Brumby v. Smith, 3 Ala. 123,	289	Buckman v. Ferguson, 108 Cal. 33,	1468
Brumagin v. Tillinghast, 18 Cal. 265,	803, 807	Buckmaster v. Harrot, 7 Ves. 341,	620, 688
Brummitt v. McGuire, 107 N. Car. 351,	799	Bucknall v. Story, 46 Cal. 589,	460
Brunnell v. Hudson Sawmill Co., 86 Wis.	587,	Bucksport R. Co. v. Brewer, 67 Maine,	295,
	912		153, 156
Brunner v. Brennan, 49 Ind. 98,	360	Bucksport R. Co. v. Buck, 65 Maine, 537,	155
Bruner v. Brown, 139 Ill. 600,	1308, 1400	Bucy v. Pittsburg Agricul. Works, 89	
Bruner v. Strong, 61 Texas, 555,	2225	Iowa, 464,	342
Bruner v. Wheaton, 46 Mo. 363,	67	Budd v. Budd, 59 Fed. Rep. 735,	1519, 1523
Brunhild v. Freeman, 77 N. Car. 128,	358	Budd v. Eyermann, 10 Mo. App. 437,	798
Brunswick Co. v. Dart, 93 Ga. 74,	1205	Budd v. Fairmaner, 8 Bing. 48,	322, 338
Brunswick v. Valteau, 50 Iowa, 120,	1902	Budd v. Hiler, 27 N. J. Law. 43,	781
Brunswick Gaslight Co. v. United Gas,		Budgett v. Binnington, L. R. (1891) 1 Q.	
etc., Co., 85 Maine, 532,	1250, 1251	B. 35,	297
Brush v. Blanchard, 18 Ill. 46,	51	Budgett v. Binnington, L. R. 25 Q. B. D.	
Bryan v. Boltz, 48 N. Y. Super. Ct. 152,	1799	(1890) 321,	296
Bryan v. Foy, 69 N. Car. 45,	519, 524	Buel v. Boughton, 2 Denio (N. Y.), 91	1950
Bryan v. Memphis, etc., R. Co., 11 Bush,	597,	Buell v. Buckingham, 16 Iowa, 284,	
	736	1289, 1296, 1298, 1307, 1393, 1406	
Bryan, City of, v. Page, 51 Texas, 532,	1500, 1588		521, 524
	1852, 1994	Buell v. Irwin, 24 Mich. 125,	1642
Bryan v. Reynolds, 5 Wis. 200,		Buena Vista, etc., Co. v. Tuohy, 107 Cal.	
Bryan v. Scholl, 109 Ind. 367,	1176	243,	974
Bryan v. Southwestern R. Co., 37 Ga. 26,	839	Buffalo v. O'Malley, 61 Wis. 255,	798, 799
Bryan v. Thompson, 7 J. J. Marsh. 586,	549	Buffalo Nat. Bank v. Sharpe, 40 Neb. 123,	
Bryant v. Biddeford, 39 Maine, 193,	1576		1288, 1741
Bryant v. Bigelow Carpet Co., 131 Mass.		Buffalo, etc., R. Co. v. Buffalo, etc., R.	
491,	821	Co., 111 N. Y. 132,	36
Bryant v. Booze, 55 Geo. 438,	76	Buffalo, etc., R. Co. v. Cary, 26 N. Y. 75,	
Bryant v. Brazil, 3 N. W. Rep. 117,	190		1323, 1335
Bryant v. Crosby, 40 Maine, 9,	637	Buffalo, R. Co. v. Dudley, 14 N. Y. 336,	
Bryant v. Edson, 8 Vt. 325,	731		259, 260, 1462
Bryant v. Erskine, 55 Maine, 153,	490	Buffington v. Bardon, 80 Wis. 635,	1313, 1314
Bryant v. Goodnow, 5 Pick. 228,	255	Buffington v. Blackwell, 52 Ga. 129,	2208
Bryant v. Isburgh, 13 Gray, 607,	347	Buffin v. Baird, 73 N. Car. 283,	496
Bryant v. Lord, 19 Minn. 396 (Gil. 342),	199	Buffum v. Buffum, 11 N. H. 451,	401
Bryant v. Ondrak, 34 N. Y. Supl. 384,		Buford v. Keokuk, etc., Packet Co., 3 Mo.	
Bryant v. Peck, etc., Co., 151 Mass. 460,	1827	App. 159,	1260
Bryant v. Poughkeepsie, etc., Ins. Co., 17		Building Association v. Timmins, 3 Phila.	
N. Y. 200,	885	R. 209,	1608
Bryant v. Rich (Mich. 1895), 62 N. W. Rep.		Buist v. Bryan (S. Car. 1895), 21 S. E. Rep.	
146,	600	537,	1623
Bryant v. Western Union Tel. Co., 17 Fed.		Bulkeley v. Noble, 2 Pick. 337,	556
Rep. 825,	1923	Bull v. Bull, 43 Conn. 455,	
Bryant v. Wilson, 71 Md. 440,	1116		190, 438, 465, 523, 538, 554
Bryar v. Willcocks, 3 Cow. 150,	191	Bull v. City of Quincy, 155 Ill. 566,	555
Bryne v. Marshall, 44 Ala. 355,	684, 867	Bull v. Robison, 10 Exch. 342,	548
Bryne v. Schuyler, etc., Mfg. Co., 65 Conn.		Bull v. Strong, 98 Cal. 27,	1693
336,	1250, 1255, 1260	Bullard v. Hascall, 25 Mich. 132,	1818
Bryne v. Van Tienhoven, L. R. 5 C. P. D.		Bullard v. Inhabitants of Shoreley, 153	
344,	57	Mass. 559,	1102
Bryon v. Home for Soldiers, etc., 168 Pa.		Bullard v. Thompson, 35 Texas, 313,	730
St. 352,	439	Bullen v. McGillicuddy, 2 Dana (Ky.), 90,	537
Bryson v. McCreary, 102 Ind. 1,	1496	Bullion, etc., Min. Co. v. Eureka Hill Min.	
Buchanan v. Andrew, 2 L. R. H. L. Sc.		Co., 5 Utah, 1,	2267
App. 286,	869	Bullitt v. Farrar, 42 Minn. 8,	990
Buchanan v. Curry, 19 Johns. (N. Y.) 137,	2021	Bullman v. North British Insurance Co.,	
Buchanan v. Litchfield, 102 U. S. 278,		159 Mass. 118,	1758
	361, 1528, 1539	Bullock v. Adams, 20 N. J. Eq. 367,	749, 752
Buchanan v. Sahlein, 9 Mo. App. 552,		Bullock v. Babcock, 3 Wend. 391,	1838
	1831, 1835	Bullock v. Falmouth, etc., Co., 85 Ky. 184,	
Buchanan v. Smith, 16 Wall. 277,	153		260, 654
Buchanan v. Hazzard, 95 Pa. St. 240,	1656	Bullock v. Finley, 28 Fed. Rep. 514,	891
Buchanon v. International Bank, 78 Ill.		Bullock v. Grinstead, 95 Ky. 261,	1695
500,	206	Bullpin v. Clarke, 17 Ves. 365,	1699
Buchanon v. Litchfield, 102 U. S. 278,	1588	Bumgardner v. Leavitt, 35 W. Va. 194,	1208
Bucher v. Dillsburg, 76 Pa. St. 306,	260	Bumpas v. Platner, 1 Johns. Ch. 213,	1148
Buck v. Albee, 26 Vt. 184,	1854	Bunce v. Beck, 43 Mo. 266,	930
Buck v. Burk, 18 N. Y. 337,	860	Bunch v. Grave, 111 Ind. 351,	29
Buck v. Pennsylvania R. Co., 150 Pa. St.		Bunch v. Hart, 133 Ind. 1,	1664
170,	1958	Bundy v. Hyde, 50 N. H. 116,	789
Buck v. Pickwell, 27 Vt. 157,	636, 639, 675	Bunge v. Koop, 48 N. Y. 225,	190, 495, 537
Buckey v. Buckey, 38 W. Va. 168,	1031	Bunker v. Barron, 79 Maine, 62,	457
Buckhouse v. Crosby, 2 Eq. Cas. Abr., p.		Bunn v. Bartlett, 8 N. Y. Supl. 160,	209
32, par. 44,	1108	Bunn v. Lett, 19 N. Y. Supl. 728,	2196
Buckingham v. Jackson, 4 Biss. 295,	859	Bunn v. Riker, 4 Johns. (N. Y.) 426,	1914, 1944
Buckingham v. Osborne, 44 Conn. 133,	662	Bunn v. Todd, 107 N. Car. 266,	1243
Buckland v. Johnson, 15 C. B. 145,	781	Bunn v. Wells, 94 N. Car. 67,	886, 892
Buckle v. Mitchell, 18 Ves. 100,	178	Bunnel v. Withrow, 29 Ind. 123,	224
Bucklon v. Hasterlik, 155 Ill. 423,	21, 397, 433	Bunnell v. Taintor, 4 Conn. 568,	644
Buckley v. Dunn, 67 Miss. 710,	1708	Bunting v. Darbyshire, 75 Ill. 408,	206

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Bunting v. Mick, 5 Ind. App. 239,	1855	Burnside v. Lincoln County Court, 86 Ky.	2128
Burbank v. Crooker, 7 Gray, 158,	170	Burr v. Beers, 24 N. Y. 178,	237, 2210
Burbank v. Dennis, 101 Cal. 90,	974, 1294	Burr v. Boyer, 2 Neb. 265,	572
Burbank v. Pillsbury, 48 N. H. 475,	2256	Burr v. Burr, 26 Pa. St. 284,	196
Burbridge v. Cotton, 8 Eng. Law & Eq. 57,	1619	Burr v. Mills, 21 Wend. (N. Y.) 290,	52
Burbridge v. Fackler, 2 MacArthur (U. S.),	1989	Burr v. Smith, 21 Barb. 262,	442
407,	909	Burr v. Swan, 118 Mass. 588,	1753
Burbridge v. Gumbel, 72 Miss. 371,	898	Burr v. Veeder, 3 Wend. 412,	798
Burch v. Augusta, etc., R. Co., 80 Ga. 296,	206	Burr v. Wilcox, 13 Allen (Mass.), 269,	211,
Burch v. Hubbard, 48 Ill. 164,	710	Burrall v. Bushwick R. Co., 75 N. Y.	259, 412,
Burchard v. Dunbar, 82 Ill. 450,	671	Burrell v. Highleyman, 33 Mo. App. 183,	557
Burchinell v. Smodle, 5 Colo. App. 417,	890	Burrill v. Boston, 2 Clifford (U. S.),	590,
Burckhardt v. Burchhardt, 36 Ohio St.	261,	2241, 2242,	204+
Burge v. Cedar Rapids, etc., Ry. Co., 32	2238	Burrill v. Daggett, 77 Maine, 545,	
Iowa, 101,	1886	Burrill v. Garst (R. I. 1895), 31 Atl. Rep.	1214
Burger v. Koelsch, 7 Ind. Hun (N. Y.), 44,	1955	436,	913
Burger v. Rice, 377 Hun, 125,	864, 876, 887	Burroughs v. Langley, 10 Md. 248,	
Burgess v. Badger, 124 Ill. 288,	1803	Burroughs v. Norwich, etc., R. Co., 100	738
Burgett v. Barrick, 25 Kan. 526,	569	Mass. 26,	579
Burgh v. Preston, 8 T. R. 483,	1063	Burrows v. Alter, 7 Mo. 424,	155, 157
Burgin v. Giberson, 26 N. J. Eq. 72,	821, 823, 2189	Burrows v. Smith, 10 N. Y. 550,	671
Burgoyne v. Ohio, etc., Co., 5 Ohio St. 586,	545	Burrows v. Whitaker, 71 N. Y. 291,	1728
	206	Burrows v. Dawson, 66 Ala. 476,	354, 359
Burk v. Brown, 2 Atk. 397,	541, 574, 576, 819	Burt v. Dewey, 40 N. Y. 283,	999
Burke v. Dillon (Iowa), 61 N. W. Rep. 370,	1400	Burt v. Mason, 97 Mich. 127,	1022, 1023
Burke v. Noble, 48 Pa. St. 168,	452	Burt v. Quisenberry, 132 Ill. 385,	333
Burke v. Smith, 16 Wall. 390,		Burtis v. Bradford, 122 Mass. 129,	
Burke v. Snell, 42 Ark. 57,		Burtis v. Thompson, 42 N. Y. 246,	
Burke v. South Eastern Ry. Co., L. R. 2	64	Burtles v. State, 4 Md. 273,	
C. P. D. 1,	2208	Burton v. Curyea, 40 Ill. 320,	2234
Burke v. Steel, 40 Ga. 217,	1014	Burton v. Marshall, 4 Gill (Md.), 487,	2073
Burke v. Taylor, 94 Ala. 530,	60	Burton v. Platter (C. C. A.), 53 Fed. Rep.	1, 38
Burke v. Wells Fargo & Co., 50 Cal. 218,	896	901,	57
Burkhard v. Travelers' Ins. Co., 102 Pa.	2009	Burton v. Schildbach, 45 Mich. 504,	574
St. 268,	179	Burton v. Shotwell, 13 Bush. 271,	57
Burkholder's Appeal, 105 Pa. St. 31,	549	Burton v. Stewart, 3 Wend. 236,	411, 421
Burkholder v. Plank, 69 Pa. St. 225,	506	Burwell v. Jackson, 9 N. Y. 535,	
Burkley v. Dayton, 14 John. 387,	1661	Busby v. Finn, 1 Ohio, 409,	260
Burkley v. States, 19 Wall. 37,	1659	Busby v. Hooper, 35 Md. 15,	437, 538
Burley v. Shannon, 3 Gray (Mass.), 387,	1803	Bush v. Abraham, 25 Ore. 336,	2211
Burley v. Barnhard, 9 N. Y. St. Rep. 587,	837	Bush v. Brooks, 70 Mich. 446,	187
Burley v. Russell, 10 N. H. 184,	846	Bush v. Rawlins, 89 Ga. 117,	1386
Burlingame v. Burlingame, 7 Cow. 92,		Bush v. Robinson, 95 Ky. 178,	671
Burlingame v. Rowland, 77 Cal. 315,		Bushnell v. Wheeler, 15 Q. B. 442,	126
Burlington, City of, v. Burlington St. Ry.	1582	Busk v. Spence, 4 Camp. 329,	1721
Co., 49 Iowa, 144,	746, 747	Buss v. Woodward, 60 N. H. 58,	767
Burlington, etc., R. Co. v. Boestler, 15	1423	Bussard v. Levering, 6 Wheat. 102,	
Iowa, 555,	1862	Bussian v. Milwaukee, etc., R. Co., 56	588
Burlington, etc., R. Co. v. Dey, 82 Iowa,	724	Wis. 325,	566
312,	469	Butcher v. Butcher, 4 B. & P. 113,	1180
Burlington, etc., R. Co. v. Northwestern	137	Butcher v. Stapely, 1 Vern. 363,	
Fuel Co., 31 Fed. Rep. 652,	1068	Butcher, Wm., Steel Works v. Atkinson,	652
Burlock v. Taylor, 16 Pick. 335,	1053	68 Ill. 421,	
Burn v. Boulton, 2 C. B. 476,	839	Butchers' Bank v. Brown, 1 N. Y. Leg.	568
Burn v. Miller, 4 Taunt. 745,	1162	Obs. 149,	
Burnell v. Moore, 17 So. Rep. —,	2105	Butchers', etc., Co. v. Crescent City, etc.,	2055, 2147
Burnell v. Morris (Ala. 1895), 18 So. Rep.	559, 649, 652	Co., 111 U. S. 764,	2264
82,	1977	Butler v. Burleson, 16 Vt. 176,	890, 2213
Burnett v. Blackmar, 43 Ga. 569,	904	Butler v. Butler, 77 N. Y. 472,	
Burnett v. Kullak, 76 Cal. 536,	544	Butler v. City of Charlestown, 7 Gray	1470
Burnett v. Western Union Tel. Co., 39 Mo.	454	(Mass.), 12,	1058
App. 599,	2105	Butler v. Durham, 3 Ired. Eq. 589,	2252
Burney v. Ball, 24 Ga. 505,	559, 649, 652	Butler v. Finck, 21 Hun (N. Y.), 210,	
Burney v. Ludeling, 47 La. Ann. 73,	1977	Butler v. Galletti, 21 How. Pr. (N. Y.)	2073
Burnham v. Allen, 1 Gray, 496,	904	465,	394
Burnham v. Rosenberger, 110 Mo. 468,	544	Butler v. Harwitz, 7 Wall. 258,	1898, 2111
Burnham v. Spooner, 10 N. H. 165,	454	Butler v. Lee, 11 Ala. 885,	
Burnie's Trustees, <i>Ex parte</i> , 1 DeG., M. &	223	Butler v. Merchant (Texas App.), 27 S. W.	442
G. 440,	167	Rep. 193,	876
Burnley v. Tufts, 66 Miss. 43,	1141	Butler v. Moses, 43 Ohio St. 166,	
Burns v. Berry, 42 Mich. 176,	1062, 1074	Butler v. Mutual, etc., Ins. Co., 94 Ga.	1625
Burns v. Caskey, 100 Mich. 94,	843	562,	2132
Burns v. Daggett, 141 Mass. 368,	829	Butler v. Palmer, 1 Hill (N. Y.), 324,	2126
Burns v. Follansbee, 20 Ill. App. 41,	13	Butler v. Pennsylvania, 10 How. (U. S.)	
Burns v. Lynde, 6 Allen, 305,	1741	402,	
Burns v. McGregor, 90 N. Car. 222,	2100	Butler v. Richmond, etc., R. Co., 88 Ga.	545, 581
Burns v. Moore, 76 Ala. 339,	866	594,	2151
Burns v. Singer Mfg. Co., 87 Ind. 541,	1674	Butler v. Rockwell, 17 Colo. 290,	
Burns v. Thompson, 39 La. Ann. 377,		Butler v. Robertson, 11 Tex. 142,	1739

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Butler v. Thomson, 92 U. S. 412,	182	Calhoun v. Leary, 6 Wash. 17,	1760, 1762
Butler v. Thornburg, 131 Ind. 237,	1720	Calhoun v. Millard, 121 N. Y. 69,	1534
Butler v. Wendell, 57 Mich. 62,	724	Calhoun v. Phillips, 87 Ga. 482,	2102
Butler Paper Co. v. Robbins, 151 Ill. 588,	1392	California, etc., Manufacturing Co. v. Schaefer, 57 Cal. 396,	1320
Butler University v. Schoonover, 114 Ind. 881,	154	California State Telegraph Co. v. Alta Telegraph Co., 22 Cal. 398,	2134
Butman v. Porter, 100 Mass. 337,	1120	California Steam Navigation Co. v. Wright, 6 Cal. 258,	2029, 2030
Butt v. Riffe, 78 Ky. 352,	362	Calkins v. Chandler, 36 Mich. 320,	200, 204, 205, 596, 599, 600
Butterfield v. Byron, 153 Mass. 517,	294, 2226, 2228	Calkins v. Griswold, 11 Hun, 208,	798
Butterfield v. Hartshorn, 7 N. H. 345,	962	Calkins v. Long, 22 Barb. (N. Y.) 97,	1758
Butternuts, etc., Turnpike Co. v. North, 1 Hill, 518,	156	Calkins v. Seabury, etc., Co., 5 S. Dak. 299,	2101
Buttler v. Rosenblath, 42 N. J. Eq. 651,	1767	Call v. Seymour, 40 Ohio St. 670,	162
Buttrick v. Holden, 8 Cush. 233,	487, 488	Call v. Ward, 4 Watts. & S. (Pa.) 118,	1841
Butts v. Andrews, 136 Mass. 221,	1139	Callahan's Appeal, 124 Pa. St. 138,	1599
Butts v. Wood, 37 N. Y. 317,	1306, 1307	Callahan v. Donnelly, 45 Cal. 152,	2026, 2029
Butz v. Muscatine, 8 Wall. (U. S.) 575,	2148	Callahan v. Stanley, 57 Cal. 476,	2202
Buxton v. Rust, L. R. 7 Ex. 1,	685	Callaway v. Fash, 50 Mo. 420,	1642
Buyck v. Schwing, 100 Ala. 355,	908, 931	Callaway M. & M. Co. v. Clark, 32 Mo. 305,	1225
Buzzell v. Cummings, 61 Vt. 213,	163	Callis v. Day, 38 Wis. 643,	1787
Buzzell v. Gallagher, 23 Wis. 678,	621	Callisher v. Bischoffsheim, L. R. 5 Q. B. 449,	210, 1473
Byam v. Hampton, 67 Hun. 585,	123	Calreton v. Lovejoy, 54 Maine, 445,	249
Byars v. Spencer, 101 Ill. 429,	15	Calton v. Lewis, 119 Ind. 181,	1176
Byassee v. Reeses, 4 Metc. (Ky.) 372,	640	Calvert v. Idaho Stage Co., 25 Ore. 412,	1268, 1269
Byerlee v. Mendel, 3 Iowa, 382,	144	Cambrelleng v. Purton, 125 N. Y. 610,	1141
Byers v. Thompson, 66 Ill. 421,	51	Camden v. Mayhew, 9 Sup. Ct. Rep. —; 129 U. S. 73,	1444
Byford v. Girtton, 90 Iowa, 661,	1708	Camden Bank v. Cilley, 83 Maine, 72,	474
Byrne v. Schiller, L. R. 9 Ex. 319,	2228	Camden, City of, v. Green, 54 N. J. Law, 591,	804
Byrne v. Van Tienhoven, L. R. 5 C. P. D. 344,	56	Camden Horse R. Co. v. Citizens' Coach Co., 31 N. J. Eq. 525,	1135
Byrnside v. Burdett, 15 W. Va. 702,	356	Camden Trust Co. v. Burlington Carpet Co. (N. J. Eq.), 33 Atl. Rep. 479,	1459, 1460
Byron v. Mayor, etc., 22 J. & S. (N. Y. Super.) 411,	293, 299	Cameron v. Durkheim, 55 N. Y. 425,	1856
Bywater v. Richardson, 1 A. & E. 508,	333	Cameron v. New York and Mt. Vernon Water Co., 62 Hun, 269,	1268
Byxhie v. Wood, 24 N. Y. 607,	2165	Cameron v. New York, etc., Water Co., 133 N. Y. 336,	1981

C

Cabe v. Jameson, 10 Ired. Law (N. Car.) 193,	517	Cameron v. Peck, 37 Conn. 555,	2100, 2102
Cabell v. Cabell, 1 Met. (Ky.) 319,	2122	Cameron v. Warbrinton, 9 Ind. 351,	198
Cabell v. Vaughan, 1 Wm. Saund. 291,	831	Camfield v. Gilbert, 4 Esp. 221,	417
Cabot v. Haskins, 3 Pick. 83,	212, 665, 687	Camidge v. Allenby, C. B. & C. 373,	455
Cabot v. Winsor, 1 Allen, 546,	108, 109	Cammack v. Soran, 30 Gratt. 292,	427
Cabot, etc., Bridge v. Chapin, 6 Cush. 50,	155	Camp v. Barker, 21 Vt. 469,	2185
Caddick v. Skidmore, 2 DeG. & J. 51,	644	Camp v. Moreman, 54 Ky. 635,	675
Cade v. Jenkins, 88 Ga. 791,	165	Camp v. Smith, 136 N. Y. 187,	473, 474
Caden v. Farwell, 98 Mass. 137,	284, 285	Campanari v. Woodburn, 15 C. B. 400,	61
Cadens v. Teasdale, 53 Vt. 469,	537	Campau v. Moran, 31 Mich. 280,	2173
Cady v. Shepherd, 11 Pick. (Mass.) 400,	2185	Campbell's Appeal, 80 Pa. St. 298,	1017
Cahaba, Town Council of, v. Burnett, 34 Ala. 400,	804, 805, 1835	Campbell's Estate, <i>In re</i> , 7 Pa. St. 100,	559
Cahalan v. Van Saint, 87 Iowa, 593,	1729	Campbell v. Allen, 38 Mo. App. 27,	197
Cabill v. Bigelow, 18 Pick. 369,	592	Campbell v. Anderson, 2 Duv. (Ky.) 384,	2021
Cain v. Bryant, 12 Heisk. 45,	445	Campbell v. Bowles, 30 Gratt. (Va.) 652,	1686
Cain v. Commissioners, 86 N. Car. 8,	1516	Campbell v. Brown, 20 Ga. 415,	572
Cain v. McGuire, 13 B. Mon. 340,	640	Campbell v. Clark, 44 Mo. App. 249,	800
Cain v. Warford, 33 Md. 23,	1031	Campbell v. Consalus, 25 N. Y. 613,	30
Caines v. Smith, 15 M. & W. 189,	188	Campbell v. Day, 90 Ill. 363,	778
Cairo v. Zane, 149 U. S. 122,	1526	Campbell v. Fetterman's, 20 W. Va. 398,	1179
Cairy v. Randolph, 6 La. Ann. 202,	2233	Campbell v. French, 6 T. R. 200,	764
Calanchini v. Branstetter, 84 Cal. 249,	814	Campbell v. Hatchett, 55 Ala. 548,	1066, 1069
Calcutta & Burmah Steam Nav. v. De Mattos, 32 L. J. Q. B. 322,	853	Campbell v. Indianapolis, etc., Railway Co., 110 Ind. 490,	637
Calder v. Bull, 3 Dall. 386,	2119	Campbell v. Insurance Co., 98 Mass. 381,	1241
Calder v. Henderson, 2 U. S. App. 627,	2129	Campbell v. Johnson, 44 Mo. 247,	425, 901
Calder v. Kirby, 5 Gray (Mass.), 597,	2125	Campbell v. Jones, 6 T. R. 570,	114
Calder v. Moran, 49 Mich. 14,	267	Campbell v. McFadden (Texas App. 1895), 31 S. W. Rep. 436,	1167, 1215
Callwell v. Cassidy, 8 Cow. (N. Y.) 271,	2196	Campbell v. New England, etc., Insurance Co., 98 Mass. 381,	318
Caldwell v. Eneas, 2 Mills (S. Car.), 348,	708	Campbell v. Nichols, 33 N. J. Law, 81,	710, 729
Caldwell v. Haley, 3 Texas, 317,	2214	Campbell v. Pope, 96 Mo. 468,	1269, 1280
Caldwell v. Hall, 49 Ark. 508,	446	Campbell v. Potter, 147 Ill. 576,	1133
Caldwell v. Martin, 29 S. Car. 22,	819	Campbell v. Richardson, 10 Johns. (N. Y.) 406,	1944, 1946
Caldwell v. Renfrow, 33 Vt. 213,	1680		
Calcuttania R. Co. v. Magistrates of Heliensburgh, 2 Macq. 391; 2 Jur. (N. S.) 695,	1314, 1315		
Caley v. Philadelphia R. Co., 80 Pa. St. 363,	155, 156		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Campbell v. Rust, 85 Va. 653,	1096	Carlyle, City of, v. Carlyle Water, Light & Power Co., 140 Ill. 445,	1519
Campbell v. Sherman, 49 Mich. 534,	1278	Carlyle Water, Light & Power Co. v. City of Carlyle, 31 Ill. App. 325,	1519
Campbell v. Stein, 6 Dow. 116,	715	Carman v. Smick, 15 N. J. Law, 252,	657
Campbell v. White, 22 Mich. 178,	1748	Carmelich v. Mims, 88 Ala. 335,	2182
Campbell v. Whitson, 68 Ill. 240,	1023	Carmichael v. Carmichael, 72 Mich. 76,	2006
Campbell Printing Press Co. v. Henkle, 19 D. C. 95,	164, 166	Carmichael v. Walters, 33 Ga. 316,	1696
Campbell Printing Press Co. v. Thorp, 36 Fed. Rep. 414,	132, 133, 134	Carmien v. Whitaker, 36 Ind. 509,	831
Campe v. Horne, 158 Pa. St. 508,	1679, 1688	Carmody v. Powers, 60 Mich. 26,	1324
Campion v. Cotton, 17 Ves. Jr. 264,	221, 223	Carnahan v. Tousey, 93 Ind. 561,	216
Canada Southern Ry. Co. v. Gebhard, 109 U. S. 527,	2118	Carnall v. Wilson, 14 Ark. 482,	1065
Canadian, etc., R. Co. v. Western Union, etc., Co., 17 Can. Sup. Ct. 151,	2052	Carnegie v. Morrison, 2 Metc. (Mass.) 381,	240, 728
Canajoharie National Bank v. Diefendorf, 123 N. Y. 191,	2281	Carnforth, etc., Co., <i>Ex parte</i> , L. R. 4 Ch. Div. 108,	492
Canal Co. v. Gordon, 6 Wall. (U. S.) 561,	2193	Carondelet Iron Works v. Moore, 78 Ill. 658,	348
Canal Co. v. Pinkham, 1 Idaho, 790,	1452	Carothers v. McNese, 43 Texas, 221, 1739, 1760	
Canal Co. v. Wheeley, 2 Barn. & Adol. 792,	1239	Carothers v. Wheeler, 1 Ore. 194,	386
Canal & C. R. Co. v. St. Charles St. R. Co., 44 La. Ann. 1039,	1264	Carpenter v. Allen, 16 La. Ann. 435,	1743
Canal R. Co. v. Orleans R. Co., 44 La. Ann. 54,	1264	Carpenter v. Allen, 45 N. Y. Super. Ct. 322,	42
Canda v. Wick, 100 N. Y. 127,	495	Carpenter v. Carpenter, 70 Ill. 457,	2289
Candee v. Smith, 93 N. Y. 349,	832	Carpenter v. Dodge, 20 Vt. 595,	580
Candee v. Western Union Tel. Co., 34 Wis. 471,	1961	Carpenter v. Freeland, Lator (N. Y.), 37,	466
Candor's Appeal, 27 Pa. St. 119,	182, 231, 234	Carpenter v. Gay, 12 R. I. 306,	285
Canfield v. Baltimore, etc., R. Co., 93 N. Y. 532,	1958, 1963	Carpenter v. Osborn, 102 N. Y. 552,	27
Canfield v. Eleventh School Dist., 19 Conn. 529,	521, 524	Carpenter v. Shanklin, 7 Blackf. 308,	12
Canfield v. Ives, 18 Pick. 253,	16	Carpenter v. Soule, 88 N. Y. 251,	557
Cangas v. Manufacturing Co., 37 Mo. App. 297,	70	Carpenter v. Talbot, 33 Fed. Rep. 537,	1048
Canhan v. Barry, 15 C. B. 597,	273	Carpentier v. Atherton, 25 Cal. 564,	442
Cannan v. Bryce, 3 Barn. & Ald. 179, 1862, 1934	1653	Carr v. Dooley, 119 Mass. 294,	632
Cannel v. Buckle, 2 P. Wms. 242,	1653	Carr v. Duval, 14 Pet. 77,	67
Canney v. South Pac., etc., R. Co., 63 Cal. 501,	241	Carr v. Hays, 25 Cent. Law Jour. 35,	900
Cannon v. Boutwell, 53 Texas, 626,	1729	Carr v. Hays, 110 Ind. 408,	855, 867
Cannon v. Cannon, 26 N. J. Eq. 316,	1882	Carr v. Lackland, 112 Mo. 442,	1679
Cannon v. Deming, 3 S. D. 421,	1642, 1643	Carr v. McCarthy, 70 Mich. 258,	649, 652
Cannon v. McMichael, 6 Mackey, 225,	163	Carr v. Miner, 92 Ill. 604,	382
Cannon River Co. v. Rogers, 46 Minn. 376,	523	Carr v. Montefiore, 5 B. & S. 407,	874
Cantime v. Phillips, 5 Harr. 428,	789	Carr v. Nat. Security Bank, 107 Mass. 45,	10
Canton Co. v. Baltimore, etc., R. Co., 79 Md. 524,	1120, 1147	Carr v. Roach, 2 Duer, 20,	122
Canton Dental Co. v. Webb, 16 N. Y. Supl. 932,	168	Carr v. State, 127 Ind. 204,	33
Capen v. Barrows, 1 Gray, 376,	814	Carr v. United States, 22 Ct. Cl. 152,	877
Capital City Ins. Co. v. Detwiler, 23 Ill. App. 656,	190, 519	Carrier v. Sears, 4 Allen (Mass.), 336,	2276
Capital, etc., Gas Light Co. v. City of Des Moines, 61 N. W. Rep. 1066,	1480	Carriere v. Ticknor, 26 Ala. 573,	446
Capps v. Hastings Prospecting Co., 40 Neb. 470,	1324	Carriagan v. Port Crescent Improvement Co., 6 Wash. 590,	1274, 1283
Capuro v. Builders' Insurance Co., 39 Cal. 123,	1294	Carrington v. Potter, 37 Fed. Rep. 767,	182
Carberry v. Tannehill, 1 Har. & J. (Md.) 224,	2271	Carrington v. Watt, 112 N. Car. 115,	488
Cardell v. Bridge, 9 Allen. 355,	146	Carroll v. City of St. Louis, 12 Mo. 444,	1512
Cardell v. Ryder, 35 Vt. 47,	1680	Carroll v. Hickes, 10 Phila. (Pa.) 303,	2039
Caroy v. Bright, 53 Pa. St. 70,	916	Carroll v. Norwood, 5 Harr. & J. 155,	884
Caroy v. Burruss, 20 W. Va. 571,	1755	Carroll v. Staten Island, etc., R. Co., 65 Barb. (N. Y.) 32,	2105
Caroy v. City of East Saginaw, 79 Mich. 73,	1508, 1555	Carroll v. Staten Island, etc., R. Co., 58 N. Y. 126,	2105
Carey v. Gunnison, 65 Iowa, 702,	1070	Carroll v. Sweet, 5 N. Y. Supl. 572,	447
Carey v. Mackay, 82 Maine, 516,	2010	Carroll v. Sweet, 123 N. Y. 19,	448, 451
Carleton v. Lombard, Ayres & Co., 72 Hun, 254,	338	Carroll v. Welch, 26 Texas, 147,	135, 144
Carleton v. Woods, 28 N. H. 290,	454, 1901	Carson v. Carson, 40 Miss. 349,	2122
Carlisle v. Brennan, 67 Ind. 12,	1192	Carson v. Clark, 2 Ill. 113,	194
Carlisle v. Carlisle, 77 Ala. 339,	1102, 1118	Carson v. German Ins. Co., 62 Iowa, 433,	417
Carlisle v. Saginaw Valley Co., 27 Mich. 315,	260	Carson v. Heath, 86 Ga. 438,	442
Carl v. Snyder (N. J. Ch. 1893), 26 Atl. Rep. 877,	2042, 2047	Carshore v. Huyck, 6 Barb. 593,	196
Carlton v. William, 77 Cal. 89,	1187	Carshaddon v. South Bend, 141 Ind. 596,	1483, 2269
		Carson v. Murray, 3 Paige (N. Y.), 483,	1758
		Carson v. Stevens, 40 Neb. 112,	1666
		Carter v. Alling, 43 Fed. Rep. 208,	2080, 2040, 2045
		Carter v. Beckwith, 128 N. Y. 312,	1814, 1815, 1823
		Carter v. Carter, 2 Day, 442,	810, 811
		Carter v. Carter, 14 Pick. 424,	817
		Carter v. Gordon, 121 Ind. 383,	2174
		Carter v. Holahan, 92 N. Y. 498,	241
		Carter v. King, 11 Rich. L. 125,	182, 231, 235
		Carter v. Phillips, 144 Mass. 100,	744, 2266
		Carter v. Scargill, L. R. 10 Q. B. 564,	135
		Carter v. Silber, L. R. (1892) 2 Ch. 278,	1807
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		Carter v. Shorter, 57 Ala. 253,	622, 628, 1117

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Carter v. Tice, 120 Ill. 277,	2285	Catlin v. Tobias, 26 N. Y. 217,	145, 149
Carter v. Toussaint, 5 B. & Ald. 855,	672	Catlin v. Ware, 9 Mass. 218,	1738
Carter v. Walker, 2 Rich. Law, 40,	360	Cato v. Thompson, L. R. 9 Q. B. Div. 616, —	—
Carter v. Wann, 45 Ala. 343,	1658	Caton v. Caton, L. R. 1 Ch. 137,	227, 618, 849, 1717
Carter v. Wormald, 1 Ex. 81,	526	Caton v. Caton, L. R. 2 H. L. 127,	688
Carter v. Zenblin, 68 Ind. 436,	561, 1183	Caton v. Stewart, 76 N. Car. 357,	2079, 2091
Cartersville Imp., Gas and Water Co. v.	1562	Catterlin v. Armstrong, 101 Ind. 258,	2171
Cartersville, 89 Ga. 683,	—	Caul v. Gibson, 3 Pa. St. 416,	256
Cartier v. Troy Lumber Co., 35 Ill. App.	449,	Cauley v. Brook, 16 Cal. 11,	2207
449,	956	Caulkins v. Heilman, 47 N. Y. 449,	662, 663, 664
Cartwright v. Cooke, 3 B. & Ad. 701,	531	Cavanaugh v. Casselman, 88 Cal. 543,	423
Cartwright v. Dickinson, 88 Tenn. 476,	1320, 1329	Cavaness v. Ross, 33 Ark. 572,	519, 524
Caruthers v. Humphrey, 12 Mich. 270, 403, 410	—	Cave v. Hastings, L. R. 7 Q. B. Div. 125,	691
Cary v. Bancroft, 14 Pick. 315,	394	Cavanaugh v. McLaughlin, 38 Minn. 83,	422
Cary v. Dixon, 51 Miss. 593,	1746	Cavender v. Waddington, 2 Mo. App. 551,	2220
Cary Library v. Bliss, 151 Mass. 364,	2117	Cavin, Matter of, v. Gleason, 105 N. Y.	1002
Cary v. McIntyre, 7 Colo. 173,	526	256,	—
Cary v. Western Union Tel. Co., 47 Hun	1995	Cawthorne v. Cordrey, 13 C. B. (N. S.)	406,
(N. Y.), 610,	—	406,	652
Cary-Halidy Lumber Co. v. Cain, 70 Miss.	628,	Caylor v. Roe, 99 Ind. 1,	617, 619, 979, 2167
628,	1231	Cayuga R. Co. v. Kyle, 5 Thomp. & C. 659,	158
Cary Lumber Co. v. Thomas, 92 Tenn.	587,	Cazet v. Hubbell, 36 N. Y. 677,	674
587,	1265	Cecil v. Deyerle, 23 Gratt. (Va.) 775,	2124
Casady v. Bosler, 11 Iowa, 242,	380, 381	Ceeder v. Lond Lumber Co., 86 Mich.	541,
Case 24, 3 Atk. 70,	545	541,	1277
Case v. Barber, Sir T. Jones, 158,	525	Centenary M. E. Church v. Clime, 116 Pa.	2217
Case v. Boughton, 11 Wend. 107,	181	St. 146,	490
Case v. Cleveland, etc., R. Co., 11 Ind. App.	517,	Central Ag. & M. Assn. v. Alabama Gold	—
517,	1967	Life Ins. Co., 70 Ala. 120,	1434
Case v. Fant, 53 Fed. 41,	471	Central Bank v. Copeland, 18 Md. 305,	1832
Case v. Fish, 53 Wis. 55,	1475	Central Bridge Corporation v. City of	—
Case v. Gerrish, 15 Pick. 49,	1640	Lowell, 4 Gray (Mass.), 474,	2146
Case v. Hall, 24 Wend. 102,	358, 359	Central Building, etc., Assn. v. Lampson	—
Case v. Hastings, L. R. 7 Q. B. Div. 125,	684	(Minn. 1-95), 62 N. W. Rep. 544,	1251, 1628
Case v. Lenington, 3 N. J. Law, 420,	98	Central, etc., Roller Co. v. Cushman, 143	2048
Case v. Phoenix Bridge Co., 55 N. Y. Su-	—	Mass. 353,	—
perior, 25,	161	79 Cal. 351,	900
Case of the Monopolies, 11 Coke, 84,	2052	Centenary Methodist Church v. Clime, 116	2264
Case of State Tax on Foreign held Bonds,	—	Pa. St. 146,	—
15 Wall. (U. S.) 300,	2141	Central Nat. Bank v. Seligman, 138 N. Y.	1647
Case Mfg. Co. v. Soxman, 138 U. S. 431,	457	435,	—
Case Plow Works v. Niles, etc., Co., 90	—	Central Ohio Salt Co. v. Guthrie, 35 Ohio	—
Wis. 590,	41, 323, 328, 351, 364	St. 666,	1424, 1426, 1983, 2037, 2058, 2060
Casey v. Galli, 94 U. S. 673,	1326, 1328	Central Pacific R. Co. v. Beal, 47 Cal. 151,	893
Casey v. Gunn, 29 Mo. App. 14,	496	Central Pacific R. Co. v. Gallatin, 99 U. S.	700,
Cagrain v. Milwaukee County, 81 Wis.	113,	700,	2119
113,	1052	Central Railroad v. Bridger, 94 Ga. 471,	266
Cash v. Douglasville, 94 Ga. 557,	1515	Central R. Co. v. Collins, 40 Ga. 5-2,	1264, 1427, 2052, 2054, 2056
Cashman v. Henry, 75 N. Y. 103,	1352	Central, etc., R. Co. v. Georgia, 92 U. S.	665,
Cashman v. Martin, 50 How. Pr. 337,	398	665,	1456, 2140
Cashman v. Root, 89 Cal. 373,	1929	Central R. Co. v. Kent, 87 Geo. 402,	276
Caskey v. City of Greensburgh, 78 Ind. 233,	2273	Central R. Co. v. Kisch, L. R. 2 H. L. 99,	1330, 1331, 1602
722,	—	Central R. Co. v. Pennsylvania R. Co., 31	—
Caskie v. Webster, 2 Wallace, Jr., 131,	872	N. J. Eq. 475,	1259, 1262, 1264
Casler v. Conn. Mut. Life Ins. Co., 22 N. Y.	442,	Central Shade Roller Co. v. Cushman, 143	—
442,	872	Mass. 353,	1981, 2055, 2065, 2074
Casler v. Thompson, 4 N. J. Eq. 59,	846	Central Transportation Co. v. Pullman's	—
Cason v. Cheely, 6 Ga. 554,	657, 658	Palace Car Co., 139 U. S. 24,	1245, 1258, 1412, 1429, 1983
Cass v. Higenbotam, 27 Hun, 406,	398	—	—
Cass v. Higenbotam, 100 N. Y. 253,	399	Central Trans. Co. v. Pullman's Palace	—
Cass v. Pittsburgh, 80 Pa. St. 31,	260	Car. Co., 11 Sup. Ct. Rep. 478; 139 U. S.	24,
Cass County v. Beck, 76 Iowa, 487,	2088	24,	1217
Cass County Bank v. Bricker, 34 Neb. 516,	2073	Central Trust Co. v. Bridges, 57 Fed. Rep.	753,
—	—	753,	1237
Cassard v. Hinman, 6 Bosw. 8,	1294	Central Trust Co. v. Condon, 67 Fed. Rep.	84,
Cassell v. Collins, 23 Ala. 676,	635	84,	866, 1277
Castle v. Swarder, 29 L. J. R. Ex. 235,	668	Central Trust Co. v. Cincinnati, etc., R.	—
Castner v. Fisher, 104 N. C. 392,	438	Co., 58 Fed. Rep. 500,	1443, 1444
Castor v. Jones, 86 Ind. 239,	1523	Central Trust Co. v. Ohio Cent. R. Co., 23	—
Castling v. Aubert, 2 East, 325,	609, 610	Fed. Rep. 306,	1895, 1993, 2062
Casswell v. Gibbs, 33 Mich. 331,	2038	Central Trust Co. v. St. Louis, etc., R. Co.,	41 Fed. Rep. 551,
Cate v. Thayer, 3 Greenl. 71,	1175	41 Fed. Rep. 551,	1453
Cathcart v. Robinson, 5 Pet. 264,	1131	Central Trust Co. v. Wabash, etc., Rail-	—
Cathwright v. Callaway County, 10 Mo.	663,	road, 29 Fed. Rep. 548,	864, 886
663,	—	—	—
Catlett v. Bacon, 33 Miss. 269,	1111	—	—
Catlett v. Trustees of M. E. Church, 62	—	—	—
Ind. 366,	2110	—	—
Catlin v. Eagle Bank, 6 Conn. 233,	1404	—	—
Catlin v. Green, 120 N. Y. 441,	160	—	—
Catlin v. Haddox, 49 Conn. 492,	1776	—	—

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

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Central Trust Co. v. Wabash, etc., Ry. Co., 84 Fed. Rep. 254,	877	Chandler v. Sanger, 114 Mass. 364, 440, 803,	2283
Central Trust Co. v. Wabash, etc., R. Co., 50 Fed. Rep. 857,	914	Chandler v. Simmons, 97 Mass. 508,	
Central Trust Co. v. Wabash R. Co., 31 Fed. Rep. 440,	273, 289	1781, 1784, 1797, 1834	
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Central Vermont R. Co. v. Soper (1894), 59 Fed. Rep. 879,	1970	Chanter v. Hopkins, 4 Mees. & W. 399,	
Chable v. Construction Co., 59 Fed. Rep. 846,	1444	338, 349, 351	
Chabot v. Tucker, 39 Cal. 434,	195, 196	Chapin v. Brown, 83 Iowa, 156,	2026, 2046
Chabot v. Winter Park Co., 34 Fla. 258, 1163,	1167	Chapin v. Chapin (Mass.), 36 N. E. Rep. 746,	396
Chadbourn v. Williams, 45 Minn. 294,	1673	Chapin v. Chicago, etc., R. Co., 18 Ill. App. 47,	574
Chadsey v. Guion, 97 N. Y. 333,	885	Chapin v. Dobson, 78 N. Y. 74,	46, 2179
Chadwick v. Moore, 8 W. & S. (Pa.) 49,	2154	Chapin v. Lapham, 20 Pick. 467,	
Chafee v. Fourth Nat. Bank, 71 Maine, 514,	724	597, 601, 608, 614, 616	
Chafee v. Sprague, 16 R. I. 189,	1208	Chapin v. Merrill, 4 Wend. 657	596, 599, 614, 615
Chafee v. Aaron, 62 Miss. 29,	2152	Chapin v. Shafer, 49 N. Y. 407,	
Chaffee v. Mackenzie, 43 La. Ann. 1062,	476	1771, 1773, 1795, 1798	
Chaffee v. Oliver, 33 La. Ann. 1008,	1742	Chaplin v. Harbeck, 156 Mass. 339,	2251
Chaffee Co. v. Potter, 142 U. S. 355,	1524, 1528	Chaplin v. Rogers, 1 East, 192,	590, 667, 668
Chaffee v. Thomas, 7 Cow. 358,	194	Chapman v. Bank, 97 Cal. 155,	1162
Chaffin v. Taylor, 116 U. S. 567,	32, 2159	Chapman v. Barnes, 93 Ala. 433,	194, 195
Chahoon v. Hollenback, 16 S. & R. 425,	401	Chapman v. Beardsley, 31 Conn. 115,	429
Chalfant v. Williams, 35 Pa. St. 212,	899	Chapman v. Bluck, 5 Scott's Reports, 515,	875
Challoner v. Boyington, 83 Wis. 399,	457	Chapman v. Chapman (Va.), 21 S. E. Rep. 813,	426, 427
Chalmers, <i>Ex parte</i> , L. R. 8 Ch. 289, 152, 2235		Chapman v. County of Douglas, 107 U. S. 348,	782, 1577, 2158
Chamber of Commerce v. Sollitt, 43 Ill. 519,	492, 496, 2220, 2221	Chapman v. Currie, 51 Mo. App. 40,	1586
Chamberlain v. Bagley, 11 N. H. 234,	760	Chapman v. Dease, 34 Mich. 375,	840
Chamberlain v. Barnes, 26 Barb. (N. Y.) 160,	2062	Chapman v. Dewyther, L. R. 1 Q. B. 463,	331
Chamberlain v. Jackson, 44 Mich. 320,	2252	Chapman v. Long, 66 Vt. 656,	1186
Chamberlain v. Hibbard, 23 Ore. 428,	2224	Chapman v. Murch, 19 Johns. 290, 321, 327, 353	
Chamberlain v. Hoppes, 8 Vt. 94,	17	Chapman v. Railroad Co., 6 Ohio St. 119,	1097
Chamberlain v. Pacific Wool Co., 54 Cal. 103,	1304	Chapman v. Republic Ins. Co., 6 Bissell, 238,	119
Chamberlain v. Painesville R. Co., 15 Ohio St. 225,	153, 155, 156	Chapman v. Robertson, 6 Paige, 627,	712, 720, 730
Chamberlain v. Shaw, 18 Pick. 278,	165	Chapman v. Seecomb, 36 Maine, 102,	863
Chamberlain v. Smith, 44 Pa. St. 431,	162	Chapman v. Speller, 14 Q. B. 621,	356
Chamberlain v. Williamson, 2 M. & S. 408, 287, 288		Chappel v. Brockway, 21 Wend. (N. Y.) 167,	2032, 2078
Chamberlin v. Ingalls, 38 Iowa, 300,	597	Chapple v. Cooper, 13 Mees. & W. 252,	1800
Chamberlin v. Murphy, 41 Vt. 110,	542	Chard v. Hamilton, 56 Hun, 259,	823
Chamberlin v. Perkins, 55 N. H. 237,	2257	Charles v. Byrd, 29 S. Car. 544,	631
Chamberlin v. Whitford, 102 Mass. 448,	192	Charles v. Hastedt (N. J. Ch. 1893), 51 N. J. Eq. 171,	1792
Chambers, <i>Ex parte</i> , L. R. 8 Ch. App. 289,	491	Charles v. People, 1 N. Y. 180,	1906
Chambers v. Chambers, 139 Ind. 111,	235	Charles River Bridge v. Warren Bridge, 11 Pet. 420,	884, 1240, 2135
Chambers v. Chambers, 92 Tenn. 707,	1763	Charlotte, The Bark, 9 Bened. 1,	276
Chambers v. Falkner, 65 Ala. 448,	1263	Charlton v. Mewcastle, etc., Ry. Co., 5 Jur. (N. S.) 1097,	2053, 2054
Chambers v. Ker, 6 Tex. C. App. 373,	1774	Charlton v. Scoville, 144 N. Y. 691,	842
Chambers v. Le Compte, 9 Mo. 575,	622	Charnley v. Winstanley, 5 East, 266,	488
Chambers v. Marks, 93 Ala. 412,	867	Charpiot v. Sigerson, 25 Mo. 63,	844
Chambers v. Ringstaff, 69 Ala. 140,		Chartered Bank of India v. Netherlands Steam Navigation Co., 9 Q. B. Div. 521,	741
Chambers v. Smith, 12 M. & W. 2,	764	Chartiers R. Co. v. Hodgkins, 85 Pa. St. 501,	157
Chambers v. State, 85 Ga. 220,	169	Chase v. Bailey, 49 Vt. 71,	1632
Chambers v. United States, 24 Ct. Cl. 387,	882	Chase v. Boughton, 93 Mich. 285,	2256
Chamblee v. Baker, 95 N. Car. 98,	148	Chase v. Bradley, 26 Maine, 531,	863
Chamness v. Cox, 2 Ind. App. 485,	785	Chase v. Dwinall, 7 Greenl. 134,	802, 807
Champ v. Kendrick, 130 Ind. 549,	2273	Chase v. East Tenn., etc., Railroad, 5 Lea, 415,	
Champion v. Joslyn, 44 N. Y. 653,	388, 412	Chase v. Everts, 19 N. Y. Supl. 987,	334
Champion v. Plummer, 1 Bos. & P. N. R. 252,	676	Chase v. Fitz, 132 Mass. 359,	618, 2170
Champion v. Short, 1 Camp. 53,	145	Chase v. Lowell, 7 Gray, 33,	675, 2127
Champlin v. Rowley, 13 Wend. 258,	2194	Chase v. Peck, 21 N. Y. 581,	434, 490, 1082
Champlin v. Rowley, 18 Wend. 187,	145	Chase v. Petroleum Bank, 66 Pa. St. 169,	1752
Chancellor v. Wiggins, 4 B. Mon. 201,	359	Chase v. Second Ave. R. Co., 97 N. Y. 384,	780
Chandelor v. Lopus, 1 Smith Lead. Cas. 294,	1878	Chase v. Sycamore R. Co., 38 Ill. 215,	157
Chandler v. Board of Education, 104 Mich. 292,	2266	Chaska, County of, v. Hedman, 53 Minn. 625,	1514
Chandler v. Commonwealth, 4 Metc. (Ky.) 66,	1802	Chatfield v. Paxton, 2 East, 471,	798
		Chatham Bank v. O'Brien, 6 Hun (N. Y.), 231,	1646

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

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Chattanooga R. Co. v. Evans, 66 Fed. Rep. 809,	1396	Chicago Gas Light Co. v. People's Gas Light Co., 121 Ill. 530,	
Chatterton v. Young, 2 Tenn. Ch. 768,	1750, 1751	1426, 1427, 1983, 2037, 2057, 2060	
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Cheddick v. Marsh, 21 N. J. Law, 463,	756	Chicago, etc., R. Co. v. Aurora, 99 Ill. 205,	864
Cheale v. Kenward, 3 De G. & J. 27,	232, 1208	Chicago, etc., R. Co. v. Ayres, 140 Ill. 644,	1421
Cheek v. Bellows, 17 Texas, 613,	1739	Chicago, etc., R. Co. v. Bartlett, 120 Ill. 603,	870
Cheever v. Wilson, 9 Wall. 108,	704	Chicago, etc., R. Co. v. Bell, 44 Neb. 44,	547
Cheltenham Stone Co. v. Gates Iron Works, 23 Ill. App. 635,	455	Chicago, etc., R. Co. v. Burlington R. Co., 34 Fed. Rep. 481,	297
Chemical Nat. Bank v. Armstrong, 59 Fed. Rep. 372,	1364	Chicago & Alton R. Co. v. Chicago, etc., Coal Co., 79 Ill. 121,	803
Chemical Nat. Bank v. Kohner, 85 N. Y. 189,	1633	Chicago, etc., Ry. Co. v. Chisholm, 79 Ill. 584,	792
Chenango, Bank of, v. Osgood, 4 Wend. 607,	569	Chicago, etc., R. Co. v. Dane, 43 N. Y. 240,	1921
Chenango Bridge Co. v. Binghamton Bridge Co., 27 N. Y. 87,	1240	Chicago, R. I., etc., R. Co. v. Denver & R. G. Co., 143 U. S. 596,	865, 875
Chenette v. Teehan, 63 N. H. 149,	2097	Chicago, etc., R. Co. v. Graham, 3 Ind. App. 28,	2105
Cheney v. Cook, 7 Wis. 413,	215, 684	Chicago, etc., R. Co. v. James, 22 Wis. 194,	1341
Cheney v. Duke, 10 Gill & J. (Md.) 11,	1902	Chicago, etc., R. Co. v. Hoyt, 89 Wis. 314,	
Cheney v. Eastern Transp. Line, 59 Md. 557,	97	Chicago, M. & St. P. Ry. Co. v. Hoyt, 149 U. S. 1,	269, 2237
Cheney v. Gleason, 117 Mass. 557,	2279	Chicago, etc., Railway Co. v. Lewis, 109 Ill. 120,	551, 588
Cheney v. Libby, 134 U. S. 68,	749	Chicago, etc., R. Co. v. Kansas City R. Co., 52 Fed. Rep. 178,	1585
Cheney v. Bigelow Wire Works v. Sorrell, 112 Mass. 442,	99	Chicago and Alton R. Co. v. N. Y., etc., R. Co., 24 Fed. Rep. 516,	1422
Cherry v. Clements, 10 Humph. (Tenn.) 557,	1699, 1750	Chicago, etc., R. Co. v. Ross, 8 Ind. App. 188,	2245
Cherry v. Heming, 4 Exch. Rep. 631,	655	Chicago R. Co. v. Sawyer, 69 Ill. 285,	276
Cherry v. Slade, 3 Murph. 82,	1083	Chicago R. Co. v. Schewe, 45 Iowa, 79,	157
Cherry v. Thompson, L. R. 7 Q. B. 573,	494	Chicago, etc., R. Co. v. Simms, 18 Ill. App. 68,	1937, 1968
Chesapeake & Ohio Canal Co. v. Hill, 15 Wall. 94,	853	Chicago, etc., Ry. Co. v. Titterington, 84 Texas, 218,	965
Chesapeake, etc., R. Co. v. American Ex. Bank, 23 S. E. Rep. 935,	1968	Chicago & E. R. Co. v. Towle, 10 Ind. App. 540,	1124
Chesapeake & O. Ry. Co. v. Miller, 114 U. S. 176,	2139	Chicago, R. I. & P. Ry. Co. v. Union Pacific Ry. Co., 47 Fed. Rep. 15,	1123
Chesapeake and Ohio Railroad v. Virginia, 94 U. S. 718,	1456	Chicago, etc., Ry. Co. v. Wabash, etc., Ry. Co., 27 U. S. App. 1,	2071
Chesham v. New York, etc., R. Co., 26 L. R. (N. Y.) 9,	2180	Chicago R. Co. v. Wabash, etc., R. Co., 61 Fed. Rep. 903,	1982, 1983
Chesham v. Conover, 140 N. Y. 382,	1980, 1994	Chicago, etc., R. Co. v. Witty, 32 Neb. 275,	1958, 1961
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Cheshire Banking Co., <i>In re</i> , L. R. 32 Ch. Div. 301,	61	Chicago Title Co. v. Smyth (Iowa 1895), 62 N. W. Rep. 792,	770
Chesman v. Nainby, 2 Ld. Raym. 1456,	301, 2045	Chickering v. Failes, 26 Ill. 507,	1033
Chesser v. DePrater, 20 Fla. 691,	996	Chilcott v. Trimble, 13 Barb. 502,	
Chester v. Dickerson, 54 N. Y. 1,	644	Child v. Pearl, 43 Vt. 224,	268, 772, 773, 2197
Chester v. Freeland, Ley R. 71,	301	Child v. Sun Mut. Ins. Co., 3 Sandf. 26,	932
Chesterfield, Earl of, v. Gausson, 1 White & T. Lead. Cas. Eq. 541,	1815	Childers v. Henderson, 76 Texas, 664,	985
Chesterfield v. Jansen, 1 Atk. 338,	1853	Chielhovitch v. Krauss (Cal.), 11 Pac. Rep. 781,	379
Chestnut v. Chestnut, 15 Ill. App. 390,	854	Childs v. O'Donnell, 84 Mich. 533,	327
Chestnut v. Harbaugh, 78 Pa. St. 473,	2102	Childs v. Shoemaker, 1 Wash. C. C. (U. S.) 494,	2184
Chew v. Bank, 14 Md. 299,	2276	Childs v. Wyman, 41 Maine, 433,	40
Chew v. Chew, 23 N. J. Eq. 471,	559, 560	Chilhowie Iron Co. v. Gardiner, 79 Va. 305,	1152
Chevrolet Lime Works v. Dismukes, 87 Ala. 344,	1421	Chillicothe, Bank of, v. Dodge, 8 Barb. 233,	802
Chicago v. Sheldon, 9 Wall. (U. S.) 50,	875, 1551, 2116, 2148	Chinock v. Marchioness of Ely, 4 De Gex, J. & S. 633,	5, 87, 97
Chicago v. Run, <i>plf.</i> 45 Ill. 90,	1504	Chipman v. Morrill, 20 Cal. 130,	826
Chicago, City of, v. Edwards, 58 Ill. 252,	2127	Chippewa Lumber Co. v. Tremper, 75 Mich. 34,	2077
Chicago Attachment Co. v. Davis, etc., 106, 112 Ill. 171,	836	Chippewa Valley R. Co. v. Chicago, etc., R. Co., 75 Wis. 221,	1989, 1994
Chicago Cheese Co. v. Fogg, 53 Fed. Rep. 72,	902	Chisholm v. Williams, 128 Ill. 115,	457
Chicago Dock Co. v. Kinzie, 49 Ill. 289,	592	Chittenden v. French, 21 Ill. 598,	871
Chicago, etc., Association v. Hunt, 127 Ill. 257,	1391		
Chicago, etc., Coal Co. v. Liddell, 69 Ill. 639,	694		
Chicago, etc., Co. v. Needles, 113 U. S. 574,	2133		
Chicago, etc., Co. v. Pullman, etc., Co., 129 U. S. 79,	2073		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Chittenden v. Woodbury, 32 Vt. 562,	1633	City Council of Montgomery v. Montgom-	
Chittoch v. Chittoch, 101 Mich. 367,	563	ery Water Works Co., 77 Ala. 248,	772
Choat v. Wright, 2 Dev. 289,	122	City, etc., Bank v. Stevens, 15 N. Y. Supl.	544
Cholmondeley v. Clinton, 2 Jac. & W. 1,	892	139,	
Chrisman v. State Ins. Co., 16 Ore. 283, 864,	867	City Electric R. Co. v. First Nat. Exch.	
Christian's Appeal, 102 Pa. St. 184,	1617	Bank (1896), 34 S. W. Rep. 89,	1341
Christian v. Bunker, 88 Texas, 234,	162	City Hotel, Proprietors of, v. Dickinson, 6	
Christian v. Niagara Ins. Co., 101 Ala. 634, 404		Gray, 586,	155
Christian, etc., Grocery Co. v. Water Sup-		City Ins. Co. v. Commercial Bank, 68 Ill.	
ply Co. (Ala. 1895), 17 So. Rep. 352,	1112	351,	725
Christie, <i>Ex parte</i> , 5 Paige (N. Y.), 242,	1814	City Loan Co. v. Cheney (Minn. 1895), 63	
Christie v. Keator, 49 Wis. 640,	2243	N. W. Rep. 250,	1621
Christy v. Barnhart, 14 Pa. St. 260,	844	City of Aberdeen v. Honey, 8 Wash. 251,	
Christy v. Burch, 25 Fla. 942,	1737		1507
Christy v. Stafford, 22 Ill. App. 430,	488	City of Alma v. Guaranty Sav. Bank, 60	
Chritch v. Holloway, 64 N. Car. 526,	1934	Fed. Rep. 203,	1531
Chrysler v. Canady, 90 N. Y. 272,	1879	City of Athens v. Hemerick, 89 Ga. 674,	1534
Chubb v. Upton, 95 U. S. 665,	1428	City of Aurora v. Cobb, 21 Ind. 492,	48
Chumassero v. Gilbert, 24 Ill. 293,	95	City of Aurora v. West, 22 Ind. 88,	1532, 1855
Church v. Brown, 21 N. Y. 315,	867	City of Baltimore v. City of New Orleans,	
Church v. Florence Iron Works, 45 N. J.		45 La. Ann. 526,	1469
Law, 129,	955	City of Beardsdown v. City of Virginia, 76	
Church v. Gilman, 15 Wend. 656,	90, 91	Ill. 34,	1587
Church v. Imperial Gas Co., 6 Ad. & El.		City of Boston v. Simmons, 9 Cush. 373,	375
846,	51, 773, 780	City of Brenham v. Brenham Water Co.,	
Church v. Kelsey, 121 U. S. 282,	2117	67 Texas, 542,	1566
Church v. Kendall, 121 Mass. 528,	1328	City of Bryan v. Page, 51 Texas, 532, 1500, 1588	
Church v. Shanklin, 95 Cal. 626,	130	City of Burlington v. Burlington Water	
Churchill v. Bradley, 11 J. & S. 170,	465	Co., 86 Iowa, 266,	113
Churchill v. Merchant's Bank, 19 Pick.		City of Burlington v. Burlington St. Ry.	
532,	768	Co., 49 Iowa, 144,	1582
Churchill v. Perkins, 5 Mass. 541,	1853	City of Camden v. Green, 54 N. J. Law,	
Churchman v. Indianapolis, 110 Ind. 259,	460	591,	804
Chute v. Pattee, 37 Maine, 102,	207	City of Carlyle v. Carlyle Water, Light &	
Chute v. Quincy, 156 Mass. 189,	1131	Power Co., 140 Ill. 445,	1519
Cicotte v. Corporation, etc., of Church of		City of Chaska v. Hedman, 53 Minn. 525, 1514	
St. Anne, 60 Mich. 552,	784	City of Chicago v. Babcock, 143 Ill. 353,	577
Cicotte v. Wayne Co., 59 Mich. 509,	1471	City of Chicago v. Edwards, 53 Ill. 252,	2127
Cincinnati Assurance Co. v. Rosenthal, 55		City of Cincinnati v. Cincinnati Gas Co.	
Ill. 90,	1265	(Ohio 1895), 41 N. E. Rep. 239,	879
Cincinnati, City of, v. Cincinnati Gas Co.		City of Corpus Christi v. Central Wharf	
(Ohio 1895), 41 N. E. Rep. 239,	879	Co., 8 Texas Civ. App. Rep. 94,	1510
Cincinnati Cooperage Co. (Ky. 1894), 26 S.		City of Corpus Christi v. Woessner, 58	
W. Rep. 539,	1235	Texas, 462,	1522, 1587
Cincinnati, etc., Coke Co. v. Avondale, 43		City of Council Bluffs v. Waterman, 86	
Ohio St. 268,	1530	Iowa, 688,	1512
Cincinnati Gas-Light and Coke Co. v.		City of Crawfordsville v. Braden, 130 Ind.	
Avondale, 43 Ohio St. 257,	1487	149,	1564, 1572
Cincinnati, etc., Gas Co. v. Western, etc.,		City of Dallas v. Brown (Texas Civ. App.	
Co., 152 U. S. 200,	158, 502, 505	1895), 31 S. W. Rep. 298,	1518
Cincinnati, etc., R. Co. v. Bensley, 51 Fed.		City of Detroit v. Hoser, Circuit Judge,	
Rep. 738,	188, 186, 187, 746, 785	79 Mich. 384,	1574
Cincinnati, etc., R. Co. v. Carthage, 86		City of Decorah v. Kesselmeier, 45 Iowa,	
Ohio St. 631,	2143	166,	872
Cincinnati, etc., Railroad v. Washburn,		City of Detroit v. Martin, 34 Mich. 170,	
25 Ind. 259,	2271		460, 807
Citizens' Bank v. City of Terrell, 78 Texas,		City of Detroit v. Michigan Paving Co.,	
450,	1517, 1533	36 Mich. 335,	1567
Citizens' Bank v. Graffin, 31 Md. 507,	798	City of Detroit v. Robinson, 38 Mich. 108,	
Citizens' Electric Light and Power Co. v.			1567
Sands, 95 Mich. 551,	1574	City of Detroit v. Whittemore, 27 Mich.	
Citizens' Gas, etc., Co. v. Town of Elwood,		281,	1512
114 Ind. 332,	1481, 1571	City of Duluth v. McDonnell (Minn. 1895),	
Citizens', etc., Association v. Coriell, 34		63 N. W. Rep. 727,	1477
N. J. Eq. 383,	1290, 2284	City of Durango v. Reinsberg, 16 Colo.	
Citizens', etc., Insurance Co. v. Doll, 35		327,	1474
Md. 89,	858	City of Erie, Appeal of, 91 Pa. St. 398,	
Citizens', etc., Association v. Lyon, 29 N.		563, 1568	
J. Eq. 110,	2284	City of East St. Louis v. East St. Louis	
Citizens' Saving and Loan Association v.		Gaslight and Coke Co., 98 Ill. 415, 1519, 1565	
Perry Co., 156 U. S. 692,	1534	City of Evansville v. Morris, 87 Ind. 269,	
Citizens' St. R. Co. v. City of Memphis, 53		2107, 2109	
Fed. Rep. 715,	1582	City of Evansville v. Summers, 108 Ind.	
City Bank v. Cutter, 3 Pick. 414,	767	189,	1910
City Bank v. Perkins, 29 N. Y. 554,	1128	City of Findlay v. Pertz, 66 Fed. Rep. 427	
City Bank v. Press Co. (1893), 56 Fed. Rep.			1591
280,	1355	City of Grand Haven v. Grand Haven	
City Building, etc., Association v. Jones,		Waterworks Co., 99 Mich. 106,	1044
82 S. Car. 308,	1683	City of Grand Rapids v. Blakely, 40 Mich.	
City Carpet Beating Works v. Jones, 102		367,	458, 459, 805
Cal. 506,	2027	City of Guthrie v. Territory, 1 Okl. 404,	
			1466, 1498

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

City of Houston v. Feeser, 76 Texas, 365,	804	City of St. Louis v. Schoenbusch, 95 Mich.	1472
City of Indianapolis v. Consumers' Gas,		618,	
etc., Co., 140 Ind. 107,	1481, 1572	City of St. Louis v. Shields, 62 Mo. 247,	1434, 1452
City of Indianapolis v. Imberry, 17 Ind.	1489	City of St. Louis v. Western Union Tel.	
175,		Co. (1893), 13 Sup. Ct. Rep. 485,	1556
City of Indianapolis v. Indianapolis Gas,		City of St. Louis v. W. U. Tel. Co., 148	
etc., Co., 66 Ind. 396,	1481, 1564	U. S. 92,	1582
City of Indianapolis v. Kingsbury, 101		City of St. Paul v. Colter, 12 Minn. 41,	1478
Ind. 200,	876	City of Sacramento v. Dunlap, 14 Cal.	
City of Indianapolis v. McAvoy, 86 Ind.		421,	172
587,	459	City of San Antonio v. French, 80 Texas,	
City of Indianapolis v. Skeen, 17 Ind. 628,	1931	575,	1500, 1522
City of Jersey City v. Lehigh Valley Ter-		City of San Diego v. San Diego & L. A. R.	
restrial R. Co., 55 N. J. Law, 203,	1581	Co., 44 Cal. 106,	1590
City of Kansas City v. Slangstrom, 53		City of Schenectady v. Trustees of Union	
Kan. 431,	821	College, 21 N. Y. Supl. 147,	1467
City of Lake View v. MacRitchie, 134 Ill.		City of Springfield v. Edwards, 84 Ill. 626,	
203,	897	1519, 1520	
City of Lexington v. Butler, 14 Wall. 232		City of Tampa v. Salomonson, 35 Fla. 416,	
1342,	1524	1479, 1480	
City of Lexington v. McQuillan's Heirs,		City of Taunton v. Wareham, 153 Mass.	
9 Dana, 513,	1542	192,	1849
City of Litchfield v. Ballow, 114 U. S. 190,	1539	City of Terrell v. Dessaint, 71 Texas, 770,	
City of Logansport v. Dykeman, 116 Ind.		1522, 1533, 1586,	1587
15,	1513	City of Valparaiso v. Gardner, 97 Ind. 1,	
City of London Gas Co. v. Nichols, 2 C. &		1519, 1520, 1564, 1565,	1568
P. 365,	810	City of Vincennes v. Citizens' Gaslight	
City of Louisville v. Henning, 1 Bush, 381,	460	Co., 132 Ind. 114,	1564, 1565
City of Louisville v. Muldoon, 94 Ky. 462,	2193	City of Valparaiso v. Moffit, 12 Ind. App.	
City of Louisville v. Murphy, 86 Ky. 53,	1470	250,	575
City of Louisville v. President, etc., of		City of Vicksburg v. Butler, 56 Miss. 72,	805
University of Louisville, 15 B. Mon.		City of Vincennes v. Citizens' Gaslight, etc.,	
(Ky.) 642,	2142	Co., 132 Ind. 114,	876, 1418
City of Louisville v. Zanone, 1 Metc.		City of Wabash v. Carver, 129 Ind. 552,	1535
(Ky.) 151,	799, 808	City Nat. Bank v. Hamilton, 34 N. J. Eq.	
City of Macon v. Dasher, 90 Ga. 195,	1468	153,	1676
City of Mound City v. Snoddy, 53 Kan. 126,	1512	City Nat. Bank v. Kusworm, 88 Wis. 188,	
City of Muscatine v. Keokuk, etc., Co., 45		1832, 1833	
Iowa, 185,	460, 803, 807	City Nat. Bank v. Phelps, 86 N. Y. 484,	195
City of Nashville v. Sutherland (Tenn.),		City Publishing Co. v. City of Jersey City,	
21 S. W. Rep. 674,	1513	54 N. J. Law, 437,	1550
City of New Albany v. Iron Substructure		Claffin v. Carpenter, 4 Metc. 580,	640
Co., 141 Ind. 500,	1585	Claffin v. Farmers', etc., Bank, 25 N. Y.	
City of New Albany v. McCullough, 127		1292, 1305	
Ind. 500,	1565	Claffin v. Gordon, 39 Hun. 51,	27
City of New Bedford v. Chace, 5 Gray		Claffin v. McDonough, 33 Mo. 412,	800
(Mass.), 23,	1660	Claffin v. Lenheim, 66 N. Y. 301,	949
City of New Haven v. New Haven R. Co.,		Claffin v. Ostrom, 54 N. Y. 316,	233
62 Conn. 252,	1583, 2209	Claffin v. Pfeiffer, 76 Texas, 469,	1681
City of New Orleans v. Fireman's Co., 43		Clancey v. Ononadaga, etc., Manufactur-	
La. Ann. 447,	373	ing Co., 62 Barb. (N. Y.) 395,	2058, 2060
City of New Orleans v. Wardens of St.		Clancy v. Piggott, 4 Nev. & Man. 496,	683
Louis Church, 11 La. Ann. 244,	1922	Clancy v. Piggett, 2 Ad. & E. 473,	610
City of New Orleans v. Great Southern		Clapham v. Shillito, 7 Beav. 146,	966
Telephone and Telegraph Co., 40 La.		Clapp v. Fullerton, 34 N. Y. 190,	1820
Ann. 41,	1583	Clapp v. Hoffman (Pa. 1894), 28 Atl. Rep.	
City of North Vernon v. Voegler, 103 Ind.		362,	995
314,	2166	Clapp v. Nordmeyer, 25 Fed. Rep. 71,	1645
City of Paterson v. Society, 24 N. J. Law,		Clapp v. Pawtucket Institution, 15 R. I.	
385,	2142	489,	573
City of Peria v. Calhoun, 29 Ill. 317,	1478	Clapp v. Peterson, 104 Ill. 26,	1380
City of Peru v. Gleason, 91 Ind. 566,	1513	Clarion Bank v. Jones, 21 Wall. 325,	152
City of Philadelphia v. Ridge Ave. Pass.		Clark v. Baker, 11 Metc. (Mass.) 186,	917
Ry. Co., 143 Pa. St. 444,	1584	Clark v. Bowen, 22 How. 270,	520
City of Plymouth v. Schultheis, 135 Ind.		Clark v. Busse, 82 Ill. 515,	2226
339,	1557	Clark's Case, 1 Blackf. 122,	2074
City of Port Huron v. McCall, 46 Mich.		Clark v. Cable, 21 Mo. 223,	829
565,	1499	Clark v. Clark, 103 Mass. 522,	251
City of Quincy v. Chicago, B. & Q. R. Co.,		Clark v. Glark, 10 N. H. 380,	2121
94 Ill. 537,	1435	Clark v. Constantine, 3 Bush (Ky.), 652,	1983
City of Quincy v. Warfield, 25 Ill. 317,	1539	Clark v. Cox, 32 Mich. 204,	1697
City of Richmond v. Dudley, 129 Ind. 112,		Clark v. Crosby, 37 Vt. 183,	2044
1557		Clark v. Dales, 20 Barb. 42,	73
City of Rochester v. Town of Rush, 80		Clark v. Davidson, 53 Wis. 317,	1181
N. Y. 302,	1502	Clark v. Devoe, 124 N. Y. 120,	25
City of Roxbury v. Boston, etc., R. Co., 6		Clark v. Dickinson, 74 N. Y. 47,	242
Cush. 424,	1439	Clark v. Draper, 19 N. H. 419,	458
City of St. Joseph v. Hamilton, etc., Rail-		Clark v. Dutcher, 9 Cow. 674,	800
road Co., 39 Mo. 476,	2140	Clark v. Fisher, 1 Paige (N. Y.), 171,	2278
City of St. Louis v. Alexander, 23 Mo. 483,	1390	Clark v. Fosdick, 118 N. Y. 7,	1758, 2010
City of St. Louis v. Bell Tel. Co., 96 Mo.			
623,	1580		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Clark v. Franklin, 7 Leigh, 1,		Clement v. Meserole, 107 Mass. 362,	496, 498
290, 2198, 2200, 2228, 2262		Clement v. N. Y. Central R. Co., 9 N. Y.	
Clark v. Gilbert, 26 N. Y. 279,	236, 948	Supl. 601,	406
Clark v. Hagar, 22 Can. (Sup. Ct.) 510,	2017	Clement's Appeal, 52 Conn. 464,	617
Clark v. Hart, 57 Ala. 390,	1066	Clements v. Lee, 114 Ind. 397,	1489
Clark v. Houghton, 12 Gray, 38,	957	Clements v. Cassilly, 4 La. Ann. 380,	171, 172
Clark v. Hodge (N. Car. 1895), 21 S. E.		Clements v. Neal, 1 Posey Unrep. Cas.	
Rep. 562,	1243	(Tex.) 41,	431
Clark v. Janesville, 13 Wis. 414,	1508	Clements v. Schuylkill, etc., R. Co., 132	
Clark v. Jones, 87 Ala. 474,	606, 1407	Pa. St. 445,	759
Clark v. Lillie, 39 Vt. 405,	855	Clements v. Yturria, 81 N. Y. 285,	1862
Clark v. Marbourg, 33 Kan. 471,	463	Clementson v. Williams, 8 Cranch, 72,	194
Clark v. Marsiglia, 1 Denio, 317,	280, 2213	Clerk v. Blackstock, Holt (N. P.), 474,	810
Clark v. Montgomery, 23 Barb. (N. Y.) 464,	1799	Clerk v. Wright, 1 Atk. 12,	843
Clark v. Parr, 14 Ohio, 118,	369	Cleveland v. Evans, 5 S. Dak. 53,	621
Clark v. Patterson, 158 Mass. 388,		Cleveland Ry. Co. v. Harrington, 131 Ind.	
	1707, 1745, 1754	426,	1520
Clark v. Pendleton, 20 Conn. 495,	227, 617, 654	Cleveland v. Pearl, 63 Vt. 127,	451
Clark v. People's Co., 46 Mo. App. 248,	360	Cleveland v. Sterrett, 70 Pa. St. 204,	388
Clark v. Powers, 45 Ill. 283,	1176	Cleveland v. Wolff, 7 Kan. 184,	1947
Clark v. Railroad Co., 36 N. Y. 135,	1433	Cleveland, etc., R. Co. v. Closser, 126 Ind.	
Clark v. Rawson, 2 Denio, 135,	816	348,	1983
Clark v. Reeder, 158 U. S. 505,	989	Cleveland, etc., R. Co. v. Zider, 61 Fed.	
Clark v. Ricker, 14 N. H. 44,	1860	Rep. 908,	922
Clark v. Russell, 116 Mass. 455,	1492	Cleveland Rolling Mill v. Rhodes, 121	
Clark v. Sawyer, 121 Mass. 224,	890	U. S. 255,	149, 347
Clark v. Shultz, 4 Mo. 235,	635	Cleveland Works v. Lang (N. H. 1893), 31	
Clark v. Spencer, 14 Kan. 398,	1997	Atl. Rep. 20,	698
Clark v. Tarbell, 58 N. H. 88,	722	Cleves v. Willoughby, 7 Hill, 83,	1102
Clark v. Terry, 25 Conn. 395,	692	Clifton v. Foster (Texas App.), 20 S. W.	
Clark v. Town of Rosedale, 70 Miss. 542,	1538	Rep. 1005,	573
Clark v. Trindle, 52 Pa. St. 492,	1688	Clifton v. Litchfield, 106 Mass. 34,	518
Clark v. Turnbull, 47 N. J. Law, 265, 213,	1831	Clifton v. Tulane, 48 N. J. Eq. 310,	208
Clark v. Tyler, 30 Gratt. 134,	32	Clinan v. Cooke, 1 Sch. & Lef. 22,	843, 1178
Clark v. Van Amburgh, 14 Hun, 557,	195	Cline v. Jones, 111 Ill. 563,	1195
Clark v. Warner, 6 Conn. 355,	557	Cline v. Libby, 46 Wis. 123,	160
Clark v. Weis, 87 Ill. 438,	115	Clinton v. Fly, 10 Maine, 292,	490
Clark v. Westrope, 18 C. B. 765,	300	Clinton v. Strong, 9 Johns. 370,	807
Clark v. Woodruff, 83 N. Y. 518,	874, 886	Clinton, etc., Manufacturing Co. v. Hum-	
Clarke v. Young, 1 Cranch. 181,	452	mel, 25 N. J. Eq. 45,	1686
Clarke v. Clarke, 17 B. Mon. 698,	560	Clippinger v. Hepbaugh, 5 Watts & S.	
Clarke v. Dutcher, 9 Cow. 674,	460	(Pa.) 315,	1992, 1995, 2082
Clarke v. Koenig, 36 Neb. 572,	1212	Clipson v. Villars, 151 Ill. 165,	679, 1198
Clarke v. Mayor, 111 N. Y. 621,	768	Clive v. Beaumont, 1 DeG. & S. 397,	73
Clarke v. Meigs, 10 Bosw. 337,	203	Clodfelter v. Hulett, 72 Ind. 1,	1079
Clarke v. Tyler, 30 Gratt. (Va.) 134,	2159	Clopper v. Union Bank, 7 Har. & J. 92,	452
Clarke v. Watson, 18 C. B. (N. S.) 278,	129	Close v. Caldwell, 47 Minn. 500,	360
Clarkeville Bldg. Assn. v. Stephens, 26 N.		Close v. Crossland, 47 Minn. 500,	354, 355, 359
J. Eq. 351,	1621	Close v. Dunn, 24 Kan. 372,	1145
Clason v. Bailey, 14 Johns. 484,		Close v. Glenwood Cemetery, 107 U. S. 466,	
	215, 674, 677, 688, 1109, 1111	1428, 1603	
Clason v. Morris, 10 Johns. (N. Y.) 524,	1644	Close v. Stuyvesant, 132 Ill. 607,	1141
Clavering v. Westley, 3 P. Wms. 402,	21-5	Clough v. Bowman, 15 N. H. 504,	884
Clay v. Allen, 63 Miss. 426,	1916	Clough v. Davis, 9 N. H. 500,	2109
Clay v. Ricketts, 66 Iowa, 362,	68	Clough v. Patrick, 37 Vt. 421,	234
Clay v. Walter, 79 Va. 92,	1711	Cloud v. Moorman, 18 Ind. 40,	2210
Clay v. Yates, 25 L. J. Ex. 237,	658	Clow v. Borst, 6 John. 37,	441, 442, 443, 445
Clay, County of, v. Society for Savings,		Clow v. Brown, 131 Ind. 287,	1374
104 U. S. 579,	1429	Clowe v. Imperial Pine Product Co., 114	
Claybrook v. Board, etc., of Rockingham		N. Car. 304,	1235
County, 114 N. Car. 453,	1515	Clunian v. Cook, 1 Sch. & Lef. 22,	99
Claypool v. Jaqua, 135 Ind. 499,	958, 1716	Clute v. Frasier, 58 Iowa, 268,	1065
Claypoole v. Houston, 12 Kan. 324,	1067	Clute v. Knies, 102 N. Y. 377,	1058
Clayton's Case, 1 Mer. 572,	468	Clyde v. Hubbard, 88 Pa. St. 358,	738
Clayton v. Andrews, 4 Burr. 2101,	656	Clyde v. Richmond H. Co., 63 Fed. Rep.	
Clayton v. Cagle, 97 N. Car. 300,	1244	21,	1436
Clayton v. Merrett, 52 Miss. 353,	444	Coal-Float v. City of Jeffersonville, 112	
Clayton v. Rose, 87 N. Car. 106,	1741	Ind. 15,	1478, 1520
Clearwater v. Meredith, 1 Wall. (U. S.) 25,	2053	Coalter v. Hurst, 97 Cal. 290,	470
Cleary v. Sohler, 120 Mass. 210,	292, 489, 2226	Coast Line R. Co. v. Mayor, etc., City of	
Cleary v. Municipal Co., 19 N. Y. Supl. 951,		Savannah, 30 Fed. Rep. 646,	1582, 1584
	554, 578, 581	Coates v. Gerlach, 44 Pa. St. 43,	1366
Cleaves v. Foss, 4 Greenl. 1,	674	Coates v. Donnell, 94 N. Y. 168,	1353, 1405
Cleaves v. Stockwell, 33 Maine, 341,	2210	Cobb v. Arnold, 8 Metc. 403,	210, 1473
Cleere v. Cleere, 82 Ala. 581,	465	Cobb v. Charter, 32 Conn. 358,	440, 2283
Clegg v. Edmonson, 3 De Cex. M. & G. 786,		Cobb v. Covenant, etc., Association, 153	
	1169	Mass. 176,	309, 310
Clelland v. James, 33 Iowa, 571,	956	Cobb v. Hatfield, 46 N. Y. 533,	412, 998
Clemans v. Supreme Assembly, etc., 131		Cobb v. Lime Rock, etc., Ins. Co., 58	
N. Y. 485,	307	Maine, 326,	931
Clement v. Cash, 21 N. Y. 253,	756	Cobb v. Malone, 36 Ala. 571	527, 544
		Cobb v. Elroy, 79 Iowa, 603,	882

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Cobb v. Prell, 15 Fed. Rep. 774,	2072	Cole v. Blake, Peake N. P. C. (239), 179,	490
Cobb v. Prell, 5 McCrary (U. S.), 80,	1926	Cole v. Cheovenda, 4 Colo. 17,	152
Cobb v. Reed, 2 Stew. (Ala.) 444,	2197	Cole v. Clark, 3 Pinney (Wis.), 303,	95
Cobb v. State, 100 Ala. 362,	46	Cole v. Clark, 85 Maine, 336,	74
Cobb v. Tirrell, 137 Mass. 143,	1632	Cole v. Cunningham, 133 U. S. 197,	725
Cobbe v. Knapp, 23 Neb. 575,	2244	Cole v. Dyer, 1 Cro. & Jer. 461,	683
Coburn v. Hartford, 38 Conn. 290,	890	Cole v. Edwards (Iowa), 61 N. W. Rep.	106, 2038
Coburn v. Herrington, 114 Ill. 104,	1642	940,	
Coburn v. Stevens, 137 Ind. 683,	29	Cole v. Gibson, 1 Vesey Sen. 503,	525
Cocheco, etc., Co. v. Whittier, 10 N. H.	805,	Cole v. Goodwin, 19 Wend. 251,	274
884		Cole v. Hutchinson, 34 Minn. 410,	600
Cochran v. Anglo-American Dry Dock Co.,		Cole v. Knight, 3 Mod. Rep. 277,	565, 556
69 Hun, 168,	1367	Cole v. La Grange, 113 U. S. 1,	2143
Cochran v. People's Ry. Co., 113 Mo. 359,	759, 760	Cole v. Lee, 45 N. J. Eq. 779,	1661
Cochran v. Pew, 159 Pa. St. 184,	959	Cole v. Lucas, 2 La. Ann. 946,	708
Cochran v. Tober, 14 Minn. 365,	746	Cole v. Parker, 7 Iowa, 167,	2088
Cochrane v. Justice Mining Co., 4 Colo.		Cole v. Pennoyer, 14 Ill. 158,	215, 1773
App. 234,	1213	Cole v. Potts, 10 N. J. Eq. 67,	843, 544
Cock v. Honychurch, T. Ray, 203,	508	Cole v. Saxby, 3 Esp. 159,	1776
Cocker v. Cowper, 1 Cromp. M. & R. 418,	643	Cole v. Shurtleff, 41 Vt. 311,	1651
Cockerell v. Aucompte, 2 C. B. (N. S.) 440,	108, 306	Cole v. Slinger, 60 Md. 248,	647
		Cole v. Skrainka, 105 Mo. 303,	1554
Cockrell v. Thompson, 85 Mo. 510,		Coleman v. Billings, 89 Ill. 183,	1033
1856, 1923, 1924, 1936		Coleman v. Burr, 93 N. Y. 17,	1687
Cockrell v. Warner, 14 Ark. 345,	2198	Coleman v. Chadwick, 80 Pa. St. 81,	924
Cocks v. Nash, 9 Bing. 341,	553	Coleman v. Coleman, 73 Ind. 344,	1384
Coddington v. Bispham, 36 N. J. Eq. 574,	2155	Coleman v. Ewing, 4 Humph. 240,	335
Coddington v. Goddard, 16 Gray, 436,	675, 676, 692	Coleman v. Eyre, 45 N. Y. 38,	214
		Coleman v. Gibson, 1 M. & R. 168,	666
Coddington v. Hoblit, 49 Ill. App. 66, 1878, 1-79	2185	Coleman v. Grubb, 23 Pa. St. 393,	875
Codman v. Jenkins, 14 Mass. 93,	2185	Coleman v. Henderson, 12 Am. Dec. 290;	2094
Coddington v. Paleologo, L. R. 2 Ex. 192,	150, 745	Littell's Select Cases (Ky.), 171,	
Coe v. Columbus, etc., R. Co., 10 Ohio St.	372,	Coleman v. Hiler, 85 Hun, 547,	131
1415, 1416		Colerick v. Hooper, 3 Ind. 316,	1176, 1177
Coe v. Hobby, 72 N. Y. 141,	12	Coleman v. Howe, 154 Ill. 458,	1372
Coe v. Smith, 4 Ind. 79,	284, 286	Coleman v. Hudson, 2 Sneed, 463,	152
Coe v. Wager, 42 Mich. 49,	784, 793	Coleman v. Whitney, 62 Vt. 123,	236, 244, 246
Coey v. Lehman, 79 Ill. 173,	897	Coles v. Hulme, 8 Barn. and Cr. 563,	95
Cofer v. Schening, 98 Ala. 383,	1722	Coles v. Pack, L. R. 5 C. P. 65,	204, 220
Coffee v. Emigh, 15 Colo. 1-4,	209, 211	Coles v. Peck, 96 Ind. 3-3,	1094
Coffee v. Ruffin, 4 Cold. (Tenn.), 4-7,	1026	Coles v. Pilkington, L. R. 19 Eq. Cas. 174,	844
Coffey v. Shuler, 112 N. C. 622,	1702	Coles v. Trecothick, 9 Ves. 234,	684, 690, 691, 692
Coffin v. Board of Kearney Co., 57 Fed.		Coll v. Board, 83 Mich. 233,	1523
Rep. 137,	1529	Collamer v. Day, 9 Vt. 144,	1947
Coffin v. City Council, 26 Iowa, 515,	1566	Collar v. Collar, 86 Mich. 507,	267
Coffin v. City of Indianapolis, 59 Fed. Rep.		Collar v. Collar, 75 Mich. 414,	900
221,	1532	Collar v. Patterson, 137 Ill. 403,	51, 194, 196, 789
Coffin v. Ransdell, 110 Ind. 417,	1374		
Coffin v. Reynolds, 21 Minn. 456,	408, 500	Collector v. Hubbard, 12 Wall. 1,	807
Coffing v. Hardy, 86 Ind. 369,	1726	Collender v. Dinsmore, 55 N. Y. 200,	42, 64, 925, 926, 2179
Coffman v. Lookout Bank, 5 Lea, 232,	1039, 1832	Colley v. Latimer, 5 Serg. & R. (Pa.) 211,	1779
Coggill v. Hartford, etc., Co., 3 Gray, 545,	162	Collier v. Baptist, etc., Society, 8 B. Mon.	68,
Coggs v. Bernard, 2 Salk. 523,	411	218, 256	
Coglan v. South Car., etc., R. Co., 112 U. S.		Collier v. Field, 1 Mont. Ter. 612,	543
101,	713, 1626	Collier v. Walters, L. R. 17 Eq. 252,	416
Cohee v. Baer, 134 Ind. 375,	1780	Collier v. White, 67 Miss. 133,	393, 415
Cohen v. Gale, L. R. 3 Q. B. D. 371,	417	Colling, <i>In re</i> , L. R. 32 Ch. Div. 333,	1173
Cohen v. L'Engle, 29 Fla. 655,	470, 474	Collins v. Blanton, 2 Wills. 341,	1873, 2083
Cohen v. Weinberg, N. Y. Daily Register,		Collins v. Bristol and Exeter R. Co., 11	736
Apr. 11, 1884,	1806	Exch. 790,	
Cohn v. Heimbauch, 86 Wis. 176,	2103	Collins v. Collins, 51 Miss. 311,	953
Cohn v. Mitchell, 115 Ill. 124,	489	Collins v. Collins, 45 N. J. Eq. 813,	1824
Coit v. Amalgamating Co., 119 U. S.		Collins v. Delaporte, 115 Mass. 159,	496, 867, 2213
843,	1374		
Coit v. Commercial Insurance Co., 7 Johns.		Collins v. Gibbs, 2 Burr. 899,	210
385,	926	Collins v. Houston, 138 Pa. St. 481,	163
Coit v. Planer, 4 Abb. Fr. (N. S.) 140,	776	Collins v. Karatopsky, 36 Ark. 316,	2170
Coit v. Stewart, 50 N. Y. 17,	2168	Collins v. Life Association, 3 Mo. App.	586,
Colburn v. Averill, 80 Maine, 310,	40	1313	
Colburn v. Phillip, 13 Gray, 64,	239	Collins v. Locke, L. R. 4 App. Cas. 674,	2060, 2074
Colby v. Colby, 81 Hun, 221,	1150		
Colby v. Sampson, 5 Mass. 312,	1853	Collins Co. v. Marcy, 25 Conn. 239,	641
Colchester, Town of, v. Culver, 29 Vt. 111,	1058	Collins v. Prosser, 1 B. & C. 682,	816
		Collins v. Sanger, 8 Texas Civ. App. 69,	1642
Colcord v. Leddy, 4 Wash. 791,	1760	Collins v. Underwood, 33 Ark. 265,	1746
Colf v. Railway Co., 87 Wis. 273,	1433	Collins v. Wilhoit, 108 Mo. 451,	168
Colgrove v. Solomon, 34 Mich. 494,	843	Collyer v. Collyer, 113 N. Y. 442,	776
Cole v. Bedford, 97 Mass. 326,	182	Colman v. Eastern Counties R. Co., 10	
Cole v. Berry, 42 N. J. Law, 808,	162	Beav. 1,	1257, 1421, 1430

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Coloma, Town of, v. Eaves, 92 U. S. 484, 1525, 1529, 1530	Commissioners v. Holcomb, 7 Ohio, 232, 1260
Colonial, etc., Mortgage Co. v. Bradley, 4 Dak. 158, 1654	Commissioners v. January, 94 U. S. 278, 1524
Colonial Mortgage Co. v. Stevens, 3 N. D. 265, 1719	Commissioners v. People, 133 Ill. 87, 2951
Colony v. Dublin, 32 N. H. 432, 2120	Commissioners v. Perry, 5 Ohio, 57, 214
Colorado Water Co. v. Adams, 5 Colo. Ct. App. 190, 1239, 1311	Commissioners v. Springfield, 36 Ohio St. 643, 472
Colson v. Meyers, 80 Ga. 490, 1948	Commissioners v. Walker, 8 Kan. 431, 440
Colson v. Thompson, 2 Wheat. 336, 1115, 1117, 1129, 1197	Commissioners of Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446, 1439
Columbia Bldg. Assn. v. Bollinger, 12 Rich. Eq. (S. Car.) 124, 1620	Commissioners of Delaware Co. v. An- drews, 18 Ohio St. 49, 1894
Columbia Turnpike Road v. Haywood, 10 Wend. 422, 762	Commissioners of Douglas County v. Bol- les, 94 U. S. 104, 1428
Columbus R. Co. v. Bridges, 86 Ala. 448, 276	Commissioners of Wabunsee County v. Walker, 8 Kan. 431, 806
Columbus, etc., R. Co. v. Powell, 40 Ind. 87, 1455	Commercial Bank v. Burgwyn, 110 N. C. 267, 1238
Columbus, etc., R. Co. v. Skidmore, 69 Ill. 566, 1458	Commercial Bank v. Jones, 18 Texas, 811, 1278
Columbus, etc., R. Co. v. Watson, 26 Ind. 60, 2271	Commercial Bank v. Pfeiffer, 22 Hun, 327, 774, 780, 1023
Colvin v. Phillips, 25 S. Car. 228, 196	Commercial Bank v. Varnum, 49 N. Y. 269, 736
Colvin v. Williams, 3 H. & J. (Md.) 38, 661	Commercial, etc., Bank v. Gillett, 90 Ind. 268, 671
Collwell v. Lawrence, 38 N. Y. 71, 756, 759	Commercial Telegram Co. v. Smith, 47 Hun, 494, 80
Colyear v. Musgrave, 2 Keen. 81, 238	Comptoir D'Escompte De Paris v. Dres- bach, 78 Cal. 15, 447
Coman v. Lakey, 80 N. Y. 345, 434	Compton v. Bunker Hill Bank, 96 Ill. 301, 1830, 1831
Combe v. Pitt, 3 Burr. 1423, 761	Compton v. Jesup (1895), 68 Fed. Rep. 263, 1415
Combes' Case, 9 Coke, 75, 1232, 1234	Compton v. Martin, 5 Rich. L. (S. Car.) 14, 655
Combination Steel Co. v. St. Paul Co., 47 Minn. 207, 453	Comstock v. Adams, 23 Kan. 513, 2007
Combs v. Scott, 12 Allen, 497, 1279, 1350	Comstock v. Coon, 135 Ind. 640, 1078
Combs v. Scott, 76 Wis. 662, 1172	Comstock v. Hopkins, 61 Hun, 189, 574
Comer v. Tabler, 44 Fed. Rep. 467, 1645	Comstock v. Morton, 36 Mich. 277, 614
Comes v. Lamson, 16 Conn. 246, 652, 693	Comstock v. Norton, 36 Mich. 277, 612
Comings v. Leedy, 114 Mo. 454, 1705	Comstock v. Purple, 49 Ill. 158, 232
Comly v. Hillegass, 94 Pa. St. 132, 1945	Comstock v. Smith, 7 Johns. 88, 193
Com. v. Alger, 7 Cush. (Mass.) 53, 1478	Conant v. National, etc., Bank, 121 Ind. 323, 331, 334
Commonwealth v. Brennan, 103 Mass. 70, 2128	Conaughty v. Nichols, 42 N. Y. 83, 2165, 2168
Com. v. City of Boston, 97 Mass. 555, 1556	Concordia, etc., Association v. Read, 93 N. Y. 474, 1600, 1627
Com. v. Cochituate Bank, 3 Allen, 42, 1378	Condon v. Kemper, 47 Kan. 126, 758
Com. v. Cullen, 13 Pa. St. 133, 1236	Condon v. South Side R. Co., 14 Gratt. (Va.) 302, 2249
Commonwealth v. Cummins, 155 Pa. 30, 519	Conduitt v. Ryann, 3 Ind. App. 1, 468, 469, 470, 471, 473
Commonwealth v. Eastern R. Co., 103 Mass. 254, 1439	Cone v. Russell, 48 N. J. Eq. 208, 1257
Commonwealth v. Fayette County R. Co., 55 Pa. St. 452, 2132, 2140	Confederate Note Case, 19 Wall. 548, 882, 883
Commonwealth v. Fitchburg R. Co., 12 Gray (Mass.), 180, 1439	Congdon v. Darcy, 46 Vt. 478, 6
Commonwealth v. Hancock Free Bridge Co., 2 Gray, 58, 1439	Conger v. Railroad Co., 120 N. Y. 29, 1123
Commonwealth v. Harrison, 11 Gray (Mass.), 309, 2100	Congregational Society v. Perry, 6 N. H. 164, 214, 255, 257
Commonwealth v. Has, 122 Mass. 40, 2094	Conkey v. Hart, 14 N. Y. 22, 2133
Com. v. Holmes, 25 Gratt. (Va.) 771, 1512	Conklin, Matter of, 8 Paige (N. Y.), 450, 1815
Commonwealth v. Kendig, 2 Pa. St. 448, 2102	Conklin v. Thompson, 29 Barb. 213, 1838
Com. v. King, 13 Metc. (Mass.) 115, 1557	Conkling v. City of Springfield, 132 Ill. 420, 462
Commonwealth v. Kinsley, 133 Mass. 578, 2128	Conkling v. King, 10 Barb. 372, 536
Commonwealth v. Knox, 6 Mass. 76, 2099	Conlan v. Roemer, 52 N. J. Law, 53, 991
Commonwealth v. Macloon, 101 Mass. 1, 719	Conley v. Meeker, 85 N. Y. 618, 38
Commonwealth v. Mitchell, 82 Pa. St. 343, 1544, 1546, 1552, 1553	Conley v. Nailor, 118 U. S. 127, 578
Commonwealth v. Nesbit, 34 Pa. St. 398, 2099	Conley v. Richmond, etc., R. Co., 109 N. Car. 692, 2174
Commonwealth v. Philadelphia, etc., Rail- road, 164 Pa. St. 252, 2136	Connecticut, etc., Ins. Co. v. Talbot, 113 Ind. 373, 1495
Commonwealth v. Pomeroy, 117 Ill. 143, 1811	Connecticut Ins. Co. v. Groom, 86 Pa. St. 92, 119
Commonwealth v. Potteryville Water Co., 94 Pa. St. 516, 2136	Connecticut Mutual Life Ins. Co. v. Cush- man, 108 U. S. 51, 2124, 2152, 2156
Commonwealth v. Proprietors of New Bedford Bridge, 2 Gray (Mass.), 339, 2130	Connecticut R. Co. v. Bailey, 24 Vt. 465, 259, 818, 1325
Commonwealth v. Suffolk Trust Co., 161 Mass. 550, 1361, 1362	Connelly v. Dunn, 73 Ill. 218, 1712
Commonwealth v. Trefethen, 157 Mass. 180, 1661	Conner v. Black (Mo. 1896), 33 S. W. Rep. 783, 1936
Commonwealth Ins. Co. v. Berger, 42 Pa. St. 285, 896	
Commissioners v. Aspinwall, 21 How. 539, 1524, 1534	
Commissioners v. Bolles, 94 U. S. 104, 1524	
Commissioners v. Clark, 94 U. S. 278, 1524	

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Conner v. Mackey, 20 Texas, 747,	2018	Coon v. Brook, 21 Barb. 546,	1703
Conner v. Robertson, 37 La. Ann. 814,	1917	Coon v. Citizens' Co., 152 Pa. St. 644,	372
Conner v. Tippet, 57 Miss. 594,	620	Coonley v. Anderson, 1 Hill, 519,	537
Conner v. Welch, 51 Wis. 431,	1005	Coonley v. Wood, 36 Hun, 559,	573
Connolly v. Hull, 3 McCord (S. Car.), 6,	1798	Cooper, <i>In re</i> , 6 Misc. R. (N. Y.) 501,	785
Connor v. Armstrong, 91 Ala. 265,	470	Cooper v. Allport, 10 Daly (N. Y.), 352,	1785
Connor v. Armstrong, 86 Ala. 262,	1054	Cooper v. Bill, 3 H. & C. 722,	669
Connor v. Black, 119 Mo. 126, 1856, 1923,	1936	Cooper v. Cooper, 147 Mass. 370,	781, 791
Connor v. Donnell, 55 Texas, 167,	727	Cooper v. Farmers', etc., Ins. Co., 50 Pa. St. 299,	320
Connor v. Mayor of New York, 5 N. Y. 285,	2127	Cooper v. Gum, 152 Ill. 471,	2287
Connor v. Tippet, 57 Miss. 594,	621	Cooper v. Lee, 75 Texas, 114,	1020
Conover v. Brown, 49 N. J. 156,	182	Cooper v. Lovering, 106 Mass. 77,	1878
Conover v. Insurance Co., 1 N. Y. 290,	1237	Cooper v. Mass. Mut. Ins. Co., 102 Mass. 227,	159
Conover v. Mutual Ins. Co., 1 N. Y. 290,	1351	Cooper v. McKee, 53 Iowa, 239,	156
Conover v. Pacific Express Co., 40 Mo. App. 31,	1966	Cooper v. Monroe, 77 Hun, 1,	843
Conover v. Stillwell, 34 N. J. Law, 54,	214	Cooper v. Parker, 14 C. B. 118,	213
10, 11, 198, 208, 210, 244		Cooper v. Pena, 21 Cal. 403,	1123
Conrad v. Kinzie, 105 Ind. 281,	2112	Cooper v. Reilly, 90 Wis. 427,	1021
Conroe v. Birdsall, 1 Johns. Ca. (N. Y.) 127,	1772	Cooper v. Southgate, 10 The Reports (Eng.) 552,	47
Conrow v. Little, 115 N. Y. 387,	945	Cooper v. Stanley, 40 Mo. App. 138,	1734
Consolidated Coal Co. v. Peers, 150 Ill. 344,	1242	Cooper v. Wormald, 27 Beav. 266,	619
Consolidated Fire Ins. Co. v. Cashow, 41 Md. 59,	897	Coos Bay Wagon Co. v. Crocker, 4 Fed. Rep. 577,	115
Continental Bank v. National Bank, 50 N. Y. 575,	955	Coosa, etc., Co. v. Barclay, 30 Ala. 120,	276
Continental Bank Note Co. v. United States, 154 U. S. 671,	770	Coosaw Mining Co. v. State, 144 U. S. 550,	1431
Continental Ins. Co. v. Miller, 4 Ind. App. 553,	118	Cooth v. Jackson, 6 Ves. Jr. 12, 675, 843, 853	168
Continental Insurance Co. v. Palmer, 42 Conn. 60,	1757	Coover v. Johnson, 86 Mo. 533,	168
Continental Insurance Co. v. Rogers, 119 Ill. 474,	318	Copas v. Anglo-Am. Provision Co., 73 Mich. 541,	—
Continental Insurance Co. v. Vanlue, 126 Ind. 410,	318	Copeland v. Boaz, 9 Baxter (Tenn.), 223, 2008	1883
Continental National Bank v. Strauss, 137 N. Y. 143,	1773	Copenrath v. Kienby, 83 Ind. 19,	1816, 2241
Contoocook R. Co. v. Barker, 32 N. H. 363,	154	Copley v. Hyland, 46 Minn. 205,	543
Conway, <i>Ex parte</i> , 4 Ark. 302,	1392	Coplay Iron Co. v. Pope, 108 N. Y. 232, 340, 504, 666	216
Conway v. Cable, 37 Ill. 82,	2120	Coppage v. Gregg, 127 Ind. 359,	2108
Conway v. Case, 22 Ill. 127,	388	Coppell v. Hall, 7 Wall. (U. S.) 542,	2108
Conyngnam v. Smith, 16 Iowa, 471,	237	Coppin v. Greeles & Ransom Co., 38 Ohio St. 275,	1259, 1260
Cook v. Allen, 67 N. Y. 57,	897	Coppock v. Bower, 4 Mees. & W. 361,	1883
Cook v. Anderson, 20 Ind. 15,	688	Corbaley v. State, 81 Ind. 62,	823
Cook v. Brown, 34 N. H. 460,	15	Corbett v. Clark, 45 Wis. 403,	446
Cook v. Barrett, 15 Wis. 596,	238, 609	Corbett v. Waterman, 11 Iowa, 86,	246
Cook v. Blake, 98 Mich. 389,	263	Corbin v. Tracy, 34 Conn. 325,	1210
Cook v. Boston, 9 Allen, 393,	458	Corcoran v. Chess, 131 Pa. St. 356,	932
Cook v. Bradley, 7 Conn. 57,	183	Corcoran v. Lehigh Coal Co., 138 Ill. 390, 1867	1867
Cook v. Brown, 34 N. H. 460,	91	Corcoran v. Lehigh and Franklin Coal Co., 37 Ill. App. 577,	1927
Cook v. City of Boston, 9 Allen, 393,	805	Corcoran v. Snow Cattle Co., 151 Mass. 71,	1352, 1358
Cook v. Doggett, 2 Allen, 439,	378	Cordes v. Miller, 39 Mich. 581,	708
Cook v. Elliott, 34 Mo. 586,	594	Corey v. Clarke, 55 Minn. 311,	1140
Cook v. Gray, 133 Mass. 106,	2184	Cork v. Baker, 1 Strange, 34,	227, 617
Cook v. Gray, 6 Ind. 335,	357	Cork R. Co., <i>In re</i> , 4 Ch. App. 748,	1246
Cook v. Hawkins, 16 S. W. Rep. 8,	916	Corkins v. Collins, 16 Mich. 477,	596, 610
Cook v. Johnson, 47 Conn. 175, 2040, 2044,	2015	Corkle v. Maxwell, 3 Blatchf. 413,	803
Cook v. Kelly, 9 Bos. 353,	401	Corley v. Williams, 1 Bailey, 553,	1880
Cook v. Kendall, 13 Minn. 324,	2158	Corn v. Matthews, L. R. (1893) 1 Q. B. 310,	1808
Cook v. Lister, 32 L. J. C. P. 121,	561	Corn Exch. Ins. Co. v. Babcock, 42 N. Y. 613,	1653
Cook v. McCabe, 53 Wis. 250,	290, 2228	Cornelius v. Wash, Breeze (Ill.), 98,	1987
Cook v. Moore, 18 Hun, 31,	609	Cornell v. Donovan, 14 Daly, 295,	35
Cook v. Moseley, 13 Wend. 277,	321, 327, 553	Cornell v. Green, 10 S. & R. 14,	407
Cook's Policy, L. R. 9 Eq. 703,	47	Cornell v. Masten, 35 Barb. 157,	543
Cook v. Stearns, 11 Mass. 533,	641	Cornell v. Moulton, 3 Donio, 12,	763
Cook v. Tullis, 13 Wall. 332,	472	Corner v. Sweet, L. R. 1 C. P. 456,	568
Cook v. Van Horn, 81 Wis. 291,	724	Corning, <i>In re</i> , 51 Fed. Rep. 205	—
Cook v. Walton, 33 Ind. 228,	1697	Corning v. McCullough, 1 N. Y. 47,	1388
Cook v. Wright, 1 B. & S. 559,	210, 1473	Cornish v. Suydam, 79 Ala. 620,	955
Cooke v. Bremond, 27 Texas, 457,	1680, 1682	Cornthwaite v. First Nat. Bank, 57 Ind. 268,	994
Cooke v. Millard, 65 N. Y. 352,	660	Cornwall v. Gould, 4 Pick. 444,	443, 780
Cooke v. Murphy, 70 Ill. 96,	956	Cornwall, Appeal of, 11 Am. St. Rep. 893,	898
Cooke v. Oxley, 3 T. R. 653,	58	Corpe v. Overton, 10 Bing. 252,	1783, 1796
Cooke v. Parsons, 2 Vern. 429,	1780	Corporation of Liverpool v. Wright, 28 L. J. Ch. 868,	2084
Cool v. Peters, etc., Co., 87 Hun, 531,	633, 671	Corpus Christi, City of, v. Central Wharf Co., 8 Texas Civ. App. Rep. 417,	1510
Coombs v. Bristol, etc., Ry. Co., 3 H. & N. 510,	664, 672		
Coombs v. MacDonald, 43 Neb. 632,	1479, 2055		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Corpus Christi City v. Woessner, 58 Texas, 462, 1518, 1522, 1587	Courtenay v. Fuller, 65 Maine, 156, 344
Corson v. Mulvany, 49 Pa. St. 88, 1147	Courtney v. Davidson, 6 La. Ann. 453, 1743
Corson v. Neatheney, 9 Colo. 212, 1947, 1948	Courtright v. Burns, 13 Fed. Rep. 317, 2004
Cort v. Ambergate, etc., R. Co., 6 Eng. Law and Eq. 230, 2221, 2222	Courtright v. Deeds, 37 Iowa, 503, 378, 414
Cort v. Ambergate R. Co., 17 Q. B. 127, 499	Couse v. Boyles, 4 N. J. Eq. 212, 110
Cort v. Lassar, 13 Ore. 221, 2073	Coutts v. Acworth, L. R. 8 Eq. 558, 253, 1018
Cortwin v. Wallace, 17 Iowa, 374, 139	Couturier v. Hastie, 8 Exch. 40, 613
Cory v. Board, 44 N. J. Law, 445, 1508	Covanhoven v. Hart, 21 Pa. St. 495, 1384
Cory v. Freeholders of Somerset, 44 N. J. Law, 445, 1549	Covel v. Turner, 74 Mich. 408, 784
Cosgrain v. Milwaukee County, 81 Wis. 1052	Coventry v. Barton, 17 Johns. (N. Y.) 142, 1975
Coster v. Mayor, 43 N. Y. 399, 237	Covert v. Rogers, 38 Mich. 363, 1405
Coster v. Phoenix Ins. Co., 2 Wash. C. C. (U. S.) 51, 897	Covill v. Geffery, 2 Roll. Rep. 96, 515
Cote, <i>Ex parte</i> , L. R. Ch. App. 27, 77	Cowan v. Abbott, 92 Cal. 100, 565
Cotbeal v. Talmage, 9 N. Y. 551, 753, 759	Cowan v. Musgrave, 73 Iowa, 884, 775, 789
Cotthran v. Cunningham, 28 Ga. 178, 1073	Cowan v. O'Connor, L. R. 20 Q. B. D. 640, 87
Cotthran v. Ellis, 125 Ill. 496, 1869	Cowan v. Radford Iron Co., 83 Va. 547, 995
Cotthran v. Scanlan, 34 Ga. 555, 398	Coward v. Coward, 148 Ill. 258, 1032
Cottage Street Church v. Kendall, 121 Mass. 523, 10, 178, 239, 255, 256, 257, 258, 260	Cowee v. Cornell, 75 N. Y. 91, 1018, 1824
Cotten v. McKenzie, 57 Miss. 418, 1887	Cowen v. Boyce, 6 Miss. (5 How.) 769, 2022
Cottrell v. Stevens, 10 Wis. 422, 238	Cowen v. West Troy, 43 Barb. 42, 2242
Cottle v. Cole, 20 Iowa, 481, 237, 248	Cowing v. Altman, 71 N. Y. 435, 1885
Cotting v. Grant St., etc., R. Co., 65 Fed. Rep. 645, 1296	Cowles v. Marble, 37 Mich. 135, 409
Cotton v. Cotton, 75 Ala. 345, 219	Cowles v. Whitman, 10 Conn. 121, 1209
Cotton v. Godwin, 7 M. & W. 147, 382	Cowley v. Davidson, 13 Minn. 92, 276
Cottrell, <i>Ex parte</i> , 2 Cow. 742, 226	Cowley v. Patch, 120 Mass. 137, 829, 832
Cottrell v. Citizens' Saving Bank, 53 Minn. 201, 1062	Cowper v. Green, 7 M. & W. 633, 563
Cotulla v. Laxson, 50 Texas, 443, 2087	Cox v. Bennett, 13 N. J. Law, 165, 955
Cotzhausen v. Simon, 47 Wis. 103, 990	Cox v. Bishop, 8 DeG. M. & G. 815, 2185
Couch v. Jeffries, 4 Burr. 2460, 2121	Cox v. Cox, 26 Pa. St. 375, 851
Couch v. Mills, 21 Wend. 424, 568	Cox v. Hazelip (Ky. 1893), 21 S. W. Rep. 1048, 1719
Couch v. Watson Coal Co., 46 Iowa, 17, 909	Cox v. Marlatt, 36 N. J. Law, 389, 2151
Coughran v. Bigelow, 9 Utah, 260, 868	Cox v. Miller, 54 Texas, 16, 1755
Coulson v. Portland, Deady, 481, 1519	Cox v. Reinhardt, 41 Texas, 591, 385
Coulter v. Board, 63 N. Y. 365, 464	Cox v. Stokes, 78 Hun, 331, 1444
Coulter v. Clark, 2 Ind. App. 512, 103	Cox v. United States, 6 Pet. 172, 695
Coulter v. Stafford, 56 Fed. Rep. 464, 2154	Cox v. Wells, 7 Blackf. 410, 1738
Couthart v. Clementson, L. R. 5 Q. B. D. 42, 60	Coxe v. State, 144 N. Y. 396, 36
Council Bluffs, City of, v. Waterman, 86 Iowa, 688, 1512	Coxe v. State Bank, 8 N. J. Law, 172, 393
Counterman v. Dublin Tp., 38 Ohio St. 515, 1540	Coxhead v. Mullis, L. R. 3 C. P. D. 439, 1806
Countess of Dunmore v. Alexander, 9 Shaw & Dunlap, 190, 77	Coxon v. Great Western Ry. Co., 5 H. & N. 274, 736
Countess of Rutland's Case, 5 Rep. 26, 553	Coy v. City Council, 71 Iowa, 515, 1566
County Court v. Boreman, 34 W. Va. 362, 1521	Coy v. Jones, 30 Neb. 798, 1385
County Judge of Shelby Co. v. Shelby R. Co., 5 Bush, 225, 1542	Coy v. Stucker, 31 Ind. 161, 212
County of Clay v. Society for Savings, 104 U. S. 579, 1429	Coyle v. Gray (Del. 1894), 30 Atl. Rep. 728, 1466
County of Crawford v. Pittsburgh R. Co., 32 Pa. St. 141, 156	Coyne v. Weaver, 84 N. Y. 386, 871, 872
County of Leavenworth v. Barnes, 94 U. S. 70, 1428	Coyner v. Lynde, 10 Ind. 282, 949
County of Macon v. Shores, 97 U. S. 272, 1428, 1535	Cozart v. Herndon, 114 N. Car. 252, 72, 1329
County of Morgan v. Allen, 103 U. S. 515, 858, 1400	Cozine v. Graham, 2 Paige Ch. 177, 693
County of Moultrie v. Rockingham Ten Cent Savings Bank, 92 U. S. 631, 1524	Crabill v. Marsh, 38 Ohio St. 331, 842
County of Piatt v. Goodell, 97 Ill. 84, 1033	Crabtree v. Levings, 53 Ill. 526, 1160
County of Ralls v. Douglas, 105 U. S. 728, 1535	Crabtree v. Messersmith, 19 Iowa, 179, 496, 2222
County of Richland v. County of Lawrence, 12 Ill. 1, 2143	Cracknall v. Janson, L. R. 11 Ch. D. 1, 88
County of Scotland v. Thomas, 94 U. S. 682, 1461	Craddock v. Dwight, 85 Mich. 581, 452, 453
County of Tipton v. Locomotive Works, 103 U. S. 523, 1461	Craft v. Baltimore, etc., Railroad Co. (Pa. Sup.), 8 Atl. Rep. 206, 584
County of Warren v. Marcy, 97 U. S. 96, 1524	Craft v. McConoughy, 79 Ill. 346, 1425, 1426, 1427, 1892, 2054, 2056, 2060, 2072
Coupland v. Arrowsmith, 18 Law T. R. (N. S.) 755, 684	Craft v. Railroad Co., 150 Mass. 207, 1341
Coupland v. Housatonic Railroad Co., 61 Conn. 531, 1965	Craft v. Smith, 35 N. J. Law, 302, 1549
	Craft v. South Boston R. Co., 150 Mass. 207, 1285, 1358
	Crafts v. Sweeney, 18 R. I. 730, 1573
	Cragie v. Hadley, 99 N. Y. 131, 2251
	Cragoe v. Jones, L. R. 8 Ex. 81, 533
	Craig v. Chambers, 17 Ohio St. 253, 797
	Craig v. Harper, 3 Cush. 158, 57
	Craig v. Van Beber, 100 Mo. 584, 1776, 1779, 1781, 1795, 1803
	Craig v. Weitner, 33 Neb. 484, 374
	Craig v. Wells, 11 N. Y. 315, 25, 52, 170
	Crain v. McGoon, 86 Ill. 431, 382
	Cramer v. Bradshaw, 10 Johns. 484, 325, 328
	Cramer v. Reford, 17 N. J. Eq. 367, 1686
	Crampton v. Ballard, 10 Vt. 251, 2210
	Crampton v. Zabriskie, 101 U. S. 601, 1438, 1521, 1545
	Crandall v. Schroepfel, 1 Hun, 577, 339
	Crane v. Ailing, 15 N. J. Law 423, 541, 538
	Crane v. Boudouine, 55 N. Y. 256, 788

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Crane v. Gough, 4 Md. 316, 618,	592, 849	Cromwell v. Royal Canadian Ins. Co., 49	
Crane v. Keck, 35 Nob. 583,	472	Md. 366,	731
Crane v. McDonald, 45 Barb. 354,	456	Cromwell v. Wilkinson, 18 Ind. 365,	743
Crane v. Patton, 57 Ark. 340,	2177	Cronin v. Tebo, 144 N. Y. 660,	842
Crane v. Peer, 43 N. J. Eq. 553,	1095	Croninger v. Crocker, 62 N. Y. 151,	124, 304
Crane v. Powell, 139 N. Y. 370,	592, 693	Cronise v. Clark, 4 Md. Ch. 403,	1772
Crane v. Stickles, 15 Vt. 252,	490	Cronise v. Cronise, 54 Pa. St. 255,	2122
Cranston v. Goss, 107 Mass. 439,		Crosbie v. McDoual, 13 Ves. 148,	851
1043, 2100, 2102, 2109, 2113		Crosby v. Fitch, 12 Conn. 410,	912
Cranston Print Works v. Dyer, 18 R. I.		Crosby Hardwood Co. v. Trester, 90 Wis.	
526,	1069	412,	670
Crapo v. Kelly, 16 Wall. 610,	739	Crosby v. President, etc., of Delaware	
Crary v. Bowers, 20 Cal. 85,	447	Canal Co., 141 N. Y. 589,	36
Cravens v. Eagle Cotton Mills Co., 120		Crosby v. Wadsworth, 6 East, 602,	638
Ind. 6,	864, 872, 945	Crosby v. Wood, 6 N. Y. 369,	187, 212
Cravens v. Eagle Cotton Mills Co., 120		Croskey v. Ladd, 96 Cal. 455,	1142
Ind. 600,	153	Cross v. Andrews, Croke Elizabeth, 622,	1838
Crawford v. Crawford, 1 Bailey, 128,	366	Cross v. Bean, 83 Maine, 61,	1157
Crawford v. King, 54 Ind. 6,	610	Cross v. Cross, 53 N. H. 373,	267, 2007
Crawford v. M'Elvy, 2 Speer, 225,	557	Cross v. Eglin, 2 B. & Ad. 106,	109, 305, 692
Crawford v. Millspaugh, 1 N. H. 281,	536	Cross v. Garnet, 3 Mod. 261,	321
Crawford v. Millspaugh, 13 Johns. 87,	562	Cross v. Huntly, 13 Wend. 385,	233
Crawford v. Morrell, 5 Johns. 253,	1111	Cross v. Johnson, 65 Ga. 717,	2208
Crawford v. Neal, 144 U. S. 585,	1646	Cross v. Kent, 32 Md. 581,	1838, 1839
Crawford v. Osmun, 94 Mich. 533,	396	Cross v. O'Donnell, 44 N. Y. 661,	662, 670
Crawford v. Paine, 19 Iowa, 172,	214, 406	Cross v. Pinckneyville Mill Co., 17 Ill. 54,	257
Crawford v. Roberts, 50 Cal. 162,	447	Cross v. Richardson, 30 Vt. 641,	592, 608, 609
Crawford v. Roberts, 8 Ore. 324,	572	Cross v. Sprigg, 6 Hare, 552,	515, 555
Crawford v. Satterfield, 27 Ohio St. 421,	161	Cross v. United States Mortgage Co., 108	
Crawford v. Schneider (Mich. 1895), 64		U. S. 477,	2121
N. W. Rep. 39,	1218	Cross v. Williams, 72 Mo. 577,	2209
Crawford v. Scovell, 94 Pa. St. 48,	1821	Crossan v. New York R. Co., 149 Mass. 196,	1286
Crawford v. Spencer, 92 Mo. 498,		Crossley v. Maycock, L. R. 18 Eq. 180,	73
1869, 1923, 1924, 1936		Crossman v. Johnson, 63 Vt. 333,	321, 333
Crawford v. Whitmore, 120 Mo. 144,	1733	Crossman v. Universal Rubber Co., 127	
Crawford v. Wick, 18 Ohio St. 190,	2077	N. Y. 34,	2275
Crawfordsville, City of, v. Braden, 130 Ind.		Crossman v. Wohleben, 90 Ill. 537,	207
149,	1564, 1572	Crotty v. Eagle's Adm'r, 35 W. Va. 143,	1771
Creagh v. Tunstall, 98 Ala. 249,	1841	Crouch v. Gutman, 45 N. Y. St. R. 470, 126, 127	
Crease v. Babcock, 4 Wheat. (U. S.) 518,	2130	Crouch v. Gutmann, 134 N. Y. 45,	
Creechius v. Horst, 89 Mo. 356,	1712	140, 371, 372, 2232	
Cree v. Sherfy, 138 Ind. 354,	971	Crow v. Ry. Co., 25	
Creed v. Railroad Co., 86 Pa. St. 139,	1432	Eng. L. & Eq. 287,	736
Creighton v. City of Toledo, 18 Ohio St.		Crow v. Beardsley, 68 Mo. 435,	1389
447,	779	Crow v. Gleason, 20 N. Y. Supl. 590,	466
Creighton v. Comstock, 27 Ohio St. 548,	306	Crow v. Rogers, 1 Strange, 592,	237, 238
Cremer v. Higginson, 1 Mason, 323,	473	Crowder v. Reed, 80 Ind. 1,	1853, 2082
Crenshaw v. United States, 134 U. S. 99,	2126	Crowder v. Town of Sullivan, 128 Ind. 486,	
Cresap v. Manor, 63 Texas, 485,	428	1519, 1560, 1564, 1565	
Crescent Mfg. Co. v. Nelson Mfg. Co., 100		Crowe v. Lewin, 95 N. Y. 423,	245
Mo. 325,	2217	Crowell v. Currier, 27 N. J. Eq. 152,	246
Crescent Min. Co. v. Wasatch Min. Co.,		Crowell v. Hospital of St. Barnabas, 27	
151 U. S. 317,	1083	N. J. Eq. 650,	246, 247, 248
Cressler v. Rees, 27 Neb. 515,	991	Crowninshield v. Crowninshield, 2 Gray	
Cresswell v. Wood, 10 Adol. & El. 460,	599	(Mass.), 524,	1811
Crest v. Jack, 3 Watts 263,	1-6	Crowley v. Genessee Mining Co., 55 Cal.	
Creswell v. Lanahan, 120 U. S. 256,	1359	273,	1318, 1341, 1355
Crintz v. Heil, 89 Ky. 429,	209, 212, 213	Crowthew v. Farrer, 15 Q. B. 677,	531
Crews v. State, 88 Ind. 28,	1955	Crozier v. Ragan, 38 La. Ann. 154,	1742
Cribbs v. Sowle, 87 Mich. 340,	1835	Cruess v. Fessler, 39 Cal. 336,	1879
Crim v. Fitch, 53 Ind. 214,	1183	Cruickshanks v. Rose, 1 M. & Rob. 100,	471
Criombie v. Overholtzer, 11 Up. Can.		Crumlish v. Central Imp. Co., 38 W. Va.	
(Q. B.) 681,	2114	390,	444
Crippen v. Culver, 13 Barb. (N. Y.) 424,	1814	Crumlish v. Wilmington R. Co., 5 Del. Ch.	
Crippen v. Hopo, 38 Mich. 344,	543	270,	128
Crisdee v. Bolton, 3 C. & P. 240,	757	Crump v. United States Mining Co., 7	
Crisfield v. Murdock, 127 N. Y. 315,	827	Gratt. 352,	1331, 1543
Crisman v. Hodges, 75 Mo. 413,	877	Cruse v. Jones, 3 Lea, 66,	1189
Crist v. Armour, 34 Barb. 378,	495	Crutchfield v. Donathon, 49 Texas, 691,	1199
Criswell's Appeal, 100 Pa. St. 488,	1599	Crutwell v. Lye, 17 Ves. 336,	2046
Crocker v. Hill, 61 N. H. 345,	853	Crymble v. Mulvaney (Colo. 1895), 40 Pac.	
Crocker v. Hutchinson, 1 Vt. 73,	797	Rep. 499,	1298
Crocker v. New London, etc., R. Co., 24		Crystal Ice Mfg. Co. v. San Antonio Brew-	
Conn. 249,	55	ing Ass'n, 8 Texas Civ. App. 1,	2075
Crockett v. Doriot, 85 Va. 240,	1746	Cubberly v. Cubberly, 33 N. J. Eq. 82,	245
Crockett v. Scribner, 64 Maine, 447,	658	Cudd v. Williams, 39 S. Car. 452,	1751
Crofoot v. Bennett, 2 N. H. 258,	660	Cuff v. Penn., 1 M. & S. 21,	690
Croft v. Hanover Ins. Co. (W. Va. 1895),		Culbertson Power Co. v. Wildman, 45 Neb.	
31 S. E. Rep. 854,	1088, 1097	663,	961
Croft v. Lumley, 5 E. & B. 648,	469	Cullers v. James, 66 Texas, 494,	1760
Cromwell v. County of Sac, 96 U. S. 51,	730	Culp v. Jones (Texas 1894), 24 S. W. Rep.	
Cromwell v. County of Sac, 94 U. S. 351,	31	1123,	1760

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Cumber v. Wane, 1 Str. 426,	189, 458, 519, 520	Curtis v. Watson, 64 Vt. 549,	374, 1288, 2178
Cumber v. Ware, 1 Smith Lead. Cas. (337) 633,	538	Curtis v. Whitney, 13 Wall. (U. S.) 68,	2119
Cumberland Coal & Iron Co. v. Parish, 42 Md. 598,	1307	Curtiss v. Ayrault, 47 N. Y. 78,	2077
Cumberland Valley R. Co. v. Baab, 9 Watts 458,	156, 1978	Curtiss v. Hoyt, 19 Conn. 154,	643
Cummer v. Butts, 40 Mich. 322,	98	Cusack v. Mutual Ins. Co., 6 Low. Can. Jur. 97,	895
Cumming, <i>In re</i> , L. R. 5 Ch. App. 72,	1173	Cusack v. Robinson, 1 B. & S. 299,	662, 263
Cumming v. Antes, 19 Pa. St. 287,	867	Cushing v. Inhabitants of Stoughton, 6 Cush. (Mass.) 389,	1473
Cumming v. Williamson, 1 Sandf. Ch. 17,	1369	Cushing v. Stoughton, 6 Cush. 393,	210
Cummings v. Arnold, 3 Mete. (Mass.) 486,	689, 950, 951, 954,	Cushing v. Wyman, 44 Maine, 121,	470
Cummings v. Baars, 36 Minn. 350,	558	Cushman v. Burritt, 14 N. Y. Week. Dig. 59,	618, 674
Cummings v. Hausen, 63 How. Pr. 351,	2211	Cushman v. New England F. Ins. Co., 65 Vt. 569,	1085
Cummings v. Martin, 128 Ind. 20,	1654	Cushman v. Thayer Manufacturing Co., 76 N. Y. 365,	1209
Cummings v. Noyes, 10 Mass. 433,	781	Custer v. Tompkins Co. Bank, 9 Pa. St. 27,	1258
Cummings v. People, 50 Ill. 132,	830	Cutler v. Babcock, 81 Wis. 195,	1201
Cummings v. Pence, 1 Ind. App. 317,	116, 144, 148	Cutler v. Good, 43 Hun, 516,	399, 400
Cummings v. Powell, 8 Texas 80,	215, 1773	Cutler v. Pope, 13 Maine, 377,	640
Cummings v. Saux, 30 La. Ann. 207,	1425, 1853	Cutler v. Roberts, 7 Neb. 4,	171
Cummings v. Vorce, 3 Hill, 283,	782	Cutler v. Wright, 22 N. Y. 472,	726, 729
Cummins v. Barkalow, 4 Keyes (N. Y. App.), 514,	1963	Cutler v. Zollinger, 117 Mo. 92,	1819
Cummins v. City of Seymour, 79 Ind. 491,	1481	Cutliff v. McAnally, 88 Ala. 507,	289
Cummins v. Kennedy, 3 Litt. 118,	364	Cutter v. Emery, 37 N. H. 567,	599
Cundiff v. Corley (Texas App.), 27 S. W. Rep. 167,	404	Cutter v. Hamlen, 147 Mass. 471,	2169
Cunliffe v. Harrison, 6 Ex. 903,	304	Cutter v. Powell, 2 Smith L. C. 1,	113
Cunningham v. Blake, 121 Mass. 333,	1139	Cutter v. Powell, 6 T. R. 320,	285, 890
Cunningham v. Brown, 44 Wis. 72,	101	Cutter v. Whittemore, 10 Mass. 442,	172
Cunningham v. Jones, 20 N. Y. 486,	148	Cutting v. Dana, 25 N. J. Eq. 265,	58
Cunningham v. National Bank of Augusta, 71 Ga. 400,	1923, 1930	Cutting v. Lincoln, 9 Abb. Pr. (N. S.), 436,	1844
Cunningham v. Norton, 125 U. S. 77,	153	Cuxon v. Chadley, 3 B. & C. 591,	535
Cunningham v. Reardon, 98 Mass. 538,	777	Cuykendall v. Corning, 88 N. Y. 130,	1376
Cupp v. Campbell, 103 Ind. 213,	1725	Cuyler v. Cuyler, 2 Johns. 186,	568
Curran v. Delaware R. Co., 63 Hun, 628,	943	Cyclone Steam Co. v. Vulcan Iron Works, 52 Fed. Rep. 920,	—
Curran v. Delaware, etc., R. Co., 138 N. Y. 480,	1286		
Curran v. Rummell, 118 Mass. 482,	511, 512, 519		
Curran v. State, 15 How. (U. S.) 304,	1365, 1400, 2116		
Curran v. Witter, 68 Wis. 16,	2248		
Current v. Fulton, 10 Ind. App. 617,	945		
Currie v. Anderson, 2 E. & E. 592,	667, 668		
Currier v. Bilger, 24 Atl. Rep. 168,	565		
Currie v. Bowman, 25 Ore. 364,	1368		
Currier v. Boston and Maine R., 34 N. H. 498,	862		
Currier v. Currier, 2 N. H. 75,	490		
Currie v. Kennedy, 78 N. C. 91,	536		
Currier v. Lebanon Slate Co., 56 N. H. 262,	1403		
Currie v. Misa, L. R. 10 Ex. 153,	178, 230, 447		
Currie v. Natchez J. & C. R. Co., 61 Miss. 725,	1976		
Curry v. Board, etc., 61 Iowa, 71,	1543		
Curry v. Curry, 10 Hun, 366,	1715		
Curry v. Rogers, 21 N. Y. 247,	257		
Curry v. Scott, 54 Pa. St. 270,	1462		
Curtin v. Patton, 11 Serg. & Raw. 305,	215, 1772, 1773		
Curtis, <i>In re</i> , 64 Conn. 501,	881, 899, 900		
Curtis v. Aspinwall, 114 Mass. 187,	2001		
Curtis v. Bowrie, 2 McLean, 374,	829		
Curtis v. Brown, 5 Cush. 488,	609		
Curtis v. Burdick, 48 Vt. 166,	2243		
Curtis v. Delaware R. Co., 74 N. Y. 116,	734		
Curtis v. Gokey, 68 N. Y. 300,	872, 1225, 1906, 2047		
Curtis v. Leavitt, 15 N. Y. 9,	1903, 2125		
Curtis v. Mansfield, 11 Cush. 152,	822		
Curtis v. Morton, 20 Ill. 558,	189		
Curtis v. Piedmont Co., 109 N. C. 401,	1235		
Curtis v. Portland, etc., Bank, 77 Maine, 151,	250, 252		
Curtis v. Pugh, 10 Q. B. 111,	666		
Curtis v. Sage, 35 Ill. 22,	651, 655		
Curtis v. Smith, 48 Vt. 116,	496		
		D	
		D. M. Osborne & Co. v. Stringham, 1 S. Dak. 406,	956
		Dabney v. Stevens, 40 How. Pr. 341,	1341, 1350
		Dacosta v. Hatch, 24 N. J. Law, 319,	695
		Dacosta v. Davis, 24 N. J. Law, 319,	697, 712, 721
		Dacosta v. Jones, 2 Cowp. 729,	1914, 1944
		Daft v. Drew, 40 Ill. App. 266,	118
		Daggett v. Johnson, 49 Vt. 345,	132, 134, 160
		Dahlman v. Hammel, 45 Wis. 466,	684
		Dahm v. Barlow, 93 Ala. 120,	631
		Daily v. City of New Haven, 60 Conn. 314,	2209
		Daily v. Litchfield, 10 Mich. 29,	1142
		Daily v. Robinson, 86 Ind. 382,	823
		Dake Engine Mfg. Co. v. Hurley, 99 Mich. 16,	338
		Dakin v. Dakin, 97 Mich. 284,	563, 1206
		Dakin v. Dunning, 7 Hill, 30,	407
		Dakin v. Rumsey (Mich. 1895), 62 N. W. Rep. 990,	967
		Dakin v. Williams, 17 Wend. 447,	761
		Dakin v. Williams, 11 Wend. (N. Y.) 67,	2044
		Dalbey v. Pullen, 3 Sim. 29,	1156
		Dale v. Hamilton, 5 Hare, 369,	644
		Dale v. Lincoln, 62 Ill. 22,	15
		Dale v. Smith, 1 Del. Ch. 1,	110
		Dallas v. Columbia Iron Co., 158 Pa. St. 444,	1285
		Dallas, City of, v. Brown (Texas Civ. App. 1895), 31 S. W. Rep. 298,	1518
		Dallas Co. v. Huidekoper, 154 U. S. 654,	1428
		Dalton v. Murphy, 30 Miss. 59,	714
		Daly v. Brennan, 87 Wis. 36,	1004
		Daly v. Proetz, 20 Minn. 411,	385
		Daly v. Smith, 49 How. Pr. (N. Y.) 150,	2073
		Dalzell v. Fahys Watch Case Co., 138 N. Y. 285,	2194, 2233
		Damon v. Granby, 2 Pick. 345,	1491
		Dana v. Bank, 5 Watts & S. 223,	1405

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Dana v. Coombs, 6 Maine, 89,	1779	Davies v. Davies, L. R. 36 Ch. Div. 359,	2034, 2047, 2050, 2051
Dana v. Fiedler, 12 N. Y. 40,	42, 870, 2179	Davies v. Davies, 9 C. & P. 87,	789
Dana v. Hancock, 30 Vt. 616,	689	Davies v. London, etc., Insurance Co., L.	1828
Dana v. Taylor, 150 Mass. 25,	543, 545	R. 8 Ch. D. 469,	
Danforth v. Dewey, 3 N. H. 79,	2257	Davies v. Second Shatham, etc., Building	1616
Danforth v. Laney, 28 Ala. 274,	844	Society, 61 L. T. (N. S.) 680,	681
Danforth v. Railway Co., 30 N. J. Eq. 12,	1121	Davies v. Otty, 35 Beav. 208,	492
Danforth v. Streeter, 28 Vt. 490,	2242	Davis, <i>Ex parte</i> , L. R. 3 Ch. Div. 463,	674
Danforth v. Walker, 37 Vt. 239,	2213	Davis, Matter of, 7 Daily (N. Y.), 1,	127, 144
Daniel v. McRae, 2 Hawk. N. Car. 590,	823	Davis v. Badders, 95 Ala. 348,	818, 889, 2190
Daniel v. Collins, 57 Ala. 627,	1116, 1118	Davis v. Bowker, 1 Nev. 487,	550
Daniels v. Bailey, 43 Wis. 566,	633, 645	Davis v. Bronson, 9 N. D. 300,	2213
Daniels v. Barney, 22 Ind. 207,	1931	Davis v. Calloway, 30 Ind. 112,	246
Daniels v. Eisenbeck, 10 Mich. 454,	490	Davis v. Cary, 15 Q. B. 418,	281
Daniels v. Hallenbeck, 19 Wend. 408,	543	Davis v. Christian, 15 Gratt. 11,	616
Daniels v. Hatch, 21 N. J. Law, 391,	190, 519	Davis v. Coleman, 7 Ired. L. 424,	307
Daniels v. Hudson, etc., Insurance Co., 12		Davis v. County of Yuba, 75 Cal. 452,	33
Cush. 416,	717, 731	Davis v. Davis, 1 Nott & McCord, 224,	559
Daniels v. Kyle, 1 Kelly, 304,	452	Davis v. Davis, 20 Ore. 78,	194
Daniels v. Newton, 114 Mass. 530,	496, 499	Davis v. Davis, 119 Ind. 511,	1930
Daniels v. Tearney, 102 U. S. 415,	996	Davis v. Davis, 25 Gratt. (Va.) 587,	1718
Dann v. Spurrier, 3 B. & P. 399,	894	Davis v. Duke of Marlborough, 1 Swanst.	2084
Dannat v. Fuller, 120 N. Y. 554,	137, 747	74,	385
Dant v. Head, 90 Ky. 255,	655	Davis v. Eppinger, 18 Cal. 381,	
Danube & Black Sea Co. v. Xenos, 13 C.		Davis v. First Nat. Bank, 5 Neb. 242,	1652, 1723
B. (N. S.) 825,	493, 494, 2222	Davis v. Foreman, L. R. (1894) 3 Ch. 654,	2265
Danville, Town of, v. Pace, 25 Gratt. (Va.)	2125	Davis v. French, 20 Maine, 21,	593
1,	464	Davis v. Garrett, 91 Tenn. 147,	13
Danziger v. Hoyt, 120 N. Y. 190,	2182	Davis v. Giddings, 30 Neb. 209,	163
Darby v. Berney Nat. Bank, 97 Ala. 643,	558	Davis v. Goodenow, 27 Vt. 715,	789
Darland v. Taylor, 52 Iowa, 503,	383	Davis v. Gray, 16 Wall. (U. S.) 203,	2126
Darling v. Chapman, 14 Mass. 101,	633	Davis v. Ham, 3 Mass. 33,	563
Darling v. Cumming (Va. 1896), 23 S. E.	1835	Davis v. Hunt, 2 Schoales & L. 348,	1171
Rep. 880,	432	Davis v. Hone, 2 Bailey, 412,	356
Darling v. Hines, 5 Ind. App. 319,	1017, 1018	Davis v. Iverson (S. Dakota), 58 N. W.	332
Darlington's Appeal, 86 Pa. St. 512,	1016	Rep. 796,	114
Darlington's Estate, 147 Pa. St. 624,	1179	Davis v. Jeffrey (S. Dak.), 58 N. W. 815,	1228
Darlington v. McCoolle, 1 Leigh, 36,	43	Davis v. Jenney, 1 Met. (Mass.) 221,	1988
Darlington Iron Co. v. Foote, 16 Fed.	2177	Davis v. Jones Admr., 94 Ky. 320,	1948
Rep. 646,	1239	Davis v. Kenaga, 51 Ill. 170,	798
Darnall v. Lyon (1892 Texas App.), 19 S.		Davis v. Krum, 12 Mo. App. 279,	207
W. Rep. 506,	2177	Davis v. Lane, 10 N. H. 156,	1028
Darst v. Perfect, 42 Neb. 574,	1239	Davis v. Latta (Iowa 1895), 62 N. W. Rep.	1830, 1832
Dartmouth College Case, 4 Wheat. 518,	2177	17,	2039
Dartmouth College v. Woodward, 4 Wheat.	518, 1348, 1481, 1581, 1583, 2122, 2124, 2127, 2130	Davis v. Luster, 64 Mo. 43,	1489, 1491
Dash v. Van Kleeck, 7 Johns. (N. Y.) 477,	2121	Davis v. Mason, 5 T. R. 118,	637
	1875	Davis v. Mayor, etc., 93 N. Y. 250,	399
Daskam v. Neff, 79 Wis. 161,	1902, 1903	Davis v. McFarlane, 37 Cal. 634,	
Dater v. Earl, 3 Gray (Mass.), 482,	604	Davis v. Miller, 14 Gratt. 1,	
Daugherty v. Bach, 167 Pa. St. 420,	1171	Davis v. Montgomery, etc., Chemical Co.	1308
Daughdrill v. Edwards, 59 Ala. 424,	123	(Ala.), 8 So. Rep. 496,	662
Daugherty v. Fowler, 44 Kan. 628,	140, 375	Davis v. Moore, 13 Maine, 424,	715, 719
Dauchey v. Drake, 85 N. Y. 407,	1238	Davis v. Morton, 5 Bush, 160,	188
D'Autremont v. Fire Association of Phil-	1725	Davis v. Munson, 43 Ver. 676,	250
adelphia, 20 N. Y. Supl. 344,	1519, 1521	Davis v. Ney, 125 Mass. 590,	517
Daven v. State, 7 Ind. App. 71,	847	Davis v. Nokes, 3 J. J. Marsh. (Ky.) 494,	194
Davenport v. Kleinschmidt, 6 Mont. 502,	163	Davis v. Noyes, 15 N. Y. Supl. 431,	
	553	Davis v. Old Colony, etc., Railroad Co.,	1576
Davenport v. Mason, 15 Mass. 85,	654	131 Mass. 258, 1257, 1263, 1285, 1421, 1430,	453
Davenport v. Shants, 43 Vt. 546,	1856	Davis v. Parsons, 157 Mass. 581,	602, 616
Davey v. Prendergrass, 5 B. & Ald. 187,	2219	Davis v. Patrick, 141 U. S. 473,	631
Davey v. Shannon, L. R. 4 Ex. D. 81,	13	Davis v. Pollock, 36 S. C. 544,	32
David v. Birchard, 53 Wis. 492,	7	Davis v. Porter, 66 Cal. 65,	
Davis v. Lumberman's Mining Co., 93		Davis v. Railroad Co., 131 Mass. 258,	1226, 1246, 1248
Mich. 491,	467		1108
Davidson v. Berthoud, 1 A. K. Marsh. 353,	561	Davis v. Robert, 89 Ala. 402,	
Davidson v. Burke, 143 Ill. 139,	2290	Davis v. Rock Creek Mining Co., 55 Cal.	1292, 1294
Davidson v. Carter, 55 Iowa, 117,	620	359,	674
Davidson v. Cooper, 11 M. & W. 778,	135	Davis v. Rowell, 2 Pick. 64,	1496, 2152
Davidson v. Davidson, 13 N. J. Eq. 246,	1638	Davis v. Rupe, 114 Ind. 588,	1739, 1760
Davidson v. Graves, Riley Eq. (S. Car.),	1442	Davis v. Saladee, 57 Texas, 326,	1885
219,	409	Davis v. Seeley, 71 Mich. 209,	876
Davidson v. Gwynne, 12 East, 381,	125	Davis v. Sexton, 35 Ill. App. 407,	
Davidson v. McGregor, 8 Mees. & W. 755,	185	Davis v. Shaper, 50 Fed. Rep. 764,	817, 877, 889, 2190
Davidson v. Mexican Nat. R. Co., 58 Fed.	234		685, 688
Rep. 653,		Davis v. Shields, 26 Wend. 341,	1863
Davidson v. Moss, 5 How. (Miss.), 673,		Davis v. Sittig, 65 Texas, 497,	390
Davidson v. Provost, 35 Ill. App. 126,		Davis v. Stonestreet, 4 Ind. 101,	
Davidson v. Westchester Co., 90 N. Y. 558,			
Davies v. Cooper, 5 M. & Cr. 270,			

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Davis v. Swanson, 54 Ala. 277,	1644	Dearborn v. Bowman, 3 Metc. (Mass.) 155	
Davis v. Tift, 70 Ga. 52,	594, 683		192, 193, 784
Davis v. Town of Harrison, 46 N. J. Law,		Dearborn v. Cross, 7 Cow. 48,	517, 951
79,	1562	Dearborn v. Dearborn, 9 N. H. 117,	490
Davis v. Town of Seymour, 59 Conn. 531,	773	Dearborn v. Parks, 5 Maine, 81,	607
Davis v. Van Buren, 72 N. Y. 587,	823	Dearborn v. Raysor, 132 Pa. St. 231,	163
Davis v. Van Wyck, 64 Hun, 186,	414	Dearborn Foundry Co. v. Augustine, 5	
Davis v. Wells, Fargo & Co., 104 U. S. 159,		Wash. 67,	1887
	52, 571	Deans v. Robertson, 64 Miss. 195,	1885
Davis v. Weymouth, 80 Maine, 307,	1576	Deaton v. Tenn., etc., Co., 12 Heis. 650,	653
Davis v. Windsor, etc., Bank, 46 Vt. 728,	444	Deaver v. Bennett, 29 Neb. 812,	1947
Davidson v. Alexander, 84 N. Car. 621,	1244	De Baker v. Carillo, 52 Cal. 473,	460
Davis, etc., Co. v. Barber, 51 Fed. Rep. 143,	817	De Bardelaben v. Stoudenmire, 82 Ala. 574,	1743
Davis Bldg., etc., Co. v. Cupp, 89 Wis. 673,	88		
Davis Bldg., etc., Co. v. Jones, 66 Fed.		De Bagnis v. Armistead, 10 Bing. 107,	1882
Rep. 124,	883	Debolt v. Ohio Life Insurance Co., 1 Ohio	
Davis Mfg. Co. v. Booth, 10 Ind. App. 364,		St. 591,	2130
820, 889, 2119,	2190	De Bruhl v. Maas, 54 Texas. 464,	431
Davis, etc., Mfg. Co. v. Barber, 51 Fed.		De Bussche v. Alt, L. R. 3 Ch. Div. 286,	1019
Rep. 143,	888, 889, 2190	Decoll v. Lewenthal, 57 Miss. 331,	1798
Davis, etc., Mfg. Co. v. McKinney, 11 Ind.		Decker v. Livingston, 15 John. 479,	543
App. 696,	889	Decora v. Kesselmeier, 45 Iowa, 166,	860
Davis, etc., Mfg. Co. v. Murray, 60 N. W.		De Cordova v. Barnum, 130 N. Y. 615,	940
Rep. 437,	888	Dederick v. Wolfe, 68 Miss. 500,	165
Davis & Rankin Co. v. Hillsboro Co., 10		Dedham Institution v. Slack, 6 Cush. 408,	
Ind. App. 42,	889		1350
Davis Sewing Machine Co. v. McGinnis,		Dedham v. Earle, 52 Ark. 164,	164
45 Iowa, 538,	499	Deering v. Chapman, 22 Mc. 438,	1896
Davison v. Davison, 13 N. J. Eq. 246,	348	Deering v. Porter, 42 Ill. App. 120,	561
Davison v. Seymour, 1 Bosw. (N. Y.) 88,	1988	De Farges v. Ryland, 87 Va. 404,	1718, 1719
Davison v. Von Lingen, 113 U. S. 40,	956	Deffenbaugh v. Foster, 40 Ind. 382,	1497
Davoue v. Fanning, 2 Johns. Ch. 252, 1308,	2285	De Forth v. Wisconsin, etc., Co., 52 Wis.	
Dawkins v. Gill, 10 Ala. 206,	1853	320,	2096
Dawkins v. Sappington, 26 Ind. 199,	60	De Frece v. National Life Co., 19 N. Y.	
Dawson v. Dawson, 12 Iowa, 512,	186	Supl. 8,	118
Dawson v. Ewing, 16 S. & R. 371,	401	De Frees v. Carr, 8 Utah, 488,	990
Dawson v. Kittle, 4 Hill, 107,	926, 2247	De Fremery v. Austin, 53 Cal. 380,	805
Dawson v. McFaddin, 22 Neb. 131,	850	De Francesco v. Barnum, L. R. 45 Ch.	
Dawson v. St. Louis, etc., R. Co., 76 Mo.		Div. 430,	1808
514,	1967	De Gogorza v. Knickerbocker Co., 65 N. Y.	
Day v. Caton, 119 Mass. 513,	778, 1476	232,	119
Day v. Cloe, 4 Bush, 563,	611	De Graff v. County of Ramsey, 46 Minn.	
Day v. Dwelling-House Insurance Co., 81		319,	461
Maine, 244,	316	De Graff, etc., Co. v. Wickham (Iowa	
Day v. Elmore, 4 Wis. 214,	1132	1892), 52 N. W. Rep. 503,	760
Day v. Gardner, 42 N. J. Eq. 199,	190, 208, 244	Degray v. Elmore, 50 N. Y. 1,	554, 2165
Day v. Jones, 150 Mass. 231,	1632	Dehority v. Paxson, 97 Ind. 253,	671
Day v. McAllister, 15 Gray (Mass.), 433,		Deischer v. Price, 143 Ill. 385,	1071
	2101, 2109, 2111	Deitz v. Insurance Co., 33 W. Va. 526,	1088
Day v. New York, etc., R. Co., 51 N. Y.		De Kay v. Hackensack Water Co., 38	
583,	693	N. J. Eq. 153,	345
Day v. New York, etc., R. Co., 31 Barb.		Delacroix v. Bulkley, 13 Wend. 71,	12, 952
548,	643	Delamater v. Borland, 1 Caines, 594,	93
Day v. Patterson, 18 Ind. 40,	2210	Deland v. Amesbury, etc., Manufactur-	
Day v. Pool, 52 N. Y. 416,	340	ing Co., 7 Pick. 244,	558
Day v. Putnam Ins. Co., 16 Minn. 408	188	DeLano v. Wild, 6 Allen, 1,	1619
Day v. Strong, 29 Hun, 505,	383	Delashmutt v. Thomas, 45 Md. 140,	99
Dayton v. Dean, 23 Conn. 99,	145	De la Vega v. Vianna, 1 B. & Ad. 284,	715
Dayton v. Parke, 142 N. Y. 391,	2172	Delavina v. Hill (N. H.), 19 Atl. Rep. 1000,	
Dayton v. Walsh, 47 Wis. 113,	1755		1902
Davis v. Wabash R. Co., 89 Mo. 340,	275	Delaware, The, 14 Wall. 579,	334
Dayton, etc., Railroad Co. v. Lewton, 20		Delaware Co. v. Andrews, 18 Ohio St. 49, 1894	
Ohio St. 401,	428	Delaware & H. Canal Co. v. Pennsylvania	
Deacon v. Gridley, 15 C. B. 295,	187, 198, 1651	Coal Co., 50 N. Y. 250,	2223
Dean, <i>Ex parte</i> , 2 Cow. 605,	764	Delaware, etc., Canal Co. v. Westchester	
Dean v. American Legion of Honor, 156		Bank, 4 Denio, 97,	237, 2210
Mass. 435,	1241	Delaware R. Co. v. Bowns, 58 N. Y. 573,	297
Dean v. Clark, 80 Hun, 80,	862	Delaware Railroad Co. v. Tharp, 5 Harr.	
Dean v. Emerson, 102 Mass. 480,		(Del.) 454,	2132
2040, 2044, 2046, 2049, 2051, 2052		Delaware Railroad Tax, The, 18 Wall.	
Dean v. Everett, 90 Iowa, 294,	912	(U. S.) 206,	2131, 2135, 2137
Dean v. Lawham, 7 Ore. 422,	867	De Lesdernier v. De Lesdernier, 45 La.	
Dean v. James, 4 B. & Ad. 546,	394, 395	Ann. 1364,	1674
Dean v. Mason, 4 Conn. 438,	41	Delevan v. Duncan, 49 N. Y. 485,	421
Dean v. Metropolitan Railway Co., 119		Deller v. Plymouth, etc., Society, 57 Iowa,	
N. Y. 540,	1736	481,	1945
Dean v. Morey, 33 Iowa, 120,	332	DeLoach v. Smith, 33 Geo. 210,	489
Dean v. Newhall, 8 T. R. 168,	568, 569, 574	Delogny v. Mercer, 43 La. Ann. 205,	883
Dean v. Williams, 17 Mass. 417,	475	Demars v. Musser, etc., Co., 37 Minn. 418,	212
Dean v. Woodbridge, 1 Root (Conn.), 191,		Demarest v. Inhabitants of New Barba-	
	2197	does, 40 N. J. Law, 604,	1570
		Demarest v. Terhune, 18 N. J. Eq. 532,	1661

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Demeritt v. Bickford, 58 N. H. 523,	614	Desper v. Continental, etc., Meter Co., 137	Mass. 252,	1172
Demestre v. West, L. R. (1891) A. C. 264,	224	Destrehan v. Louisiana Lumber Co., 45	La. Ann. 920,	930
Deming v. Darling, 148 Mass. 504,	1875	Dethlefs v. Tomsen, 7 Daly (N. Y.), 354,	2047	
Deming v. Foster, 42 N. H. 165,	338, 350, 351	Detrick v. Sharrar, 95 Pa. St. 521,	846	
Demings v. Supreme Lodge, 131 N. Y. 522,	1323	Detroit v. Mutual Gas Light Co., 43 Mich.	594,	1223
DeMott v. Laraway, 14 Wend. 225,	274	Detroit, City of, v. Hosmer, 79 Mich. 384,	1574	
Dempsey v. Kipp, 62 Barb. 311,	641	Detroit, City of, v. Martin, 34 Mich. 170,	460, 807	
Dempsey v. Tylee, 3 Duer (N. Y.), 73,	1672	Detroit, City of, v. Michigan Paving Co.,	36 Mich. 335,	1567
Dempster v. West, 69 Ill. 613,	2289	Detroit, City of, v. Robinson, 38 Mich.	103,	1567
Den v. Shotwell, 23 N. J. L. 465,	1957	Detroit, City of, v. Whittemore, 27 Mich.	281,	1512
Den v. Vreelandt, 7 N. J. Law, 352,	1284	Detroit, etc., Railroad Co. v. Smith, 50	Mich. 112,	438
Denby v. Graff, 10 Ill. App. 195,	867, 868	Detroit R. Co. v. Starnes, 38 Mich. 698,	156, 158	
Denham v. Walker, 93 Ga. 497,	170	Detroit Schuetzen Bund v. Detroit Agita-	tions Verein, 44 Mich. 313,	1337
Denison v. City of Columbus, 62 Fed.	1461	Deutmann v. Kilpatrick, 46 Mo. App. 624,	876, 903	
Denison v. Crawford County, 48 Iowa,	2087	Deusen v. Sweet, 51 N. Y. 378,	1822	
Deniston v. Hoagland, 67 Ill. 265,	1186	Deuser v. Walkup, 43 Mo. App. 625,	544	
Denman v. McMahan, 37 Ind. 242,	560	Deux v. Jefferies, Cro. Eliz. 352,	568, 569	
Denmead v. Glass, 30 Ga. 637,	662	Devendorf v. Emerson, 66 Iowa, 698,	1659	
Denn v. Reid, 10 Pet. (U. S.) 524,	1587	Devin v. Belt, 70 Md. 352,	1546	
Dennett v. Chick, 2 Green. 191,	833	Devine v. Edwards, 101 Ill. 138,	800	
Dennett v. Dennett, 44 N. H. 532,	1812	Devlin v. Mayor, 63 N. Y. 8,	2218	
Donnie v. Hart, 2 Pick. 204,	447	Devlin v. United States, 12 Ct. of Cl. 266,	803	
Dennie v. Walker, 7 N. H. 190,	385	Devling v. Little, 26 Pa. St. 502,	549	
Dennington v. Kirk, 57 Ark. 595,	470	Devou v. Ham, 17 Ind. 472,	533	
Dennis v. Piper, 21 Ill. App. 169,	187	De Vries v. Conklin, 22 Mich. 255,	1746	
Dennis v. Walsh, 16 N. Y. Supl. 257,	149, 372	Dew v. Clark, 3 Add. Eccl. 79,	1820	
Denny v. Bennett, 125 U. S. 489,	2116	Dewes Brewery Co. v. Merritt, 82 Mich.	198,	162, 170
Denny v. Denny, 123 Ind. 240,	1672	Dewey v. Carey, 60 Mo. 224,	829	
Denny v. Lincoln, 5 Mass. 385,	1853	Dewey v. Algire, 37 Neb. 6,	1821, 1837	
Denny's Estate, <i>In re</i> , 8 Ir. R., Eq. Series,	427,	Dewey v. Superior Court, 81 Cal. 64,	2267, 2268	
Denny Hotel Co. v. Schram, 6 Wash. 134,	1262	Dewey v. Toledo, etc., R. Co., 91 Mich. 351,	1268	
Densmore v. Mathews, 58 Mich. 616,	2252	Dewey v. Union School Dist., 43 Mich. 480,	272, 276, 287	
Densmore Oil Co. v. Densmore, 64 Pa. St.	43,	Dewhurst v. Wright, 29 Fla. 223,	1104	
Dent v. Ferguson, 132 U. S. 50,	1640	DeWitt v. Berry, 134 U. S. 306,	41, 336, 338, 232	
Dent v. North Am. Steamship Co., 49 N.Y.	330,	DeWitt v. Brisbane, 16 N. Y. 503,	2072	
Denton v. Davies, 18 Ves. 499,	335, 854	DeWitt, etc., Co. v. New Jersey, etc., Co.,	16 Daly (N. Y.), 529,	2055
Denton v. English, 2 Nott. & M. (S. Car.)	581,	De Wolf v. City of Chicago, 26 Ill. 444,	755	
Denton v. Erwin, 6 La. Ann. 317,	2, 2016	De Wolf v. De Wolf, 4 R. L. 450,	1215	
Denver, etc., R. Co. v. Atchinson, etc., R.	Co., 15 Fed. Rep. 650,	De Wolf v. New York, etc., Ins. Co., 20	Johns. (N. Y.) 214,	2021
Denver Tramway Co. v. Owens, 20 Colo.	107,	De Wolf v. Rabaud, 1 Pet. 476,	538	
Debold v. Oppermann, 111 N. Y. 531,	1975	Dexter v. Blanchard, 11 Allen, 365,	595, 610	
Depas v. Mayo, 11 Mo. 314,	1768	Dexter v. Billings, 110 Pa. St. 135,	1764	
Depau v. Humphreys, 8 Mart. (N. S.) 1,	712, 729, 730	Dexter v. Hall, 15 Wall. (U. S.) 9,	1837	
De Perez v. Everett, 73 Texas, 434,	1006	Dexter v. Norton, 47 N. Y. 62, 270, 295, 946,	2227	
De Peyster v. Hasbrouck, 11 N. Y. 582,	434	Dey, <i>In re</i> , 9 N. J. Eq. 181,	1846	
De Peyster v. Pulver, 3 Barb. 284,	438	Deyoe v. Jamieson, 33 Mich. 94,	166	
Derby v. Phelps, 2 N. H. 515,	617, 654	Deyoe v. Woodworth, 144 N. Y. 448,	2088	
Derby v. Johnson, 21 Vt. 17,	496	De Zeng v. Dailey, 9 Wend. 336,	819	
DeRivafinoli v. Corsetti, 4 Paige (N. Y.),	264,	Dial v. Crain, 10 Texas, 444,	1199	
Dermott v. Jones, 2 Wall. 1,	144, 277, 290, 897, 2227, 2237	Diamond Match Co. v. Roeber, 106 N. Y.	473, 1268, 1951, 2026, 2035, 2036, 2037, 2040, 2041,	2042, 2043, 2074, 2076, 2078
Dermott v. Jones, 23 How. 220,	137, 746	Dibble v. Brown, 12 Ga. 217,	274	
Derrick v. Monette, 73 Ala. 75,	1118	Dibble v. Morgan, 1 Wood. 406,	124	
Derry v. Derry, 98 Ind. 319,	1690	Diboll v. Minott, 9 Iowa, 403,	152	
Derry v. Peek, L. R. 14 App. Cas. 337,	990	Dibrell v. Smith, 40 Texas, 447,	431	
De Ruyter v. Trustees, 3 Barb. Ch. (N.Y.)	119,	Dick v. Ireland, 130 Pa. St. 299,	885	
Desha v. Holland, 12 Ala. 513,	907	Dice v. Irvin, 110 Ind. 561,	1033	
Deshon v. Wood, 143 Mass. 132,	618	Dickenson v. Breeden, 30 Ill. 279,	1033	
Des Moines County Agricultural Society	v. Tubbesing, 87 Iowa, 138,	Dickenson v. Dodds, L. R. 2 Ch. Div. 463,	88	
Des Moines, University of, v. Polk County,	etc., Co., 87 Iowa, 36,	Dicker v. Jackson, 6 C. B. 103,	114, 123	
Des Moines R. Co. v. Graff, 27 Iowa, 99,	157	Dickerman v. Lord, 21 Iowa, 338,	802	
Des Moines Valley Ry. Co. v. Graff, 27	Iowa, 99,	Dickerson v. Gordon, 5 N. Y. Supl. 310,	1792	
Desnoyer v. Jordan, 27 Minn. 295,	2122	Dickey v. Linscott, 20 Maine, 453,	283, 286	
De Sobry v. De Laistre, 2 Harr. & J. (Md.)	193,	Dickey v. Maine Telegraph Co., 46 Maine,	483,	1576
De Sollar v. Hanscome, 158 U. S. 216,	1166, 1217	Dickie v. Carter, 42 Ill. 376,	1923	

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Dickinson v. Calahan, 19 Pa. St. 227,	287	District of Columbia v. Gallaher, 124	
Dickinson v. Dodds, L. R. 2 Ch. Div. 463,	60	U. S. 505,	876
Dickinson v. Edwards, 77 N. Y. 573,		District of Columbia v. Waggaman, 4	1478
Dickinson v. Follett, 1 M. & R. 299,	332	Mackey (D. C.), 328,	
Dickinson v. Gay, 7 Allen, 29,	167	District of Columbia v. Washington, etc.,	
Dickinson v. Hall, 14 Pick. 217,	233	Ry. Co., 1 Mackey (D. C.), 361,	1584
Dickinson v. Hart, 142 N. Y. 183,	487, 501	Ditson v. Ditson, 4 R. I. 87,	2122
Dickinson v. Metacommet, etc., Bank, 130		Dively v. City of Cedar Falls, 27 Iowa,	
Mass. 132,	573	227,	1519
Dickinson v. Poughkeepsie, 75 N. Y. 65,		Diver v. Diver, 56 Pa. St. 106,	1764
783, 2241,	2247	Diversy v. Kellogg, 44 Ill. 114,	1759
Dickson v. Dickson, 33 La. Ann. 1261,	2177	Divine v. Divine, 58 Barb. 264,	1143
Dickson v. Frisbee, 52 Ala. 165,	652	Dix v. Marcy, 116 Mass. 416,	693, 837
Dickson v. Gourdin, 29 S. Car. 343,	196	Dixon v. Brooklyn City Railroad, 100	
Dickson v. Rawson, 5 Ohio St. 218,	1643	N. Y. 170,	588
Dickson v. Thomas, 97 Pa. St. 278,	1914, 1930	Dixon v. Clarke, 5 C. B. 365,	383, 387, 395
Dickson v. Zizania, 10 C. B. 602,	338	Dixon v. Duke, 55 Ind. 434,	670
Diebold Safe Co. v. Huston, 55 Kan. 104,		Dixon Co. v. Field, 111 U. S. 83,	1526
	40, 347	Dixon v. Fletcher, 3 M. & W. 146,	304
Dieckhoff v. Fox, 56 Minn. 438,	1905	Dixon v. Oliver, 5 Watts, 509,	1163
Diefenback v. Stark, 56 Wis. 462,		Dixon v. Olmstead, 9 Vt. 310,	2072
	144, 146, 147, 148, 149	Dixon Co. v. Field, 111 U. S. 83,	1529, 1530
Diffenderfer v. Scott, 5 Ind. App. 243, 230, 233		Dixon v. Merritt, 21 Kinn. 196,	1789
Diefenthaler v. Mayor, etc., New York, 111		Doan v. Dow, 8 Ind. App. 324,	1155
N. Y. 331,	459, 460	Doane v. Dunham, 79 Ill. 131,	913
Diem v. Koblitiz, 49 Ohio St. 41,	152	Dobell v. Hutchinson, 3 A. & E. 355,	423
Dieter v. Friday (Texas Civ. App. 1893),		Dobbins v. Edmonds, 18 Mo. App. 387,	95
22 S. W. Rep. 291,	2219	Dobie v. Larkan, 10 Ex. 776,	387
Dietz v. Winehill, 6 Wash. 109,	1759	Dobinson v. McDonald, 92 Cal. 33,	578
Dike v. Erie Ry. Co., 45 N. Y. 113,	735	Dobson v. Sotheby, 1 Moody & M. 90,	317
Dike v. Reitlinger, 23 Hun. 241,	126	Dock v. Boyd, 93 Pa. St. 412,	609
Dikeman v. Dikeman, 11 Paige Ch. (N. Y.)		Doctor v. Hellberg, 65 Wis. 495,	1182
484,	2154	Doctor Harter Co. v. Hopkins, 83 Wis. 309,	
Dill v. Wareham, 7 Metc. (Mass.) 438,			501
	1895, 1949	Dodd v. Farlow, 11 Allen, 426,	167
Dillaby v. Wilcox, 69 Conn. 71,		Dodge v. Adams, 19 Pick. 429,	183, 193
	598, 603, 604, 609	Dodge v. Evans, 43 Miss. 570,	1013
Dillingham v. Estill, 3 Dana (Ky.), 21,	550	Dodge v. Favor, 15 Gray, 82,	915
Dillman v. Nadehoffer, 119 Ill. 567, 989, 1010		Dodge v. Fearey, 19 Hun. 277,	331
Dillon v. Allen, 46 Iowa, 299,	1890	Dodge v. Moss, 82 Ky. 441,	236, 247
Dillon v. Anderson, 43 N. Y. 231,	172	Dodge v. Stiles, 26 Conn. 463,	187, 188
Dillon v. Barnard, 21 Wall. (U. S.) 430,	2180	Dodge v. Trust Co., 93 U. S. 379,	1443
Dillon v. Brown, 11 Gray, 179,	2184	Dodge v. Walley, 22 Cal. 224,	884
Dillon v. City of Syracuse (Sup.), 9 N. Y.		Dodge v. Woolsey, 18 How. (U. S.) 331,	2117, 2131
Supl. 98,	1559	Dodds, <i>In re</i> , 60 L. J. Q. B. 599,	88
Dillon v. Coppin, 4 M. & Cr. 647,	88	Dodsley v. Varley, 12 A. & E. 632,	663
Dillon v. Russell, 5 Neb. 584,	572	Dodson v. McAdams, 96 N. Car. 149,	793
Dilly v. Barnard, 8 Gill & J. 170,	1148	Dodson v. Lomax, 113 Mo. 555,	1089
Dilzer v. Building Assn. (Pa. 1892), 39 Leg.		Dodson v. Lomax (Mo. 1893), 21 S. W. Rep.	
Int. 383,	801	25,	1063
Dilworth v. Bostwick, 1 Sweeny (N. Y.),		Doe v. Brewer, 4 M. & S. 300,	549
581,	684	Doe v. Knight, 5 B. & C. 671,	88, 89
Dimmitt v. Kansas City, etc., R. Co., 103		Doe v. Lewis, 11 C. B. 1035,	89
Mo. 433,	738	Doe v. Martin, 4 T. R. 39,	894
Dimmitt v. Robbins, 7 Texas, 441,	1834	Doe v. Rugeley, 6 Q. B. 107,	281
Dimond v. Sanderson, 103 Cal. 97,	1747	Doe v. Ulph, 13 Q. B. 204,	277
Dingeldein v. Third Ave. R. Co., 37 N. Y.		Doe v. Williams, 1 H. Bl. 25,	884
575,	238	Doebbling v. Loos, 45 Mo. 150,	452
Dingley v. Bon, 130 N. Y. 607,	416, 419	Doernbecher v. Columbia, etc., Lumber	
Dingley v. Oler, 11 Fed. Rep. 372,	496	Co., 21 Ore. 573,	1206, 1236
Dingley v. Oler, 117 U. S. 490,	497, 2222	Doewin v. Smith, 35 Vt. 69,	2242
Dinham v. Bradford, 5 Ch. App. 519, 1094, 1212		Dogge v. Northwestern Ins. Co., 49 Wis.	
Dinsmore v. Livingston Co., 60 Mo. 241,	126	501,	117
Dintleman v. Gilbert, 140 Ill. 597,	1102	Doggett v. Railroad Co., 99 U. S. 72,	1557
Dinwiddie v. Self, 145 Ill. 290,	1064	Doogood v. Rose, 9 C. B. 132,	114
Dion v. St. John Baptist Society, 82		Dooley v. Smith, 13 Wall. 604,	392, 400
Maine, 319,	1943	Doolin v. Ward, 6 Johns. (N. Y.) 194,	
Direct Exeter R. Co., <i>In re</i> , 3 DeG. & Sm.			2019, 2000
234,	260	Doolittle v. Luzerne Co., 6 Kulp, 495,	461
Dirkson v. Knox, 71 Iowa, 728,	1065	Dooper v. Noelke, 5 Daly, 413,	466
Disborough v. Neilson, 3 Johns. Cas.		Dole v. Lincoln, 31 Maine, 422,	249
(N. Y.) 81,	1921	Dole v. Stinson, 21 Pick. 384,	663
Disbrow v. Durand, 54 N. J. Law, 343,	790	Dole v. Young, 24 Pick. 250,	613
Disbrow v. Harris, 122 N. Y. 302,	52	Dolittle v. Eddy, 7 Barb. 74,	643
Dispatch Line of Packets v. Bellamy		Doll v. Crume, 41 Neb. 655,	1403
Manfg. Co., 12 N. H. 231,	1349, 1350	Doll v. Noble, 116 N. Y. 230,	
Distilling, etc., Co. v. People, 11 Lewis's			127, 130, 131, 132, 2225
Am. R. R. & Corp. Rep. 353; 156 Ill. 448,	2058	Doll v. State, 45 Ohio St. 445,	1592
		Dollner v. Snow, 16 Fla. 86,	1700
District Tp. of Norway v. District Tp. of		Dolloff v. Inhabitants of Ayer, 162 Mass.	
Clear Lake, 11 Iowa, 506,	1950	569,	1476

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Doloret v. Rothschild, 1 Sim. & St. 590,	751	Downer v. Chesebrough, 36 Conn. 39,	717, 728
Dolph v. Hand, 156 Pa. St. 91,	1786	Downey v. Farmers' and M. Bank, 12 S. & R. 288,	830
Dolph v. Troy, etc., Machinery Co., 28 Fed. Rep. 553,	2056	Downey v. Hinchman, 25 Ind. 453,	214
Dolsen v. Arnold, 10 How. Pr. 528,	526, 527	Downey v. Hicks, 14 How. 240,	452, 456
Don v. Lippmann, 5 C. & F. 1,	710	Downey v. McGinn, 1 City Ct. (N. Y.) 478,	465
Donahue's Appeal, 62 Conn. 370,	1181	Downey v. Smith, 2 Dev. Eq. 535,	22
Donahue v. McNulty, 24 Cal. 411,	853	Downie v. White, 12 Wis. 176,	156, 1325
Donalds v. Plumb, 8 Conn. 447,	1695	Downing v. Funk, 5 Rawle, 69,	204
Donaldson v. Waters, 35 Ala. 107,	630	Downing v. Plate, 90 Ill. 248,	394, 395
Donegan v. Donegan, 103 Ala. 488,	1768	Downs v. Marsh, 29 Conn. 409,	666
Donellan v. Read, 3 Barn. & Ad. 899,	655	Downs v. Smit, 15 Mo. App. 583,	143
Donnelly v. Corbett, 7 N. Y. 500,	2125	Dows v. Kidder, 84 N. Y. 121,	2280
Donham v. Hahn, 127 Mo. 439,	1230	Dows v. Nat., etc., Bank, 91 U. S. 618,	886
Donnell v. State, 76 Ind. 524,	1482	Dows v. Sweet, 134 Mass. 140,	604
Donohue v. Woodbury, 6 Cush. (Mass.) 115,	523, 525	Doxey v. Miller, 2 Brad. (Ill. App.) 30,	1948
Donovan v. Halsey, etc., Engine Co., 58 Mich. 38,	775, 783	Doyle v. Dixon, 97 Mass. 208,	617, 649, 654, 957
Donovan v. McCarty, 155 Mass. 543,	2099	Doyle v. Glascock, 21 Texas, 200,	1327
Donovan v. Sheridan, 24 N. Y. Supl. 116,	2211	Doyle v. Lynn, etc., R. Co., 118 Mass. 195,	2099
Donovan v. Ward, 100 Mich. 601,	1794	Drake v. Dodsworth, 4 Kan. 159,	40, 2044
Doran v. Smith, 49 Vt. 353,	1802	Drake v. Found Treasury Min. Co., 53 Fed. Rep. 474,	717
Dord v. Bonnafée, 6 La. Ann. 563,	698	Drake v. Goree, 22 Ala. 409,	152
Doremus v. Dutch Reformed Church, 3 N. J. Eq. 332,	1338	Drake v. Lanning, 49 N. J. Eq. 452,	7, 177
Doremus v. McCormick, 7 Gill, 49,	543	Drake v. Inhabitants of Stoughton, 6 Cush. 393,	1473
Dorgan v. Weeks, 86 Ala. 329,	1117	Drake v. Seaman, 97 N. Y. 230,	6-3
Dorman v. Ames, 12 Minn. 451,	275	Drake v. Stoughton, 6 Cush. 393,	210
Dorr v. Munsell, 13 Johns. 480,	179	Drake v. Wells, 11 Allen, 141,	610
Dorrington v. Myers, 11 Neb. 388,	702	Drake v. White, 117 Mass. 10,	360
Dorris v. Sweeney, 60 N. Y. 463,	1325	Draper v. Hitt, 43 Vt. 439,	399, 517, 1631
Doster v. Brown, 25 Ga. 24,	972	Draper v. Randolph, 4 Harr. (Del.) 454,	779
Doty v. Bates, 11 Johns. 544,	825	Draper v. Snow, 20 N. Y. 331,	1-9
Doty v. Chicago R. Co., 49 Minn. 499,	587	Drayton v. Chandler, 93 Mich. 383,	2236
Doty v. Clint, 11 N. Y. St. Rep. 87,	1634	Dresel v. Jordan, 104 Mass. 407,	688, 1147
Doty v. Crawford, 39 S. Car. 1,	399, 401	Dresser, etc., Co. v. Waterston, 3 Metc. 9,	162
Doty v. Martin, 32 Mich. 462,	2038, 2039	Drexler v. Tyrell, 15 Nev. 114,	1886, 1891
Doty v. Wilson, 5 Lans. 7,	562	Drew v. Claggett, 39 N. H. 431,	2257
Doty v. Wilson, 14 Johns. 378,	197, 2016	Drew v. Corliss, 65 Vt. 650,	1663
Doty v. Willson, 47 N. Y. 580,	559, 560	Drew v. Drum, 44 Mo. App. 25,	1614
Dougherty v. Hitchcock, 35 Cal. 512,	1468	Drew v. Edmunds, 60 Vt. 401,	325
Dougherty v. Hunter, 54 Pa. St. 380,	1281	Drew v. Hagerty, 81 Maine, 231,	250, 252
Dougherty v. Seymour, 16 Colo. 289,	2019	Drew v. Peor, 93 Pa. St. 234,	642
Dougherty v. Sprinkle, 88 N. Car. 300,	1703	Drew v. Smith, 59 Maine, 393,	718
Dougherty v. Stamps, 43 Mo. 243,	976	Drinkwater v. Jordan, 46 Maine, 432,	541, 573, 574
Dougherty v. Stone, 66 Hun, 498,	594	Drohan v. Lake Shore R. Co., 162 Mass. 435,	521
Douglas v. Com., 108 Pa. St. 559,	1552, 1553	Drown v. Ingels, 3 Wash. St. 424,	1044
Douglas v. County of Pike, 101 U. S. 677,	1532, 1540, 2149, 2207	Drue v. Thorne, Aleyn, 72,	1651
Douglas v. Oldham, 6 N. H. 150,	696	Drummond v. Burrell, 13 Wend. 307,	651
Douglas v. Patrick, 3 T. R. 683,	395, 398	Drum Seed Co. v. McFarland Co. (Texas App. 1895), 30 S. W. Rep. 93,	750
Douglas v. Shumway, 13 Gray, 498,	640	Druon v. Sullivan, 66 Vt. 609,	968
Douglas v. Smith, 74 Iowa, 468,	1919	Drury v. Cross, 7 Wall. 299,	1301
Douglas v. White, 3 Barb. Ch. 621,	192	Drury v. De Fontaine, 1 Taunt. 131,	2094
Douglas County, Commissioners of, v. Bolles, 94 U. S. 104,	1128	Drury v. Foster, 2 Wall. (U. S.) 24,	1740
Douglas v. Com., 103 Pa. St. 559,	1544	Drury v. Henderson, 36 Ill. App. 521,	194
Douglass v. Davie, 2 McCord (S. Car.), 215,	2184	Drury v. Holden, 121 Ill. 130,	466
Douglass v. Howland, 24 Wend. 35,	1132	Drury v. Hooke, 1 Vernon, 412,	425
Douglass v. Ireland, 73 N. Y. 100,	1372	Drury v. Young, 58 Md. 546,	684, 687, 688
Douglass v. Moody, 80 Ala. 61,	1065	Druse v. Wheeler, 22 Mich. 439,	641
Douglass v. Lucas, 63 Pa. St. 9,	1088	Dryden v. Kellogg, 2 Mo. App. 87,	355, 358
Douglass v. Satterlee, 11 John. 16,	549	Dryden v. Stephens, 19 W. Va. 1,	536
Douglasse v. Ward, 1 Ch. Cas. 100,	226	Dryer v. Lewis, 57 Ala. 551,	286
Dounce v. Dow, 61 N. Y. 411,	348	Dubach v. Hannibal, etc., R. Co., 89 Mo. 483,	1581
Dow v. Clark, 7 Gray, 198,	239	Dube v. Beaudry, 150 Mass. 448,	1797
Dow v. Harkin (N. H. 1893), 29 Atl. Rep. 846,	2256	Dubois v. Delaware Canal Co., 4 Wend. (N. Y.) 285,	2181
Dow v. Iowa Central R. Co., 144 N. Y. 426,	1442, 1449	Duck v. Mayen, L. R. (1892) 2 Q. B. 511,	577
Dow v. Memphis, etc., R. Co., 20 Fed. Rep. 230,	1417	Duckworth v. Allison, 1 Mees. & W. 412,	758
Dow v. Whetten, 8 Wend. 160,	326	Dudgeon v. Haggart, 17 Mich. 273,	868
Dow v. Worthen, 37 Vt. 108,	672, 673	Dudley v. Bland, 83 N. Car. 220,	542, 572
Dowell v. Talbot Paving Co., 138 Ind. 675,	1495	Dudley v. Danforth, 61 N. Y. 626,	1364
Dowling v. McKenney, 124 Mass. 478,	659	Dudley v. Mayhew, 2 Const. 9,	234
Dowling v. Merchants' Ins. Co., 168 Pa. St. 234,	319	Dueber Mfg. Co. v. Howard Clock Co., 55 Fed. Rep. 851,	1981
Down v. Hatcher, 10 Ad. & El. 121,	189	Duff v. Snider, 54 Miss. 245,	656
		Duffield v. Barnum Wire & Iron Works, 64 Mich. 293,	1319
		Duffield v. Hue, 129 Pa. St. 94,	385

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Duffy v. O'Donovan, 46 N. Y. 223,	693	Duplex Safety Boiler Co. v. Garden, 101	
Duffy v. Ogden, 64 Pa. St. 240,	763	N. Y. 387,	130, 131, 134
Duffy v. Shockey, 11 Ind. 70,	2044	Duppa v. Mayo, 1 William Saund. 275d,	636
Dugan v. Anderson, 36 Md. 567,	152, 887, 2222	Dupre v. Rein, 7 Abb. (N. C.) 256,	1758
Dugan v. Gittings, 3 Gill (Md.), 138,	850	Dupre v. Thompson, 4 Barb. (N. Y.) 279,	2073
Dugan v. Lewis, 79 Texas, 246,	730	Durango, Town of, v. Pennington, 8 Colo.	
Duggan v. Colorado, etc., Investment Co.,		257,	1508
11 Colo. 113,	1434	Durango, City of, v. Reinsberg, 16 Colo.	
Duggan v. Pacific Boom Co., 6 Wash. 593,	1274, 1356	327,	1474
Dugger v. Hicks, 11 Ind. App. 374,	1494	Durant v. Comegys, 2 Idaho, 936,	1129
Dula v. Cowles, 7 Jones L. (N. Car.) 290,	2191	Durant v. Rhener, 26 Minn. 362,	2097
Duke v. Brown, 96 N. Car. 127,	1516	Durant v. Ritchie, 4 Mason, 45,	1672
Duke v. Markham, 105 N. Car. 138,	1231, 1244	Durant v. Titley, 7 Price, 577,	2007
Duke v. Taylor (Fla. 1896), 19 So. Rep.	172,	Durell v. Wendell, 8 N. H. 369,	574
1406,	1408	Durfee v. O'Brien, 16 R. I. 213,	655, 656
Duke of Leeds v. Earl of Amherst, 2 Phil.		Durfee v. Newkirk, 83 Mich. 522,	327
Ch. 117,	1019	Durfee v. Old Colony, etc., R. Co., 5 Allen,	
Dulin v. Prince, 124 Ill. 76,	489	230,	1462
Dullanty v. Town of Vaughn, 77 Wis. 38,	1508, 1509	Durgin v. American Express Co., 66 N. H.	
Duluth, City of, v. McDonnell (Minn. 1895), 63 N. W. Rep. 863,	1477	277,	1961
Duluth Chamber of Commerce v. Knowlton, 22 Minn. 229,	190, 519, 523, 544	Durham v. Bischof, 47 Ind. 211,	246
Dumestre, Succession of (45 La. 1892), 12		Durham v. Board of Commissioners, 95	
So. Rep. 123,	1762	Ind. 182,	807
Dumont v. Dufore, 27 Ind. 263,	2016	Durham v. Hiatt, 127 Ind. 514,	646
Dunbar v. De Boer, 44 Ill. App. 615,	384, 406	Durham, etc., Land Co. v. Guthrie, 116 N.	
Dunbar v. Foreman (S. Car. 1894), 1683,	—	Car. 381,	630
Dunbar v. Harden, 13 N. H. 311,	212, 233	Durkin v. Cranston, 7 John. 412,	798
Dunbar v. Smith, 66 Ala. 490,	610	Durland v. Durland, 83 Hun (N. Y.) 174,	1670
Dunbar v. Tirey (Texas App.), 17 S. W.		Durrant v. Ecclesiastical Commissioners,	
Rep. 1116,	209, 211	L. R. 6 Q. B. Div. 234,	481
Dunbar v. Williams, 10 Johns. 249, 184, 186, 788		Durrell v. Todd, 31 Neb. 256,	474
Duncan v. Barker, 21 Kan. 548, 135, 146, 147, 148		Durst v. Swift, 11 Texas, 273,	756
Duncash v. Clark, 2 Rich. Law (S. Car.),		Duryea v. Mayor, 62 N. Y. 592,	25, 170
587,	1750	Dusenbury v. Ellis, 3 Johns. Cas. 70,	1189
Duncan v. Dixon, 44 Ch. Div. 211,	1807	Dushane v. Benedict, 120 U. S. 630,	365
Duncan v. Duncan, 1 Watts, 322,	19	Dussol v. Bruguiere, 50 Cal. 456,	827
Duncan v. Duncan, 93 Ky. 37,	1206	Dustan v. McAndrew, 44 N. Y. 72,	388
Duncan v. Sanders, 50 Ill. 476,	232	Dutcher v. Wright, 94 U. S. 553,	153
Dunckel v. Dunckel, 141 N. Y. 427,	1192, 1198	Dutton v. Poole, 2 Levinz, 210,	231
Dunckel v. Dunckel, 66 Hun, 25,	842	Dutton v. Thompson, 23 Ch. Div. 278,	1018
Dunckel v. Failing, 5 N. Y. Supl. 504,	209	Duval v. Wellman, 1 N. Y. Supl. 70,	1972
Duncomb v. New York, etc., R. Co., 84		Duval v. Myers, 2 Md. Ch. 401,	1105
N. Y. 190, 1281, 1293, 1296, 1307, 1308, 1393, 1406		Duval v. Parker, 2 Duv. 182,	383
Duncombe v. Richards, 46 Mich. 166,	1030	Duval v. Roder, 46 La. Ann. 814,	1675
Duncult v. Albrecht, 12 Sim. 189,	660	Duval v. Wellman, 14 Sup. Ct. Rep.	
Dundas v. Bowler, 3 McLean (U. S. Cir.),		1162,	1537
397,	2117	Duval v. Wellman, 124 N. Y. 156,	1640
Dundas v. Dutens, 1 Ves. Jr. 196,	620, 1717	Duvals v. Ross, 2 Munf. 290,	110
Dung v. Parker, 52 N. Y. 494,	593	Duvenick v. Missouri Pac. Railroad Co.,	
Dunham v. Boston & A. R. Co., 46 Hun,		40 Mo. App. 31,	1966
245,	124	Duvergier v. Fellows, 5 Bing. 248,	279
Dunham v. Griswold, 100 N. Y. 224,	803, 2012	Dwelle v. Dwelle, 1 Kan. App. 473,	268
Dunham v. Jackson, 6 Wend. 22,	388	Dwelle v. Dwelle, 143 Mass. 509,	815, 876
Dunham v. Pettee, 8 N. Y. 508,	115	Dwen v. Blake, 44 Ill. 135,	970
Dunham v. Steele Packing Co., 100 Mich.		Dwenger v. Branigan, 95 Ind. 221,	1720
75,	1062	Dwenger v. Geary, 113 Ind. 106,	876
Dunkell, Matter of, 5 Dem. (N. Y.) 188,	465	Dwight v. Badgley, 27 N. Y. Supl. 107,	1926
Dunklee v. Adams, 20 Vt. 415,	490	Dwight v. Brewster, 1 Pick. 50,	274
Dunlap v. Montgomery, 123 Pa. St. 27,	285	Dwight v. Cutler, 3 Mich. 566,	421, 1142
Dunlap v. Petrie, 35 Miss. 590,	152	Dwight v. Eckert, 117 Pa. St. 490,	102
Dunlap v. Water Com'rs of Erie, 151 Pa.		Dwight v. Germania, etc., Insurance Co.,	
St. 477,	1467	103 N. Y. 341,	313, 853, 902
Dunlop v. Gregory, 10 N. Y. 241,	2033	Dwight v. Hamilton, 113 Mass. 175,	2039, 2049
Dunlop v. Higgins, 1 H. L. C. 381,	56, 57, 58	Dwight v. Newell, 15 Ill. 333,	549
Dunmore, Countess of, v. Alexander, 9		Dwinel v. Brown, 54 Maine, 468,	753
Shaw & Dunlap, 190,	77	Dwinel v. Howard, 30 Maine, 258,	152
Dunne v. Ferguson, Hayes, 540,	636	Dwyer v. Gulf, etc., Ry. Co., 69 Texas, 707,	920
Dunn v. People, 40 Ill. 465,	1956	Dyas v. Stafford, 7 L. R. Ired. 590, 674, 687, 688	
Dunn v. Ralvey, 6 Watts & S. 475,	1174, 1175	Dycus v. Hart, 2 Texas Civ. App. 354,	1667
Dunn v. Sharp, 4 Ired. (N. C.) Eq. 7,	617	Dye v. Kerr, 15 Barb. 444,	792
Dunn v. West, 5 B. Mon. 376,	615	Dye v. Dye, 11 Cal. 167,	161
Dunning v. Leavitt, 85 N. Y. 30,	241, 245	Dyer v. Hargrave, 10 Vesey Jr. 506,	426
Dunphy v. Ryan, 116 U. S. 491,	645, 692	Dyer v. Hunt, 5 N. H. 401,	696
Dunsbach v. Hollister, 49 Hun, 352,	276	Dyer v. Sutherland, 75 Ill. 583,	549
Dunsmore v. Lyle, 87 Va. 391,	634, 1136	Dyett v. North American Coal Co., 20	
Dunton v. Dunton, 18 Victorian L. Rep.		Wend. (N. Y.) 570,	1703
114,	233	Dygert v. Remerschneider, 32 N. Y. 629, 222, 618	
Dunton v. Niles, 95 Cal. 494,	2203	Dyke v. Spargur, 143 N. Y. 651,	1125, 1126
		Dykers v. Allen, 7 Hill (N. Y.), 497,	920
		Dykema v. Minneapolis, etc., R. Co., 101	
		Mich. 47,	2219
		Dykers v. Townsend, 24 N. Y. 57,	1916

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Dynen v. McCullough, 46 N. J. Eq. 11, 748, 749
Dzialynski v. Bank, 23 Fla. 346, 1737

E

Eadie v. Slimmon, 26 N. Y. 9, 1039, 1830, 1832, 1836
Eads v. Carondelet, 42 Mo. 113, 4, 6, 69
Eads v. Murphy, 52 Ala. 520, 219
Eagle v. Kohn, 84 Ill. 292, 1885
Eakle v. Reynolds, 54 Md. 305, 1024
Eakright v. Torrent (Mich. 1895), 63 N. W. Rep. 292, 840
Eames v. Dorsett, 147 Ill. 540, 1665
Eames v. Sweetser, 101 Mass. 78, 1660
Eames Brake Co. v. Prosser, 88 Hun, 343, 523
Earl v. Peck, 64 N. Y. 596, 9, 230, 232
Earle v. Bickford, 6 Allen (Mass.), 549, 1949
Earle v. Coburn, 130 Mass. 596, 1476
Earle v. Middleton, Cheves, 127, 366
Earle v. Norfolk, etc., Hosiery Co., 36 N. J. Eq. 188, 1039, 1813
Earle v. Oliver, 2 Ex. 71, 194
Earle v. Reed, 10 Metc. (Mass.) 387, 1801
Earle v. Seattle, etc., R. Co., 56 Fed. Rep. 909, 1422
Earley v. Law, 42 S. Car. 330, 1703
Earl of Aylesford's Case, 2 Stra. 783, 844
Earl of Chesterfield v. Ganssen, 1 White & T. Lead. Cas. Eq. 541, 1815
Earl of Falmouth v. Thomas, 1 Crompt. & M. 89, 636
Earle of Milltown v. Stewart, 3 Mylne & C. 18, 8 Sum. 371, 1873
Earl of Shrewsbury v. Gould, 2 B. & Ald. 487, 883
Earp v. Tyler, 73 Mo. 617, 118
Easley v. Gordon, 51 Mo. App. 637, 184
East Anglican Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775, 1248, 1430
Easter v. White, 12 Ohio St. 219, 616
Eastern Granite Co. v. Heim, 89 Iowa, 693, 636
Eastern Ice Co. v. King, 86 Vir. 97, 193
Eastham v. Powell, 15 Ark. 530, 14
East Hartford, Town of, v. Hartford Bridge Co., 10 How. (U. S.) 511, 2143
Eastin v. Ducrest, 21 La. Ann. 656, 2021
East Jordan Lumber Co. v. Village of East Jordan, 100 Mich. 201, 1561
East Lincoln, Town of, v. Davenport, 94 U. S. 801, 1461
East Louisiana R. Co. v. City of New Orleans, 46 La. Ann. 526, 1583
Eastman v. Batchelder, 36 N. H. 141, 490
Eastman v. Grant, 34 Vt. 387, 543
Eastman v. Provident Relief Assn., 65 N. H. 176, 1075
Eastman v. Ried, 101 Ala. 320, 1008
Eastman v. State, 109 Ind. 278, 1910
East Norway Lake Church v. Froislie, 37 Minn. 447, 1434
Easton v. Easton, 112 Mass. 443, 210, 1473
Easton v. Mitchell, 21 Ill. App. 189, 871
Easton v. Montgomery, 90 Cal. 307, 122
Easton v. Pickersgill, 55 N. Y. 310, 876
Easton v. Pratchett, 1 C. M. & R. 798, 11
Easton Bank v. Commonwealth, 10 Pa. St. 442, 2137
Easton, etc., Co. v. Millington, 105 Cal. 49, 1113
East River Bank v. Butterworth, 45 Barb. 476, 457
East River Gas Light Co. v. Donnelly, 93 N. Y. 557, 1546
East St. Louis, City of, v. East St. Louis Gas Light and Coke Co., 98 Ill. 415, 1519, 1564, 1565, 1567
East Tennessee Co. v. Gammon, 5 Sneed, 557, 259

East Tennessee, etc., R. Co. v. Johnson, 75 Ala. 596, 907, 920, 931
East Tennessee R. Co. v. Wright, 76 Geo. 532, 397, 407
Eastwood v. Kenyon, 11 A. & E. 438, 183, 192, 268, 597
Easun v. Buckeye Brewing Co., 51 Fed. Rep. 156, 1260
Eaton v. Aspinwall, 19 N. Y. 119, 1323, 1326
Eaton v. Burns, 31 Ind. 390, 823
Eaton v. Eaton, 35 N. J. Law, 290, 800, 1813, 1837, 2276
Eaton v. Hill, 50 N. H. 235, 1790
Eaton v. Libbey, 42 N. E. Rep. 1127, 228
Eaton v. Lincoln, 13 Mass. 424, 534, 538, 1631
Eaton v. Smith, 20 Pick. 150, 903, 904
Eaton v. Walker, 76 Mich. 579, 1337
Eaton v. Wells, 22 Hun, 123, 379
Eaton v. Whitaker, 18 Conn. 222, 836
Eaton v. Winnie, 20 Mich. 156, 1879
Eaton v. Woolly, 28 Wis. 623, 796
Eberle v. Mehrbach, 55 N. Y. 682, 2098
Ebert v. Wood, 1 Bin. 216, 628
Eccleston v. Cliphsham, 1 Saund. 153, 828
Eckel v. Bostwick, 88 Wis. 493, 1197, 1217
Ecker v. Bohn, 45 Md. 290, 1997
Ecker v. McAllister, 45 Md. 290, 1997
Eckerly v. McGhee, 85 Tenn. 661, 1699
Eckman v. Scott, 34 Neb. 817, 1723
Eckman v. Township of Brady, 81 Mich. 70, 782
Eckstein v. Downing, 64 N. H. 248, 1208
Eclipse Tow-Boat Co. v. Pontchartrain R. Co., 24 La. Ann. 1, 2054
Economy, etc., Association v. Hungerbuehler, 93 Pa. St. 258, 1607
Eddy, The, 5 Wall. 481, 124
Eddy v. Capron, 4 R. I. 394, 1988, 2081
Eddy v. Davis, 116 N. Y. 247, 388, 1142
Eddy v. Graves, 23 Wend. 82, 12
Eddy v. Herrin, 17 Maine 338, 1830, 1831
Eddy v. Roberts, 17 Ill. 505, 594, 607
Eddy v. Winchester, 60 N. H. 63, 724
Edelen v. Gough, 5 Gill, 103, 684
Edelman v. Latshaw, 159 Pa. St. 644, 966
Eden v. Parkinson, 2 Doug. 732, 354
Eden v. Smyth, 5 Ves. 341, 553, 557
Edichal Bullion Co. v. Columbia Gold Min. Co., 87 Va. 641, 1113
Edinboro' Academy v. Robinson, 37 Pa. St. 210, 1320
Edings v. Brown, 1 Rich. Law, 255, 1189
Edgar v. Fowler, 3 East, 222, 1871
Edgecombe v. Rodd, 1 Smith's Rep. (Eng. K. B.) 515, 442
Edgecombe v. Rodd, 5 East, 29, 445, 518
Edgerly v. Bush, 81 N. Y. 199, 721, 722
Edgerly v. Shaw, 25 N. H. 514, 1771
Edgerton v. Hodge, 41 Vt. 676, 672
Edgerton v. Peckham, 11 Paige, 352, 751
Edgerton v. State, 67 Ala. 588, 2100
Edgeware Highway Board v. Harrow District Gas Co., L. R. 10 Q. B. 92, 204
Edling v. Bradford, 30 Neb. 593, 868
Edmondson v. Welsh, 27 Ala. 578, 1289
Edmunds v. Mister, 53 Miss. 765, 1777
Edsall v. Camden, etc., Co., 50 N. Y. 661, 882
Edwards v. Baugh, 11 M. & W. 641, 213
Edwards v. Bowden, 103 N. Car. 50, 1834
Edwards v. Bowden, 99 N. C. 80, 853
Edwards v. Brown, 68 Texas, 329, 1682
Edwards v. Campbell, 23 Barb. 423, 559
Edwards v. Carson Water Co., 21 Nev. 469, 1349, 1350, 1356, 1374
Edwards v. Carter, 1 The Reports, 218, 1787
Edwards v. Carter, 1 Stra. 473, 834
Edwards v. Coombe, L. R. 7 C. P. 519, 530, 534
Edwards v. Davis, 16 Johns. 281, 183
Edwards v. Dick, 4 Barn. & Ald. 212, 1885
Edwards v. Estell, 48 Cal. 194, 2080
Edwards v. Farmers', etc., Ins. Co., 21 Wend. 467, 383

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Edwards v. Goldsmith, 16 Pa. St. 43,	878	Elliott v. Elliott, 1 Dev. & B. Eq. (N. Car.)	2286
Edwards v. Grand Junction Railway Co.,		57,	144
1 Mylne & C. 650,	1314, 1316	Elliott v. Espenhain, 59 Wis. 272,	1799
Edwards v. Grand Trunk Ry. Co., 48		Elliott v. Gibbons, 30 Barb. (N. Y.) 498,	540, 572
Maine, 379,	657, 658, 662, 663	Elliott v. Holbrook, 33 Ala. 659,	1791
Edwards v. Hancher, 1 C. P. Div. 111,	530	Elliott v. Horn, 40 Ala. 348,	423
Edwards v. Harvey, 2 Colo. App. 169,	453	Elliott v. Plator, 43 Ohio St. 198,	2001
Edwards v. Hoeffinghoff, 36 Fed. Rep. 635,	1926	Elliott v. Richardson, L. R. 5 C. P. 744,	364
Edwards v. Kearzey, 96 U. S. 595,		Elliott v. Saufley, 89 Ky. 52,	1738
35, 2116, 2152, 2153, 2157		Elliott v. Sleeper, 2 N. H. 525,	807
Edwards v. Kelly, 6 M. & S. 204,	608	Elliott v. Swartwout, 10 Pet. 137,	905
Edwards v. Lycoming, etc., Ins. Co., 77		Elliott v. Wanamaker, 155 Pa. St. 67,	425
Pa. St. 373,	117, 769	Ellis v. Weed, 44 Conn. 19,	541
Edwards v. McEnhill, 51 Mich. 160,	1754	Ellis v. Bitzer, 2 Ohio, 289,	1102
Edwards v. Rives, 17 So. Rep. 416,	1113	Ellis v. Burden, 1 Ala. 458,	789, 1181
Edwards v. Schoeneman, 104 Ill. 278, 1058,	1059	Ellis v. Cary, 74 Wis. 176,	204
Edwards v. Stevens, 3 Allen (Mass.), 315,	1754	Ellis v. Clark, 110 Mass. 389,	680
Edwards v. Symonds, 65 Mich. 348,	165	Ellis v. Deadman, 4 Bibb, 466,	1013
Edwards v. Thompson, 71 N. Car. 177,	427	Ellis v. Ellis, 5 Texas C. App. 46,	543
Edwards v. Travelers' Co., 20 Fed. Rep. 661,	119	Ellis v. Esson, 50 Wis. 133,	187, 897
Edwards v. Varick, 5 Denio, 664,	819	Ellis v. Hamlen, 3 Taunt. 52,	2107
Edwards v. West, L. R. 7 Ch. Div. 858,	302	Ellis v. Hammond, 57 Ga. 179,	1063
Bells v. St. Louis, etc., R. Co., 52 Fed.		Ellis v. Harrison, 104 Mo. 270,	468, 469, 474
Rep. 903,	1962	Ellis v. Mason, 32 S. Car. 277,	251,
Efner v. Shaw, 2 Wend. 567,	214	Ellis v. Mortimer, 1 Bos. & P. (New R.)	133
Egbert v. Baker, 58 Conn. 319,	722, 724	Ellis v. Northern Pac. R. Co., 144 U. S. 458,	30
Ege v. Koontz, 3 Pa. St. 109,	458, 801	Ellis v. Secor, 31 Mich. 185,	257
Egerton v. Earl Browning, 4 H. L. Cas. 1,	1128, 1952, 1954	Ellis v. Singletary, 45 Texas, 27,	2214
		Ellis v. Ward (Ill.), 20 N. E. Rep. 671,	2284
		Ellison v. Albright, 41 Neb. 93,	467
		Ellison v. Brigham, 38 Vt. 764,	639
		Ellithorpe Air Co. v. Sire, 41 Fed. Rep. 662,	299
Egerton v. Matthews, 6 East, 307,	688	Ellmaker v. Ellmaker, 4 Watts, 89,	870, 871
Egger v. Nesbitt, 122 Mo. 667,	69, 71, 83	Ellsworth v. Fogg, 35 Vt. 355,	1631
Eggleston v. Rumble, 20 N. Y. Supl. 819,	1919	Ellsworth v. Low, 62 Iowa, 178,	1729
Eggleston v. Wagner, 46 Mich. 610,	67	Ellwood v. Monk, 5 Wend. 235,	237
Engelhorn v. Reitlinger, 122 N. Y. 76,	2179	Elmer v. Pennel, 40 Maine, 430,	234
Englebert v. Troxell, 40 Neb. 195,	1790	Elmore v. Marks, 39 Vt. 538,	17, 90
Ehle v. Judson, 24 Wend. 97,	183, 268	Elmore v. Naugatuck R. Co., 23 Conn. 457,	735, 737
Ehrlich v. Aetna Ins. Co., 103 Mo. 231,	500	Elmore v. Stone, 1 Taunt. 458,	668
Ehrsam v. Mahan, 52 Kan. 245,	1513	Elorfrson v. Lindsay, 90 Wis. 203,	1052
Eichelberger v. Murdock, 10 Md. 373,	2210	El Paso, etc., Association v. Lane, 81	
Eighmie v. Taylor, 98 N. Y. 288,	41, 2179	Texas, 369,	1605, 1629
Eilenberger v. Protective, etc., Insurance		Elston v. Castor, 101 Ind. 426,	29
Co., 89 Pa. St. 464,	319	Elston v. Chicago, 40 Ill. 514,	804
Eiler v. Crull, 99 Ind. 375,	777	Elston v. Fieldman, 57 Minn. 70,	346
Einstein v. Rochester Gas Co., 146 N. Y.		Elston v. Jasper, 45 Texas, 409,	1813
46,	855	Elting v. Dayton, 17 N. Y. S. 849,	2174
Eisel v. Hayes, 141 Ind. 41,	106, 2045	Elting v. Sturtevant, 41 Conn. 455,	465
Eisenhart v. Slaymaker, 14 S. & R. 153,	577	Elting v. Vanderlyn, 4 Johns. 237,	204
Elbring v. Mullen (Idaho 1894), 38 Pac.		Elting Woolen Co. v. Martin, 5 Daly, 417,	149
Rep. 404,	2178	Elton v. Brogdon, 4 Camp. 281,	333
Elder v. Schumacher, 18 Colo. 433,	1837	Elton v. Johnson, 16 Conn. 253,	438
Eldred v. Malloy, 2 Colo. 320,	1914	Elton v. Jordan, 1 Stark. 102,	333
Eldred v. Peterson, 80 Iowa, 264,	819	Elwell v. Dodge, 33 Barb. 336,	1286
Eldridge v. Rowe, 7 Ill. 91,	147	Elwell v. Puget Sound R. Co., 7 Wash.	
Electric, etc., Co. v. Gill, etc., Co., 125 Mo.		487,	1274, 1357
140,	1124, 1209	Elwell v. Shaw, 16 Mass. 42,	1233, 1234
Ely v. Positive, 34 Law T. R. (N. S.) 190,	1310	Elwood v. Monk, 5 Wend. 235,	607
Elias v. Gill, 92 Ky. 569,	1947	Elwood v. Stewart, 5 Wash. 736,	1056, 1089
Eliason v. Henshaw, 4 Wheat. 225,	67	Ely v. James, 123 Mass. 36,	453
Eliot, etc., Bank v. Beal, 141 Mass. 566,	294	Ely v. McKay, 12 Allen, 323,	1120
Elizabeth City Academy v. Lindsey, 6		Ely v. Positive Assur. Co., L. R. 1 Ex. D.	653
Ired. Law, 476,	1323	20,	
Elkhart County Lodge v. Crary, 98 Ind.		Elyton Land Co. v. Birmingham Ware-	
238,	2083, 2084	house and Elevator Co., 92 Ala. 407,	1374, 1877
Elkins v. Camden, etc., R. Co., 36 N. J. Eq.		Ala. 369,	1123
241,	1225	Embrey v. Jemison, 131 U. S. 336,	
Elkins v. Parkhurst, 17 Vt. 105,	2198	1869, 1920, 1921, 1923, 1929, 1931	
Eloit N. Bank v. Beal, 141 Mass. 566,	2227	Emerson v. Knower, 8 Pick. 63,	540, 549
Ellen v. Topp, 6 Ex. 424,	117, 135	Emerson v. McNamara, 41 Maine, 565,	781
Eller v. Lacy, 137 Ind. 436,	820, 2186	Emerson v. Slater, 22 How. 28,	602, 688, 689
Ellerman v. Chicago, etc., Stock Yards		Emerson v. White, 10 Gray, 351,	379
Co., 49 N. J. Eq. 217,	2035, 2077	Emery v. Boston, etc., Insurance Co., 138	
Ellerman v. Stockyards Co., 49 N. J. Eq.		Mass. 398,	954
217,	2050	Emery v. Burbank, 163 Mass. 426,	718
Ellicott v. Chamberlin, 38 N. J. Eq. 604,	1040, 1884	Emery v. Lowell, 127 Mass. 138,	460
Ellicott v. Turner, 4 Md. 476,	647, 650, 652, 655		
Ellicott's Appeal, 60 Pa. St. 161,	2044		
Elliott v. Abbot, 12 N. H. 549,	1236		
Elliott v. Bell, 37 W. Va. 834,	810		
Elliott v. Caldwell, 43 Minn. 357,			
136, 138, 142, 2230, 2232			

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Emery v. Ohio Candle Co., 47 Ohio St. 320,	2060	Erkstine v. Plummer, 7 Greenl. (Maine) 447,	640
Emery v. Owings, 6 Gill, 191,	901	Erkstine v. Van Arsdale, 15 Wall. 75,	462, 807
Emery v. Parrott, 107 Mass. 95,	1979	Erlanger v. New Sombbrero Phosphate Co., L. R. 3 App. Cas. 1218,	1980
Emery v. Piscataqua, etc., Insurance Co., 62 Maine, 322,	316	Ennis v. Ennis, 48 Hun, 11,	618, 1715
Emery v. Royal, 117 Ind. 299,	209, 211	Erringdale v. Riggs, 118 Ill. 403,	1731
Emery v. Smith, 46 N. H. 151,	648, 655, 693	Errington v. Aynesly, 2 Brown Ch. 341,	1203
Emery v. Wilson, 79 N. Y. 78,	203	Ensign v. Webster, 1 Johns. Cas. 145,	465
Emigrant Industrial Saving Bank, <i>In re</i> , 75 N. Y. 388,	1551	Enterprise Distilling Co. v. Bradley, 17 Ill. App. 509,	831
Emley v. Drumm, 36 Pa. St. 123,	674	Erwin v. Erwin, 25 Ala. 236,	98, 106
Emma Silver Mining Co. v. Grant, L. R. 11 Ch. Div. 918,	1980	Erwin v. Greene, 5 Rob. (La.) 70,	813, 844
Emmel v. Hayes, 102 Mo. 186,	845	Erwin v. Harris, 87 Ga. 333,	150
Emmerson v. Heelis, 2 Taunt. 38,	636, 674	Erwin v. Scotten, 40 Ind. 339,	831
Emmitsburg R. Co. v. Donoghue, 67 Md. 383,	212	Eshelman v. Henrietta Vineyard Co., 102 Cal. 199,	1162, 1184
Emmitt v. Brophy, 42 Ohio St. 82,	1443	Eshleman v. Henrietta Vineyard Co., 97 Cal. 670,	1201
Emons v. Scudder, 115 Mass. 367,	440	Eslow v. Mitchell, 26 Mich. 500,	404
Emperor of Austria v. Day, 2 Giff. 628,	392	Esmond v. Van Benschoten, 12 Barb. 376,	517
Empire v. Darlington, 101 U. S. 87,	1461	Esmay v. Gorton, 15 Ill. 433,	684
Empire State Insurance Co. v. American Cent. Ins. Co., 138 N. Y. 446,	1294	Espy v. Anderson, 14 Pa. St. 308,	122, 689, 690, 692
Emulous, The Cargo of Ship Gall (U. S. C. C.), 562,	2020	Espinosa v. Gregory, 40 Cal. 58,	281
Encking v. Simmons, 28 Wis. 273,	1825	Esselestyn v. Weeks, 12 N. Y. 635,	196
Enders v. Enders, 164 Pa. St. 266,	1128	Essex v. Essex, 20 Beav. 442,	644
Energia, The, 56 Fed. Rep. 124,	741	Essex v. New York, etc., R. Co., 8 Hun, 361,	2180
Enfield Toll Bridge Co. v. Hartford, etc., Railroad, 17 Conn. 40,	2146	Essex, Town of, v. New York, etc., R. Co., 8 Hun (N. Y.), 361,	2170
Endriss v. Chippewa Co., 43 Mich. 317,	1471	Estabrook, <i>Ex parte</i> , 2 Lowell, 547,	1285
Engel v. Scott, etc., Lumber Co. (Minn. 1895), 61 N. W. Rep. 825,	880	Estate of Baubichon, 49 Cal. 19,	1713
Eager v. Dawley, 62 Vt. 164,	325, 326	Estate of McCarty, 58 Cal. 335,	2235
Eager v. Davidson, 11 A. & E. 856, 189, 2090		Estell v. Knightstown, etc., Turnpike Co., 41 Ind. 174,	153
England v. Davidson, 39 Eng. Com. Law, 453,	188	Esterly Machine Co. v. Pringle, 41 Neb. 205,	198
Engle v. White, 104 Mich. 15,	2274	Estes v. Reynolds, 75 Mo. 563,	975
Engle v. White (Mich. 1895), 62 N. W. Rep. 154,	1155	Estes v. Tower, 102 Mass. 65,	385
Engelbert v. Troxell, 40 Neb. 195,	1774, 1783, 1789, 1798, 1837	Estey v. Starr, 56 Vt. 690,	1477
Englehardt v. Fifth Ward, etc., Association, 25 N. Y. Supl. 835,	1616	Esty v. Aldridge, 46 N. H. 127,	653
Engelhardt v. Fifth Ward, etc., Loan Association, 148 N. Y. 281,	173	Esty v. Baker, 50 Maine, 325,	894
Englehorn v. Reitlinger, 122 N. Y. 76,	41, 46	Ettlinger v. Persian Rug Co. 142 N. Y. 189,	1393
English v. McNair, 31 Ala. 40,	886	Eubank v. Hampton, 1 Dana, 343,	424
English v. Spokane Com. Co., 57 Fed. Rep. 742,	346, 348	Eubank v. May, etc., Hardware Co. (Ala. 1895), 17 So. Rep. 109,	631
English v. Thomasson, 82 Ky. 280,	363	Eureka Steel Works v. Bresnahan, 60 Mich. 322,	1273, 1282
Episcopal Soc. v. Episcopal Church, 1 Pick. (Mass.) 373,	1895	European, etc., Ry. Co. v. Poor, 59 Maine 277,	1292
Eppens v. McGrath, 3 N. Y. Supl. 213,	123	Eustis v. Bolles, 146 Mass. 413,	1634
Epperson v. Nugent, 57 Miss. 45,	777	Eustis Manfg. Co. v. Eustis, 51 N. J. Eq. 563,	1135
Eppes v. Randolph, 2 Call. 125,	224	Evans v. Bailey, 66 Cal. 112,	1263, 1514
Equitable, etc., Foundry Co. v. Hersee, 103 N. Y. 25,	945	Evans v. Bolling, 5 Ala. 550,	409
Equitable, etc., Society v. Clements, 140 U. S. 226,	732	Evans v. City of Trenton, 24 N. J. Law, 764,	1512
Equitable, etc., Society v. Paterson, 41 Geo. 333,	119	Evans v. Eaton, 1 Peters C. C. (U. S.) 322,	2118
Equitable Ins. Co. v. Van Etten, 40 Ill. App. 232,	118	Evans v. Elliott, 20 Ind. 283,	2044
Erbin v. Lorillard, 19 N. Y. 299,	693	Evans v. English, 61 Ala. 416,	1743, 1744
Erin, Appeal of City of, 91 Pa. St. 398,	1519, 1520, 1523, 1565, 1568	Evans v. Evans, 93 Ky. 510,	2010
Erie County Bank v. Roop, 48 N. Y. 292,	988	Evans v. Evans, 155 Pa. St. 572,	1679
Erie Co. Savings Bank v. Coit, 104 N. Y. 512,	594	Evans v. Forster, 1 Barn. & Adol. 118,	2172
Erie, etc., Ry. Co. v. Knowles, 117 Pa. St. 77,	850	Evans v. Gallantime, 57 Ind. 367,	1634
Erio, etc., R. Co. v. Patrick, 2 Abbott App. Dec. 72,	818	Evans v. Goggan, 5 Texas App. 129,	1014, 1020
Erie R. Co. v. Pennsylvania, 21 Wall. (U. S.) 492,	2136	Evans v. Greenhow, 15 Gratt. 153,	427
Erie R. Co. v. Union Locomotive Co., 35 N. J. Law, 240,	301	Evans v. Hardy, 76 Ind. 527,	637
Erie Ry. Co. v. Wilcox, 84 Ill. 239,	737	Evans v. Hoating Co., 157 Mass. 37,	1240
Erkstine v. Adeane, L. R. (8Ch. App.) 756,	46	Evans v. Hoare, L. R. 1 Q. B. 593,	638
		Evans v. Koons, 10 Ind. App. 603,	2175
		Evans v. Lee, 12 Nev. 393,	1129
		Evans v. Lewellin, 1 Cox Ch. 333,	582
		Evans v. Miller, 53 Miss. 120,	781, 2168
		Evans v. Morgan, 69 Miss. 328,	1793
		Evans v. Powis, 1 Ex. 601,	529, 531
		Evans v. Prothero, 1 DeG. M. & G. 572,	675
		Evans v. Richardson, 3 Mer. 469,	1837
		Evans v. Roberts, 5 B. & C. 829,	636
		Evans v. Trenton, 24 N. J. Law, 764,	1505

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Evans v. Union Pac. R. Co., 58 Fed. Rep. 497,	1092	<i>Ex parte</i> Good, 5 Ch. Div. 46,	819
Evans v. Ware, 3 The Reports, 32,	1798	<i>Ex parte</i> Hawkins, 25 L. J. Ch. 221,	260
Evans v. Welborne, 74 Texas, 530,	1681	<i>Ex parte</i> Hoag, 7 Paige (N. Y.), 312,	1844
Evans v. Western Brass Mfg. Co., 118 Mo. 548,	930	<i>Ex parte</i> Jones, L. R. 18 Ch. Div. 109,	1807
Evans v. Wood, L. R. 5 Eq. 9,	300	<i>Ex parte</i> Kendall, 17 Ves. 514,	822
Evansville v. Woodbury, 60 Fed. Rep. 718,	1532	<i>Ex parte</i> Kirk, L. R. 5 Ch. Div. 800,	567
Evansville, City of, v. Morris, 87 Ind. 269,	2107, 2109	<i>Ex parte</i> Mansfield, 19 L. J. Ch. 258,	280
Evansville, City of, v. Summers, 108 Ind. 189,	1910	<i>Ex parte</i> McBurnie's Trustees, 1 DeG., M. & G. 440,	223
Evansville, etc., R. Co. v. Dunn, 17 Ind. 603,	138	<i>Ex parte</i> McClure, L. R. 5 Ch. 737,	488
Evansville Railroad Co. v. Evansville, 15 Ind. 395,	1532	<i>Ex parte</i> Pettit, 2 Paige (N. Y.), 596,	1844
Evansville, etc., R. Co. v. Meeds, 11 Ind. 273,	866	<i>Ex parte</i> Piercy, L. R. 9 Ch. 33,	239
Evarts v. Agnes, 4 Wis. 343,	13	<i>Ex parte</i> Pollard, 40 Ala. 77,	2151
Everet v. Williams, 2 Poth. Obl. (By Evans), 3,	1905	<i>Ex parte</i> Smith, 17 W. R. 491,	800
Everett v. Drew, 129 Mass. 150,	2180	<i>Ex parte</i> Stapleton, L. R. 10 Ch. Div. 586,	492, 2222
Everett v. Herrin, 46 Maine, 357,	715	<i>Ex parte</i> Virginia, 100 U. S. 339,	2160
Everett v. Vendryes, 19 N. Y. 436,	727, 728	<i>Ex parte</i> Weston, 12 Mete. 1,	825
Everham v. Oriental, etc., Association, 47 Pa. St. 352,	1599	<i>Ex parte</i> Whitehead, L. R. 14 Q. B. Div. 419,	619
Everhart's Appeal, 106 Pa. St. 349,	644	<i>Ex parte</i> Yelland, 21 L. J. Ch. 260,	—
Everhart v. Puckett, 73 Ind. 409,	48	Express Co. v. Caldwell, 21 Wall. (U. S.), 264,	1987
Everingham v. Meighan, 55 Wis. 354,	212	Exton v. Scott, 6 Sim. 31,	88
Everitt v. Chapman, 6 Conn. 347,	2252	Eyre v. Cook, 9 Iowa, 185,	835
Everitt v. Everitt, L. R. 10 Eq. 405,	253	Eyre v. Countess of Shaftsbury, 2 P. Wms. 121,	1780
Everroad v. Schwartzkopf, 123 Ind. 35,	2229, 2248	Ezzard v. Frick, 76 Ga. 512,	170
Evemann v. Schmitt (Ohio 1895), 41 N. E. Rep. 139,	1593, 1597, 1598, 1615		
Everson v. Carpenter, 17 Wend. 419,	1773, 1776		
Everson v. Eddy, 12 N. Y. Supl. 872,	1229	Fabacher v. Bryant, 46 La. Ann. 820,	1868
Everts v. Allen, 12 Johns. 352,	186	Faber v. Matz, 86 Wis. 370,	1875
Evarts v. Steger, 5 Ore. 147,	2192	Fackler v. Ford, McCahon (Kan.), 21,	2024
Ewart v. Street, 2 Bailey L. (S. Car.) 157,	275	Fagin v. Connolly, 25 Mo. 94,	904
Ewell v. Daggs, 108 U. S. 143,	2125	Fahrney v. Holsinger, 65 Pa. St. 388,	1524
Ewing v. Burnett, 11 Pet. 41,	886, 894	Fahy v. North, 19 Barb. 341,	286
Ewing v. Fiedler, 30 Ill. App. 202,	128	Falkney v. Reynous, 4 Burr. 2069,	1854
Ewing v. Stultz, 9 Ind. App. 1,	1382	Fain v. Turner (Ky.), 29 S. W. Rep. 628,	203, 611, 647
Ewing v. Walker, 60 Ark. 503,	17		
Excelsior Manufacturing Co. v. Wheelock (N. M.), 28 Pac. Rep. 772,	182	Fairbank Co. v. Metzger, 118 N. Y. 260,	321, 504
Excelsior Needle Co. v. Smith, 61 Conn. 56,	882, 899	Fairbanks v. Phelps, 22 Pick. 535,	166
Excelsior Pav. Co. v. Pierce (Cal. 1893), 33 Pac. Rep. 727,	1494	Fairbrother v. England, 40 Wkly. Rep. 220,	501
Exchange Bank v. Knox, 19 Gratt. 739,	427	Fairchild v. Holly, 10 Conn. 175,	473
Exchange Bank v. Rice, 107 Mass. 37,	8, 239, 240, 2184	Fairchild v. House, 18 Fla. 770,	1700
Exchange Building Co. v. Bayless (Va. 1895), 21 S. E. Rep. 279,	571	Faires v. Cockerill (Texas 1895), 29 S. W. Rep. 669,	2189
Executors of Moffat v. Strong, 10 Johns. 11,	275	Fairfield v. County of Gallatin, 100 U. S. 47,	1532
Exhaust Elevator Co. v. Chicago, etc., R. Co., 66 Wis. 218,	132, 133, 134	Fairly v. Wappoo Mills (S. Car. 1895), 22 S. E. Rep. 108,	917
Ex-Mission, etc., Water Co. v. Flash, 97 Cal. 610,	1980	Faitoute v. Sayre (N. J. 1894), 28 Atl. Rep. 711,	1676
<i>Ex parte</i> Andrews, 18 Cal. 678,	2094	Falcke v. Gray, 4 Drewry, 651,	234
<i>Ex parte</i> Banner, L. R. 17 Ch. Div. 480,	210, 1473	Fales v. Hemenway, 64 Maine, 373,	490
<i>Ex parte</i> Barclay, 7 Ves. 597,	457	Falk v. Moebis, 127 U. S. 507,	1236
<i>Ex parte</i> Barrett, 34 L. J. Ch. 558,	200	Falkner v. Linehan, 88 Iowa 641,	2285
<i>Ex parte</i> Blackburne, 10 Ves. 204,	456	Fall v. Hazelrigg, 45 Ind. 576,	846
<i>Ex parte</i> Carnforth, etc., Co., L. R. 4 Ch. Div. 108,	492	Fall River, etc., Co. v. Borden, 10 Cush. 458,	644
<i>Ex parte</i> Chalmers, L. R. 8 Ch. 289,	152, 491, 2235	Fallon v. Railroad Co., 1 Dill. 121,	1110
<i>Ex parte</i> Christie, 5 Paige (N. Y.) 242,	1814	Fallowes v. Taylor, 7 T. R. 471,	179
<i>Ex parte</i> Conway, 4 Ark. 302,	1332	Falls v. Cairo, 53 Ill. 403,	460
<i>Ex parte</i> Cote, L. R. 9 Ch. App. 27,	77	Falls v. United States Savings Loan and Building Co., 97 Ala. 417,	727
<i>Ex parte</i> Cottrell, 2 Cowp. 742,	226	Falls Wire Manf. Co. v. Broderick, 12 Mo. App. 378,	66, 67
<i>Ex parte</i> Davis, L. R. 3 Ch. Div. 463,	492	Falcon v. McIntyre, 118 Ill. 292,	51, 1684
<i>Ex parte</i> Dean, 2 Cow. 605,	704	Falcon v. Simshauser, 130 Ill. 649,	1032
<i>Ex parte</i> Estabrook, 2 Lowell, 547,	1235	Fannin v. Bellomy, 5 Bush. 663,	110
<i>Ex parte</i> Ford, L. R. 16 Q. B. Div. 305,	22	Fannin v. Thomas, 50 Geo. 614,	382
		Fanning v. Consequa, 17 John. 511,	710, 729
		Fant v. Miller, 17 Gratt. 47,	717
		Fareira v. Gabell, 89 Pa. St. 89,	1859, 1926, 1929, 1930
		Farewell v. Coker, 2 Merr. 353,	566

F

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Fargo v. New York, etc., R. Co., 23 N. Y. Supl. 360,	1212	Faure v. Martin, 7 N. Y. 210,	110
Fargusson v. Duluth Imp. Co., 56 Minn. 222,	1202	Faurie v. Morin, 4 Mart. (O. S.) (La.) 39,	2081
Farina v. Home, 16 M. & W. 119,	668	Faust v. Faust, 31 S. Car. 576,	32
Farley v. Cleveland, 4 Cow. 432,	236, 601, 603, 607	Favor v. Robinson, 46 Tex. 204,	428
Farley v. Cleveland, 9 Cow. 639,	617	Fawcett v. Eberley, 53 Iowa, 544,	1512, 2088
Farley v. Parker, 6 Ore. 125,	1837	Fawcett v. Woodbury Co., 55 Iowa, 154,	1512, 2083
Farley v. Rodocanachi, 100 Mass. 427,	2167	Fay v. Burditt, 81 Ind. 433,	1816, 1817, 1850
Farmer v. Arundel, 29 Wm. Bl. 824,	798	Fay v. Fay, 121 Mass. 561,	1640
Farmer v. Farmer, 39 N. J. Eq. 211,	1017	Fay v. Jenks, 78 Mich. 304,	724, 831
Farmer v. Russell, 1 B. & B. 216,	1854	Fay v. Noble, 12 Cush. 1,	1270, 1351, 1358
Farmers' Bank v. Blair, 41 Barb. 641,	189, 550	Fay v. Pacific Improvement Co., 93 Cal. 253,	274
Farmers' Bank v. King, 57 Pa. St. 202,	472	Fay v. Richards, 21 Wend. 626,	1-1
Farmers', etc., Bank v. Champlain Trans. Co., 23 Vt. 186,	735	Fay v. Richardson, 7 Pick. 91,	15, 67
Farmers', etc., Co. v. St. Joseph, etc., R. Co., 1 McCrary (U. S.), 247,	1895	Fay v. Richmond, 13 Mo. App. 355,	1311
Farmers', etc., Trust Co. v. Galesburg, 133 U. S. 156,	1044	Fay v. Wheeler, 44 Vt. 292,	661
Farmers' Insurance Co. v. Ross, 29 Ohio St. 429,	2252	Fazakerly v. McKnight, 6 El. & Blackf. 794,	567
Farmers' Loan Co. v. Northern Pac. R. Co., 63 Fed. Rep. 36,	1419	Fear v. Bartlett, 81 Md. 435,	713, 1331
Farmers' Loan Co. v. Wilson, 139 N. Y. 284,	949	Fearnley v. DeMainville, 5 Colo. App. 441,	1874, 2091
Farmers' Loan, etc., Co. v. Toledo, etc., R. Co., 61 Fed. Rep. 49,	1428	Feary v. Hamilton, 140 Ind. 45,	2170
Farmers' Loan & Trust Co. v. Canada, etc., Ry. Co., 127 Ind. 250,	1855	Featherston v. Hutchinson, Cro. Eliz. 199,	1861
Farmers' Loan and Trust Co. v. Postal Telegraph Co., 55 Conn. 331,	720	Fechter v. Montgomery, 33 Beav. 22,	2072
Farmers' Nat. Bank v. Sutton Mfg. Co., 52 Fed. Rep. 191,	728	Feder v. Field, 117 Ind. 356,	2166
Farmers' Stock Assn. v. Scott, 53 Kan. 534,	335	Federlicht v. Glass, 13 Lea (Tenn.), 481,	1750, 1751
Farmington Academy v. Allen, 14 Mass. 172,	255	Feeney v. Howard, 79 Cal. 525,	634
Farnam v. Brooks, 9 Pick. 212,	1031	Feineman v. Sachs, 33 Kan. 621,	1902
Farnham v. O'Brien, 22 Maine, 475,	183	Felch v. Bugbee, 48 Maine, 9,	725
Farnham v. Ross, 2 Hall, 167,	758	Felch v. Hooper, 119 Mass. 52,	1152, 1161, 1172
Farnsworth v. Duffer, 142 U. S. 43,	989	Felix v. Patrick, 145 U. S. 317,	13
Farnsworth v. Garrard, 1 Camp. 38,	187	Fell v. State, 42 Md. 71,	2128
Farnum v. Canal Co., 1 Sumn. 46,	1453	Feller v. Green, 26 Mich. 70,	803
Farnum v. Fowle, 12 Mass. 92,	767	Fellows v. Smith, 130 Mass. 378,	1669
Farquhar v. Iles, 39 La. Ann. 874,	378	Fellows v. Spaulding, 141 Mass. 89,	2257
Farquhar v. McAlvey, 142 Pa. St. 233,	163	Fellows v. Stevens, 24 Wend. 284,	535, 1633, 1638
Farr v. Ricker, 46 Ohio St. 235,	1073	Fellows v. Wood, 59 L. T. Rep. 513,	1798
Farr v. Stevens, 26 Vt. 209,	457	Felthouse v. Bindley, 11 C. B. N. S. 869,	63
Farrar v. Churchill, 135 U. S. 609,	425, 980	Felton v. Dickenson, 10 Mass. 287,	237, 240, 2210
Farrar v. Hinch, 20 Ill. 646,	854	Felton v. Leigh, 48 Ark. 498,	1052
Farrer v. Close, L. R. 4 C. B. 602,	2074	Felton v. Smith, 84 Ind. 485,	845
Farrell v. Baltimore, 75 Md. 493,	1611	Fennell v. Mulcahy, 8 Irish Law Rep. 434,	599
Farrell v. Burbank, 57 Minn. 395,	440	Fennell v. Ridler, 5 B. & C. 406,	2094
Farrell v. Oldtown, 69 Maine, 72,	1576	Fenno v. Weston, 31 Vt. 345,	69
Farrell v. Railroad Co., 61 Conn. 127,	1249	Fentiman v. Smith, 4 East, 107,	643
Farrell v. School District, 98 Mich. 43,	2215	Fenton v. Emblers, 3 Burrows, 1278,	647, 650
Farrington v. Donohue, 1 Ir. Rep. C. L. 675,	652	Fenton v. Clark, 11 Vt. 557,	148, 286
Farrington v. Forman (N. J. Eq. 1893), 26 Atl. Rep. 502,	1708	Ferdon v. Cunningham, 20 How. Pr. (N. Y.) 154,	1907
Farrington v. Hodgdon, 119 Mass. 453,	487, 535, 1631	Ferebee v. Pritchard, 112 N. Car. 83,	1727
Farrington v. South Boston R. Co., 150 Mass. 406,	1351	Ferguson v. Baker, 116 N. Y. 257,	46, 47
Farrington v. Tennessee, 95 U. S. 679,	2121, 2123, 2137	Ferguson v. Boll, 17 Mo. 347,	1774
Farrow v. Wilson, L. R. 4 C. P. 744,	284	Ferguson v. Crick (1893 Ky.), 23 S. W. Rep. 668,	625, 635
Farthing v. Shields, 106 N. Car. 283,	1703, 1740, 1741	Ferguson v. Dunn, 28 Ind. 53,	1818
Farwell v. Cohen, 138 Ill. 216,	1641	Ferguson v. Ferguson, 2 N. Y. 360,	490
Farwell v. Cramer, 38 Neb. 61,	1691, 1706, 1728, 1745	Ferguson v. Halsell, 47 Tex. 421,	1500
Farwell v. Jacobs, 4 Mass. 631,	1524	Ferguson v. Harris, 39 S. Car. 323,	1694
Farwell v. Johnston, 34 Mich. 342,	1207	Ferguson v. Hogan, 25 Minn. 135,	408
Farwell v. Lowther, 13 Ill. 252,	215	Ferguson v. Houston, etc., Ry. Co., 73 Texas, 344,	1773
Farwell v. Tillson, 76 Maine, 227,	694	Ferguson v. Kimball, 3 Barb. Ch. 616,	490
Fassett v. Smith, 23 N. Y. 252,	2280	Ferguson v. Landram, 5 Bush (Ky.), 230,	1748
Fatman v. Thompson, 2 Disney (Cincinnati), 432,	354	Ferguson v. Railway Co., 53 Iowa, 293,	1433
Faulkner v. Lowe, 2 Ex. 595,	278	Ferguson v. Staver, 33 Pa. St. 411,	676
Faulkner v. Wright, Rice L. 107,	275	Ferguson v. Brent, 12 Md. 9,	276
		Ferguson v. Fyffe, 8 C. & F. 121,	710
		Fergus Water Co. v. Fergus Falls, 65 Fed. Rep. 586,	1569
		Ferner v. Williams, 14 Abb. Pr. 215,	161
		Ferrall v. Bradford, 2 Fla. 508,	832
		Ferree v. Wilson (Con. Pl. 1892), 19 N. Y. Supl. 209,	2193
		Ferrell v. Maxwell, 28 Ohio St. 383,	614
		Ferrenbach v. Turner, 88 Mo. 416,	1580
		Ferrier v. Storer, 63 Iowa, 484,	62, 76, 103

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Ferrill v. Mooney, 33 Texas, 219,	781	First Nat. Bank v. Christopher, 40 N. J.	
Ferris v. Spooner, 102 N. Y. 10,	495, 507	Law, 435,	1288
Ferry v. Clarke, 77 Va. 397,	1136	First National Bank v. Coffin, 162 Mass.	103
Ferry v. Williams, 8 Taunt. 62,	378	180,	
Fertilizing Co. v. Hyde Park, 97 U. S. 659,	2147	First Nat. Bank v. Council Bluffs City	1352
Fesler v. Haas, 19 Kan. 216,	201	Water-Works Co., 56 Hun, 512,	
Fessenden v. Taft, 65 N. H. 39,	720	First Nat. Bank v. Craig, 1 N. J. Law J.	1748
Fetrow v. Wiseman, 40 Ind. 148,		153,	
215, 1771, 1772, 1773, 1775		First Nat. Bank v. Dovetail B. & G. Co.,	1406
Fetterly v. Municipality of Russell, 14		(Ind.) 40 N. E. Rep. 810,	2247
U. C. Q. B. 433,	1508	First Nat. Bank v. Fiske, 133 Pa. St. 241,	158,
Ficklin v. Rixey, 89 Va. 832,	1718	First Nat. Bank v. Grindstaff, 45 Ind. 329,	333
Fidelity, etc., Co. v. Alpert, 67 Fed. Rep.			
460,	314	First Nat. Bank v. Gustin Minerva Con.	
Fidelity, etc., Deposit Co. v. Shenandoah		Co., 42 Minn. 327,	1375, 1398
Valley R. Co., 86 Va. 1,	448	First Nat. Bank v. Hogan, 47 Mo. 472,	1341
Fidelity Trust Co. v. People's Co., 150 Pa.		First National Bank v. Hollinsworth, 78	
St. 3,	565	Iowa, 575,	470
Fiebel v. Obersky, 13 Abb. Pr. N. S.		First Nat. Bank v. Jagger, 41 Minn. 308,	1600
(N. Y.) 402,	1807	First Nat. Bank v. Keefer Milling Co., 95	
Field v. Aldrich, 162 Mass. 587,	510	Ky. 97,	1363
Field v. Chipley, 79 Ky. 260,	2085, 2086,	First Nat. Bank v. Kimberlands, 16 W. Va.	1282
Field v. Crawford, 6 Gray, 116,	239	555,	
Field v. Dickinson, 3 Ark. 409,	717	First Nat. Bank v. Kingsley, 84 Maine, 111,	
Field v. Holland, 6 Cranch, 8,	470, 473	2100, 2106, 2112	
Field v. Jones, 9 East, 151,	761	First National Bank v. Marshall, 73 Maine,	
Field v. Lelean, 80 L. J. Ex. 168,	891	79,	550, 573
Field v. Leiter, 118 Ill. 17,	853, 872	First Nat. Bank v. Mayor, etc., 68 Ga. 119,	461
Field v. Runk, 22 N. J. Law, 525,	816	First Nat. Bank v. Nelson (Ala. 1894), 16	
Field v. Shorb, 99 Cal. 661,	1030	So. Rep. 707,	920
Fiero v. Fiero, 52 Barb. 258,	635	First National Bank v. North Missouri,	
Fietsam v. Hay, 122 Ill. 293,	1250	etc. Co., 86 Mo. 125,	1271, 1287
Fifth Avenue Bank v. Forty-second Street		First Nat. Bank v. Oskaloosa Packing Co.,	
R. Co., etc., 137 N. Y. 231,	1344	66 Iowa, 41,	1869
Fifth Nat. Bank v. Navassa Phosphate		First Nat. Bank v. Root, 107 Ind. 224,	2166
Co., 119 N. Y. 256,	1357	First Nat. Bank v. Ruhl, 122 Ind. 279,	1855
Figes v. Cutler, 3 Stark. 139,	95	First Nat. Bank v. Shaw, 61 N. Y. 283,	733
Fildew v. Besley, 42 Mich. 100,	239	First National Bank v. Sioux City Terminal	
Filkins v. Whyland, 24 Barb. 379,	343	Co., 69 Fed. Rep. 441,	1256
Filley v. Pope, 115 U. S. 213,	744	First Nat. Bank v. Snyder, 79 Iowa, 191,	900
Filson v. Himes, 5 Pa. St. 452,	2081	First Nat. Bank v. Watkins, 154 Mass. 385,	454
Finch v. Boning, L. R. 4 C. P. D. 143,	403	First National Bank v. Watkins, 21 Mich.	
Finch v. Brook, 1 Bing. N. Car. 253,	389	483,	805
Finch v. Finch, 10 Ohio St. 501,	618	First Nat. Bank v. Winona Plow Co., 59	
Findley v. Armstrong, 23 W. Va. 113,	860	N. W. Rep. 997,	1386
Findlay, City of, v. Pertz, 66 Fed. Rep.		First Parish, Inhabitants of, v. Jones, 8	
427,	1591	Cush. 184,	186
Findley v. City of Pittsburgh, 82 Pa. St.		First Presbyterian Church v. Logan, 77	
351,	1544, 1547, 1552,	Iowa, 326,	1064
Findley v. Findley, 11 Gratt. 434,	871	Firth v. Hamill, 167 Pa. St. 382,	49
Fine v. Hornsby, 2 Mo. App. 61,	661	Fiscus v. Turner, 125 Ind. 46,	1818
Finegan v. Theisen, 92 Mich. 173,	1030	Fish v. Dunn, 59 Minn. 99,	263
Finegan & Co. v. L'Engle, 8 Fla. 413,	2223	Fish v. Hubbard, 21 Wend. 651,	99
Finger v. Hahn, 42 N. J. Eq. 606,	2046	Fish v. Hutchinson, 2 Wils. 94,	610
Fink v. Cox, 13 Johns. (N. Y.) 145,	1712	Fish v. Thomas, 5 Gray, 45,	597, 608
Finlay v. Stewart, 56 Pa. St. 183,	826	Fiscus v. Turner, 125 Ind. 46,	1810
Finley v. Steele, 23 Ill. 56,	863	Fisher v. Bishop, 108 N. Y. 25,	1825
Finley Rubber Co. v. Finley (N. J. Eq.		Fisher v. Bowser, 1 Posey Unrep. Cases,	
1895), 32 Atl. Rep. 740,	1300	346,	1169
Finn v. Donahue, 35 Conn. 216,	2106, 2108	Fisher v. Bridges, 3 El. & Bl. 641,	1929
Finnegan v. Pacific Vinegar Co., 26 Ore.		Fisher v. Bush, 35 Hun (N. Y.), 641,	2060
152,	1269	Fisher v. City of Boston, 104 Mass. 87,	1476
Finney v. Apgar, 31 N. J. Law. 266,	659	Fisher v. Fisher, 113 Ind. 474,	1917
Finney v. Bedford Ins. Co., 8 Met. (Mass.)		Fisher v. Fisher, 3 Ind. App. 665,	1917
348,	2184	Fisher v. Hildreth, 117 Mass. 558,	1946
Finney v. Callendar, 8 Minn. 41,	2112	Fisher v. Hall, 41 N. Y. 416,	15, 80, 91
Fire Ins. Co. v. Wickham, 141 U. S. 564,	209	Fisher v. Hoover, 3 Texas Civ. App. 81,	1623
Fireman's Association v. Berghaus, 13 La.		Fisher v. May's Heirs, 2 Bibb. 448,	538
Ann. 209,	1425, 1954, 1988	Fisher v. Mobray, 8 East. 330,	1772
First Baptist Church, Trustees of, v. Brook-		Fisher v. Monongahela Railway Co., 131	
lyn Fire Ins. Co., 19 N. Y. 305,	653	Pa. St. 292,	2253
First, etc., Society v. Brown, 147 Mass.		Fisher v. Provin, 25 Mich. 347,	1764
296,	1141	Fisher v. Samuda, 1 Camp. 190,	666
First Nat. Bank v. Asheville Lumber Co.,		Fisher v. Sargent, 10 Cush. 250,	937
116 N. C. 827,	1273, 1286	Fish v. Street, 27 Kan. 270,	831
First Nat. Bank v. Bartlett, 8 Neb. 319,	1666	Fisher v. Syfers, 109 Ind. 514,	1397, 1859
First Nat. Bank v. Border (Texas App.		Fisk v. Henarie, 14 Ore. 29,	831
1895) 29 S. W. Rep. 659,	611	Fisk v. Jefferson Police Jury, 116 U. S.	
First Nat. Bank v. Bryan, 62 Iowa 42,	1832	131,	2116
First Nat. Bank v. Buchanan, 87 Tenn. 82,	446	Fisk v. Stewart, 24 Minn. 97,	977
First Nat. Bank v. Chalmers, 144 N. Y. 432,	606	Fisk v. Tank, 12 Wis. 306,	265
		Fiske v. Fiske, 20 Pick. 499,	490

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Fist v. Fist, 3 Colo. App. 273,	578	Fleming v. Bills, 3 Ore. 286,	1956
Fitch v. American, etc., Insurance Co.,		Fleming v. Burnham, 100 N. Y. 1,	420
59 N. Y. 557,	318	Fleming v. Fleming, 33 S. Car. 505,	
Fitch v. Forman, 14 John. 172,	577		194, 195, 196
Fitch v. Peckham, 16 Vt. 150,	789	Fleming v. Fulton, 7 Miss. 473,	767
Fitch v. Seymour, 9 Met. 462,	643	Fleming v. Holt, 12 W. Va. 143,	1179
Fitch v. Seymour Water Co., 139 Ind. 214,	1575	Fleming v. Gilbert, 3 Johns. 528,	517, 951
Fitch v. Snedaker, 38 N. Y. 218,	60	Fleming v. Ogden, 152 Pa. 418,	1021
Fitchburg R. Co. v. Gage, 12 Gray (Mass.),	1420	Fleming v. Ramsey, 46 Pa. St. 253,	635
		Fleming v. Prescott, 3 Rich. Law (S.	
Fitchburg R. Co. v. Grand Junction R. &		Car.), 307,	1750
Depot Co., 4 Allen, 198,	1439	Flenner v. Flenner, 29 Ind. 564,	618
Fitts v. Hall, 9 N. H. 441,	1785, 1802, 1803	Flenniken v. Marshall (S. Car. 1895), 20	
Fitts v. Fitts, 14 Texas, 443,	1738	S. E. Rep. 788,	1381
Fitz v. Comey, 118 Mass. 103,	957	Flesh v. Lindsay, 115 Mo. 1,	1707
Fitzgerald Case, 56 Minn. 424,	1000	Fletcher v. Austin, 11 Vt. 447,	171
Fitzgerald v. Andrews, 15 Neb. 52,	2098	Fletcher v. Cole, 23 Vt. 114,	123, 150
Fitzgerald v. Dressler, 5 C. B. (N. S.) 885,		Fletcher v. Drath, 66 Mo. 126,	357
	596, 608	Fletcher v. Dyche, 2 T. R. 32,	758
Fitzgerald v. Evans, 40 Minn. 541,	332, 333	Fletcher v. Fletcher, 4 Hare, 67,	88, 89
Fitzgerald v. Fitzgerald, etc., Construc-		Fletcher v. Fletcher, 2 MacArthur, 38,	843
tion Co., 41 Neb. 374, 202, 441, 1295, 2283,	2289	Fletcher v. Grover, 11 N. H. 308,	826
Fitzgerald v. Fuller, 19 Hun, 180,	170	Fletcher v. New York, etc., Ins. Co., 13	
Fitzgerald v. Goff, 99 Ind. 28,	13	Fed. Rep. 526,	733
Fitzgerald v. Hanson, 16 Mont. 474,	916	Fletcher v. Peck, 6 Cranch, 87,	18, 2121, 2123
Fitzgerald v. Missouri Pacific R. Co., 45		Fletcher v. Prather, 102 Cal. 413,	1468
Fed. Rep. 812,	1453	Fletcher v. Wurgler, 97 Ind. 223,	198, 511
Fitzgerald v. Moran, 19 N. Y. Supl. 958, 95,	100	Fleury v. Tufts, 25 Ill. App. 101,	163
Fitzgerald v. Quann, 109 N. Y. 441,	1736	Flexner v. Dickerson, 72 Ala. 318,	1776, 1778
Fitzgerald v. Smith, 1 Ind. 310,	193	Flight v. Bolland, 4 Russ. 293,	1190
Fitzgerald v. Staples, 83 Ill. 234,	554	Flint v. Clinton Co., 12 N. H. 430,	1231
Fitzgerald v. Walker, 55 Ark. 148,	128	Flint v. Gibson, 106 Mass. 391,	1131
Fitzgerald Construction Co. v. Fitzgerald,		Flint v. Pierce, 99 Mass. 68,	239
137 U. S. 98,	1359	Flint v. Rogers, 3 Maine, 67,	385
Fitzhugh v. Fitzhugh, 11 Gratt. 210,	561	Fliokstein v. Mobile, 40 Ala. 725,	2094
Fitzhugh v. Franco, etc., Land Co., 81		Flood v. Thomasson (Ky. 1894), 25 S. W.	
Texas, 306,	1350	Rep. 108,	1188
Fitzhugh v. Wilcox, 12 Barb. (N. Y.) 235,	1322	Florida, etc., R. Co. v. State, 31 Fla. 482,	
Fitzmaurice v. Bayley, 9 H. L. Cas. 78,	684		1976, 1977
Fitzpatrick v. Beatty, 1 Gilman, 454,	1127	Florsheim v. Brestrup, 43 Minn. 298,	474
Fitzpatrick v. Dorland, 27 Hun, 291,	1172	Flower v. Cornish, 25 Minn. 473,	1645
Fitzpatrick v. Woodruff, 96 N. Y. 441,	160	Flower v. Lance, 59 N. Y. 603,	800
Fivas v. Nicholls, 2 Com. B. 500,	2101, 2112	Flower v. Marten, 2 M. & C. 459,	561
Flack v. Garland, 8 Md. 188,	526	Floyd Acceptance, The, 7 Wall. 666,	1342, 1430
Fleck v. Warner, 25 Kan. 492,	165	Floyd v. Maddux, 68 Ind. 124,	2171
Flagg v. Baldwin, 38 N. J. Eq. 319,	1926, 1930, 1931	Floyd v. Patterson, 72 Texas, 202,	1925
	853	Floyd v. Patterson (Texas 1891), 18 S. W.	
Flagg v. Fames, 40 Vt. 16,	1022	Rep. 654,	1925
Flagg v. Gilpin, 17 R. I. 10,		Fludry v. Cocker, 12 Ves. 25,	1148
Flagg v. Manhattan Railroad Co., 10		Flummerfelt v. Flummerfelt, 51 N. J. Eq.	
Fed. Rep. 413,	1295	432,	578
Flagg v. Mann, 2 Sumn. 486,	433	Flynn v. Hatton, 43 How. Pr. 383,	2170
Flagg v. Millbury, 4 Cush. (Mass.) 243,	2099	Flynn v. Hurd, 118 N. Y. 19,	987
Flagg v. Southern Building Assn., 113 N.		Flynn v. North American Ins. Co., 115	
Car. 374,	2205	Mass. 449,	1241, 2184
Flaherty v. Miner, 123 N. Y. 382,		Flynn v. Van Kleeck (Iowa 1894), 58 N. Y.	
127, 128, 370, 371, 2193, 2231		Rep. 1091,	1205
Flake v. Nuse, 51 Texas, 98,	388	Foakes v. Beer, L. R. 9 App. Cas. 605,	
Flanagan v. Domarest, 3 Robt. 173,	145		189, 190, 519
Flanagan v. Meyer, 41 Ala. 182,	707, 2107	Foard v. Grinter (Ky.), 18 S. W. Rep.	
Flanagan v. Mitchell, 10 N. Y. Supl. 234,	201	1034,	200, 204, 206
Flanders v. Blandy, 45 Ohio St. 100,	16	Fogg v. Blair, 133 U. S. 534,	1396
Flanders v. Chamberlain, 24 Mich. 305,	397, 408	Fogg v. Portsmouth Atheneum, 44 N. H.	
	490	115,	787
Flanders v. Lamphear, 9 N. H. 201,	214	Foland v. Town of Frankton, 142 Ind.	
Flanders v. Wood, 83 Texas, 277,		546,	1564
Flangan v. Great Western R. Co., L. R.		Foley v. Addenbrooke, 4 Ad. & El. (N. S.)	
7 Eq. 116,	1421	197,	828
Flanigan v. Seelye, 53 Minn. 23,	401	Foley v. Crow, 37 Md. 51,	426
Flanzen v. City of Philadelphia, 51 Pa.		Foley v. Greene, 14 R. I. 618,	
St. 491,	1175		1039, 1828, 1832
Flannagan v. Kilcome, 58 N. H. 443,	214	Foley v. Hamilton, 89 Iowa, 686,	1070
Flarty v. Odium, 3 T. R. 61,	2084, 2036	Foley v. Hotry, 41 Neb. 533,	2239
Flash v. Conn, 109 U. S. 311,	135	Foley v. Mason, 6 Md. 87,	394
Flaum v. Wallace, 103 N. Car. 296,	1702	Foley v. Mut. Life Ins. Co., 64 Hun, 63,	
Fleetwood v. City of New York, 2 Sandf.			1781
475,	807	Foley v. Speir, 100 N. Y. 552,	1865
Fleetwood v. Green, 15 Ves. 594,	1118	Folk v. Fonda (N. J. Eq. 1894), 29 Atl.	
Flego v. Garvey, 47 Cal. 371,	1157	Rep. 676,	1661, 1662
Fleischmann v. Miller, 35 Mo. App. 177,		Foll's Appeal, 91 Pa. St. 434,	966
	136, 144	Follansbee v. Adams, 86 Ill. 13,	492, 2220
Fleischmann v. Stern, 90 N. Y. 110,	2234		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Follette v. United States Mutual, etc., Association, 110 N. Car. 377,	2206	Fort Worth R. Co. v. Williams, 77 Texas, 121,	375
Follett v. Hall, 16 Ohio, 111,	761	Forth v. Stanton, 1 Wms. Saunders, 210,	598
Folliard v. Wallace, 2 Johns. 395,	132	Forward v. Pittard, 1 T. R. 27,	275
Folsom v. Cook, 115 Pa. 539,	902	Fosdick v. Schall, 99 U. S. 235,	1436
Foltz v. State, 33 Ind. 215,	2094	Fosdick v. Van Husan, 21 Mich. 567,	392
Fonda v. Van Horne, 15 Wend. 631,	215, 1771, 1773	Fosdyke v. Nixon, 107 Ind. 138,	535
Fones v. Rice, 9 Gratt. 568,	224	Foss v. City of Chicago, 56 Ill. 354,	1546
Fonseca v. Cunard Steamship Co., 153 Mass. 553,	739	Foss v. Cummings, 149 Ill. 353,	1892
Foot v. Ætna, etc., Insurance Co., 61 N. Y. 571,	307	Foss v. Harbottle, 2 Hare, 461,	1980
Foot v. New Haven, etc., Co., 23 Conn. 214,	641	Foss v. Haynes, 31 Maine, 81,	1157
Foot v. Burnet, 10 Ohio, 317,	369	Foss v. Hildreth, 10 Allen (Mass.), 76,	1834
Forbes v. Appleton, 5 Cush. (Mass.) 115, 1829	1884, 1974	Foster v. Bank of New Orleans, 21 La. Ann. 338,	2021
Forbes v. McDonald, 54 Cal. 98,	1884, 1974	Foster v. Bartlett, 62 N. H. 617,	2257
Forbes v. Petty, 37 Neb. 899,	545	Foster v. Belcher Sugar Co., 118 Mo. 238, 1362	327, 328
Forbes v. Watt, L. R. 2 Sc. & D. 214,	876	Foster v. Caldwell, 13 Vt. 176,	561
Forbis v. Inman, 23 Ore. 68,	185, 789, 785	Foster v. Dawber, 6 Ex. 839,	399
Forbush v. Lombard, 13 Metc. 109,	894	Foster v. Drew, 39 Vt. 51,	993
Force v. Batavia, 61 Ill. 99,	1561	Foster v. Gressett, 29 Ala. 393,	1185
Force v. Dutcher, 18 N. J. Eq. 401,	1135	Foster v. Hackett, 112 N. Car. 546,	458
Force v. Haines, 17 N. J. Law, 385, 184, 185, 186	96	Foster v. Hill, 38 N. H. 526,	821
Forcheimer v. Stewart, 65 Iowa, 593,	22	Foster v. Hooper, 2 Mass. 572,	94
Ford, <i>Ex parte</i> , L. R. 16 Q. B. Div. 305,	962	Foster v. Kimmons, 54 Mo. 483,	1745
Ford v. Adams, 2 Barb. 349,	1739	Foster v. Leach, 160 Mass. 418,	1201
Ford v. Ballard, 1 Texas Civ. App. 376,	568	Foster v. Maginnis, 89 Cal. 264,	415
Ford v. Beech, 11 Q. B. 852,	700	Foster v. Mayor, 20 N. Y. Supl. 487,	649, 653
Ford v. Buckeye, etc., Insurance Co., 6 Bush. 133,	2058, 2070	Foster v. McO'Brien, 18 Mo. 88,	2277
Ford v. Chicago Milk, etc., Assn., 155 Ill. 166,	270, 946, 2172	Foster v. Mura, 98 U. S. 425,	1390
Ford v. Cotesworth, L. R. 4 Q. B. 127,	1760	Foster v. Mullamphy Planing Mill Co., 92 Mo. 73,	606
Ford v. Cowan, 64 Texas, 129,	1136	Foster v. Napier, 74 Ala. 393,	35
Ford v. Euker, 86 Va. 75,	198	Foster v. Neilson, 2 Pet. 253,	502
Ford v. Garner, 15 Ind. 298,	1041	Foster v. Pettibone, 7 N. Y. 433,	431
Ford v. Harrington, 16 N. Y. 235,	521	Foster v. Powers, 64 Texas, 247,	531
Ford v. Hubinger, 64 Conn. 129,	1844	Foster v. Trull, 12 John. 456,	2102
Ford v. Livingston, 140 N. Y. 162,	779	Foster v. Wooten, 67 Miss. 540,	1806
Ford v. McVay, 55 Ill. 119,	457	Foulke v. San Diego, etc., R. Co., 51 Cal. 365,	1275, 1349, 1895
Ford v. Mitchell, 15 Wis. 304,	1777	Foulkes, <i>In re</i> , v. Hughes, 3 The Reports, 682,	1780
Ford v. Phillips, 1 Pick. (Mass.) 202,	898	Fountain v. Caine, 1 P. Wms. 504,	644
Ford v. Smith, 25 Ga. 675,	488	Fountain v. Menard, 53 Minn. 443,	2021
Ford v. Tiley, 6 B. & C. 325,	2346	Fournet v. Beer, 21 La. Ann. 658,	91 Mo. 190,
Ford v. Tirrell, 9 Gray, 401,	785	Foust v. Shoffner, Phil. Eq. 242,	2252
Ford v. Ward, 26 Ark. 360,	1364	Fowell v. Forrest, 2 Saunders, 48,	630
Ford v. Williams, 3 B. Mon. 550,	671	Fowkes v. Manchester, etc., Assurance Association, 13 B. & S. 917,	568
Fordyce v. Gibson, 129 Ind. 7,	1148	Fowle v. Park, 131 U. S. 88,	883
Fordyce v. Ford, 4 Brown Ch. 494,	2167	Fowle v. Torrey, 135 Mass. 87,	2035, 2044, 2050, 2075
Fordyce v. Nix, 58 Ark. 136,	2103	Fowler v. Ætna, etc., Insurance Co., 7 Wend. 270,	1754
Foreman v. Ahl, 55 Pa. St. 325,	321	Fowler v. Austin Mfg. Co., 5 Ind. App. 489,	926
Foreman v. Bigelow, 4 Cliff. 508,	695	Fowler v. Bowery, etc., Bank, 113 N. Y. 450,	1473, 1566
Forepaugh v. Delaware, etc., R. Co., 128 Pa. St. 217,	2171	Fowler v. Bott, 6 Mass. 63,	2169
Forester v. Forester, 10 Ind. App. 680,	393	Fowler v. Brantly, 14 Pet. 318,	292
Forest Oil Co., Appeal of, 118 Pa. St. 138,	162	Fowler v. Brooks, 13 N. H. 240,	941
Forrest v. Nelson, 108 Pa. St. 481,	842, 1202	Fowler v. Butler, 78 N. Y. 63,	270
Forrester v. Flores, 64 Cal. 24,	1742	Fowler v. Gilman, 13 Metc. 267,	1757
Forstall, Succession of, 39 La. Ann. 1052,	681	Fowler v. Shearer, 7 Mass. 14,	165
Forster v. Hale, 3 Ves. 696,	810	Fowler v. United States, 3 Ct. Cl. 43,	1234
Forster v. Taylor, 3 Camp. 49,	1150	Fox v. Abel, 2 Conn. 541,	2119
Forster v. Winfield, 142 N. Y. 327,	2016	Fox v. Brady, 1 Texas Civ. App. 590,	2097
Forsythe v. State, 6 Ohio, 19,	466	Fox v. Dixon, 12 N. Y. Supl. 267,	1893
Fort v. Richey, 123 Ill. 502,	156, 2083	Fox v. Jones, 1 W. Va. 205,	1907, 1908
Fort Edward, etc., Co. v. Payne, 15 N. Y. 583,	1926	Fox v. Kitton, 19 Ill. 519,	1667
Fortenbury v. State, 47 Ark. 188,	1432	Fox v. Mackreth, 1 White & T. Lead. Cas. Eq. 115,	492, 496, 2220, 2221
Fort Scott R. Co. v. Sparks, 55 Kan. 238,	1432	Fox v. Mensch, 3 W. & S. 444,	44
Fort St. & E. R. Co. v. Schneider, 15 Mich. 74,	1584	Fox v. Parker, 44 Barb. 541,	2107
Fort Wayne v. Lake Shore R. Co., 132 Ind. 558,	1503	Fox v. Pullman Co., 16 Mo. App. 122,	916
Fort Wayne Light Co. v. Miller, 131 Ind. 499,	375	Fox v. Scard, 33 Beav. 327,	136
Fort Worth City Co. v. Smith Bridge Co., 151 U. S. 294,	1224, 1227	Fox v. Sloo, 10 La. Ann. 11,	2039, 2073
Ft. Worth R. Co. v. Greathouse, 82 Texas, 104,	1969	Fox v. Walker, 62 N. H. 419,	785
		Foxcraft Academy v. Favor, 4 Maine, 382,	500
		Fraker v. Little, 24 Kan. 598,	254
			799

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Frale v. Dispham, 10 Pa. St. 320,	348	Freeman v. Boston, 5 Metc. 56,	10
Frame v. August, 88 Ill. 424,	594	Freeman v. Boynton, 7 Mass. 483,	399
Frame v. Felix, 167 Pa. St. 47,	1551	Freeman v. Brehm (Ind. App.), 30 N. E.	
Frame v. Frame, 32 W. Va. 463,	1179	Rep. 712,	187
France v. France, 8 N. J. Eq. 650,	7	Freeman v. Campbell, 55 Cal. 197,	825
Franchot v. Leach, 5 Cow. 506,	495	Freeman v. Cooke, L. R. 2 Ex. 663,	2
Francis, The Ship, 1 Gall. (U. S. C. C.)		Freeman v. Freeman, 43 N. Y. 34,	
445,	2020	7, 627, 845, 851, 2274	
Francis v. Deming, 69 Conn. 108,	379, 405, 526	Freeman v. Freeman, 66 Ill. 53,	794
Francis v. Lawrence, 45 N. J. Eq. 508,	1676	Freeman v. Foss, 145 Mass. 361,	652
Francis v. Railway Co., 108 N. Y. 93,	551	Freeman v. Kieffer, 101 Cal. 254,	971
Francis v. Wilkinson, 147 Ill. 370,	1022, 1023	Freeman v. People, 4 Denio (N. Y.), 9,	1811
Francisco v. Smith, 143 N. Y. 488,	2040	Freeman v. Smalley, 38 N. J. Law, 383,	183
Frank v. Anderson, 13 Lea (Tenn.), 695,	1751	Freeman v. Tucker, 20 Geo. 6,	465
Frank v. Bobbitt, 155 Mass. 112,	724	Freemout v. Dedire, 1 P. Wms. 429,	226
Frank v. Frank (Texas 1894), 25 S. W. Rep.		Freer v. Denton, 61 N. Y. 492,	495, 507, 2111
819,	1662, 1667, 1730	Freese v. Brownell, 35 N. J. Law, 285, 711, 728	
Frank v. Hicks (Wy. 1894), 35 Pac. Rep.		Freeson v. Bissell, 63 N. Y. 168,	1126, 1144
475,	1368	Freeth v. Burr, L. R. 9 C. P. 208,	152
Frank v. Jenkins, 11 Wash. 611,	265	Freiberg v. De Lamar, 7 Texas Civil App.	
Frank v. Morehead (N. J. Eq. 1895), 31 Atl.		263,	1730
Rep. 1016,	707	Freiburg v. Langfelder, 64 La. Ann. 1417, 1674	
Frank v. Pickens, 69 Ala. 369,	408	Fredline v. Board of Trustees, 23 Ill. App.	
Frank v. Thomas, 35 Ill. App. 547,	27	494,	258
Frankhouser v. Ellett, 22 Kan. 121,	1857, 1858	Freiler v. Kear, 126 Pa. St. 470,	1655
Frankfort v. Capital, etc., Light Co. (Ky.		Fremout v. Dedire, 1 P. Wms. 429,	222
1895), 29 S. W. Rep. 855,	1569	French v. Andrews, 145 N. Y. 441,	1353
Frankfort, Inhabitants of, v. Winterport,		French v. Buffalo, etc., R. Co., 4 Keyes	
54 Maine, 250,	1853	(N. Y.), 108,	1963
Frankland v. Johnson, 147 Ill. 520,	1360	French v. Burlington, 42 Iowa, 614,	1515
Franklin v. Lord Brownlow, 14 Ves. 550,	2266	French v. French, 84 Iowa, 655,	209, 211
Franklin Bank v. Commercial Bank, 36		French v. Griffin, 18 N. J. Eq. 279,	954
Ohio St. 350,	1259, 1260	French v. Hall, 9 N. H. 137,	696
Frankfort Bridge Co. v. City of Frankfort,		French v. Merrill, 132 Mass. 525,	1153
18 B. Mon. 41,	1508	French v. O'Brien, 52 How. Pr. 394,	1274
Franklin Bldg. Assn. v. Marsh, 29 N. J.		French v. Parker, 16 R. I. 219,	2044
Law, 225,	1621	French v. Strumberg, 52 Texas, 92,	1682
Franklin Co. v. Lewiston Institution for		French v. Teschemacker, 24 Cal. 518,	1386
Savings, 68 Maine, 23,	1249, 1259,	Fresno Canal Co. v. Dunbar, 80 Cal. 530,	373
Franklin Co. Grammar School v. Bailey,		Fresno, etc., Irrigation Co. v. Warner, 72	
62 Vt. 467,	2123, 2124	Cal. 379,	1336
Franklin Ins. Co. v. Colt, 20 Wall. 560,	1097	Frey v. Fort Worth R. Co., 6 Texas Civ.	
Franklin, etc., Ins. Co. v. Wallace, 93 Ind.		App. 29,	106, 137
7,	876	Friedenwald Co. v. Ashville Tobacco Co.	
Franklin Fire Ins. Co. v. Updegraff, 43 Pa.		(N. Car. 1895), 23 S. E. Rep. 490,	1448
St. 350,	896	Friend v. Miller, 52 Kan. 139,	1855, 2013
Franklin Tel. Co. v. Harrison, 145 U. S.		Frierson v. Branch, 30 Ark. 453,	1613
459,	1103	Fries v. Griffin, 35 Fla. 212,	1114
Fransen v. Eller, 34 Neb. 664,	2208	Frink v. Green, 5 Barb. 455,	540, 568
Franz, etc., Brewing Co. v. Mielenz, 5 Dak.		Frisbee v. Seaman, 49 Iowa, 95,	196
136,	1643	Frisbie v. Larned, 21 Wend. 450,	537, 543
Fray v. Sterling, 99 Mass. 461,	648, 649, 655	Frisby v. Ballance, 4 Scam. 287,	1127
Fraser v. Backus, 62 Mich. 540,	200	Frith v. Barker, 2 John. 327,	167
Fraser v. Gates, 118 Ill. 99,	655	Frith v. Sprague, 11 Mass. 455,	826
Fraser v. San Francisco Bridge Co., 103		Fritsch v. Heislen, 40 Mo. 555,	707
Cal. 79,	1275	Fritts v. Palmer, 132 U. S. 282,	1265
Fraser v. Thompson, 4 DeG. & J. 659,	223	Frizzle v. Dearth, 23 Vt. 787,	490
Fratcher v. Smith (Mich. 1895), 62 N. W.		Froman v. Froman, 13 Ind. 317,	1079
Rep. 832,	622	Fross' Appeal, 105 Pa. St. 253,	793
Fratt v. Clark, 12 Cal. 89,	2168	Frost v. Belmont, 6 Allen, 152,	1128, 1992, 1994
Frazee v. Frazee, 79 Md. 27,	1651	Frost v. Brigham, 139 Mass. 43,	565, 957
Fraser v. Gates, 118 Ill. 99,	842	Frost v. Flanders, 37 N. H. 549,	383
Frazier v. Tunis, 1 Binn. 254,	563	Frost v. Knight, L. R. 7 Ex. 111,	
Frazier v. Lanahan, 71 Md. 131,	474	492, 494, 498, 945, 2213, 2221	
Frazier v. Miller, 16 Ill. 48,	1133, 2287	Frost v. Parker, 65 Iowa, 178,	1720
Frazier v. Virginia Military Institute, 81		Frost v. Plumb, 40 Conn. 111,	1043
Va. 59,	2127	Frost v. Tarr, 53 Ind. 390,	651
Frer v. Hardenbergh, 5 Johns. 272,	196, 635	Frost v. Williams, 2 S. Dak. 457,	818, 889, 2190
Frecking v. Rolland, 53 N. Y. 422,		Frost v. Wolf, 77 Tex. 453,	182, 1232
1652, 1746, 1747, 1748		Frost v. Yonkers, etc., Bank, 70 N. Y. 553,	410
Fredenburg v. Biddlecome, 17 Weekly			
Dig. 25 (N. Y.),		Frost's, etc., Lumber Works v. Millers,	
Fredonall v. Taylor, 26 Wis. 286,	1385	etc., Insurance Co., 37 Minn. 300,	885
Fredricks v. Mayer, 13 How. Fr. (N. Y.)		Frostburg Mining Co. v. New England	
596,	2072	Glass Co., 9 Cush. 115,	669
Frederick Co. Mut. Ins. Co. v. Deford, 38		Frothingham v. Haley, 3 Mass. 68,	563
Md. 404,	897	Frothingham v. Seymour, 121 Mass. 409,	300
Freed v. Brown, 55 Ind. 310,	1817, 1850	Frue v. Houghton, 6 Colo. 318,	182
Freedley v. French, 154 Mass. 339,	578, 588	Fruin v. Crystal R. Co., 89 Mo. 397,	908, 931
Freeland v. Ritz, 154 Mass. 257,	684, 691	Fruitt v. Anderson, 12 Ill. App. 421,	51
Freeland v. Williams, 131 U. S. 405,	2150	Fry v. Day, 97 Ind. 348,	979, 2167
Freelove v. Cole, 41 Barb. 318,	1041		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Garfield v. Paris, 96 U. S. 557,	685, 668, 671	Gemberling v. Spaulding (Mich.), 62 N. W.	
Garland v. Salem Bank, 9 Mass. 408,	480	Rep. 342,	263
Garment v. Barrs, 2 Esp. 673,	333	Genereux v. Sibley, 18 R. I. 42,	1798
Garner v. Graves, 54 Ind. 188,	1690	Gent v. Manufacturers, etc., Insurance	
Garner v. Hudgins, 46 Mo. 399,	616	Co., 107 Ill. 652,	1314
Garner v. Lasker, 71 Texas, 431,	417	Gentili v. Starace, 14 N. Y. Supl. 764,	326
Garner v. Second Nat. Bank, 151 U. S.		Gentry v. Hamilton, 3 Ired. (Eq.) 376,	110
420,	1665	Gentry v. Rogers, 40 Ala. 442,	1102, 1164, 1165
Garnett, <i>In re</i> , L. R. 31 Ch. Div. 1,	1009	George v. Baker, 3 Allen, 326,	1410
Garnier v. Renner, 51 Ind. 372,	482	George v. Central R. Co., 101 Ala. 607,	1410
Garnsey v. Rogers, 47 N. Y. 233,		George v. Chicago, etc., Co., 85 Iowa, 590,	544
	243, 245, 246, 247	George v. Concord, 45 N. H. 434,	2118
Garretson v. Joseph, 100 Ala. 279,	439	George v. Conhaim, 38 Minn. 338,	418
Garrett v. Belmont Land Co. (Tenn.		George v. Edney, 36 Neb. 604,	1720
1895), 29 S. W. Rep. 726,	1231	George v. George, 47 N. H. 27,	2096
Garrett v. Burlington Plow Co., 70 Iowa,		George v. Harris, 4 N. H. 533,	214, 255, 257
697,	1296, 1393, 1406	George v. Hoskins (Ky. 1895), 30 S. W. Rep.	
Garrett v. Dillsburg, etc., R. Co., 78 Pa.		406,	615
St. 465,	1329	George v. Taylor, 55 Texas, 97,	480
Garrett v. Heaston, 5 Blackf. 349,	354	George v. Wyandotte Electric Light Co.,	
Garrett v. Kansas City Coal Mining Co.,		106 Mich. 11,	2256
113 Mo. 330,	1233, 1247	George's Creek, etc., Co. v. County Com-	
Garrett v. Brazell, 34 Iowa, 100,	49	missioners, 59 Md. 255,	797
Garrey v. Stadler, 67 Wis. 512,	787	Georgetown College v. Perkins, 74 Md. 72,	194
Garrigus v. Home, etc., Society, 3 Ind.		Georgia, etc., R. Co. v. Macon Construc-	
App. 91,	215	tion Co., 94 Ga. 306,	1434, 1435
Garrison v. Perrin, 2 C. B. (N. S.) 681,	125, 126	Georgia Ice Co. v. Porter, 70 Ga. 637,	1435
Garrison v. City of New York, 21 Wall.		Georgia Railroad, etc., Co. v. Smith, 128	
(U. S.) 196,	2150	U. S. 174,	2133
Garth v. Earnshaw, 3 Y. & C. 584,	2008	Gerecke v. Campbell, 24 Neb. 306,	440, 460
Garton v. Bristol, etc., Ry. Co., 1 Best &		Gorlach v. Skinner, 34 Kan. 86,	2013
S. 112,	804	Gerli v. Poidebard Mfg. Co. (N. J. Err.	
Garver v. Daubenspeck, 22 Ind. 238,	2229	1895), 31 Atl. Rep. 401,	1049
Garver v. Hawkeye Ins. Co., 69 Iowa, 202,	888	German-American Ins. Co. v. Commercial	
Garvey v. Fowler, 4 Sand. 665,	161	Fire Ins. Co., 95 Ala. 469,	505, 531
Garvey v. Jarvis, 54 Barb. 179,	517	German Bank v. Mulhall, 8 Mo. App. 553,	525
Garvin v. Ingram, 10 Rich. Eq. 130,	1672	German, etc., Insurance Co. v. Grim, 32	
Garvin v. Watkins, 29 Fla. 151,	1699, 1737	Ind. 249,	1079
Garza v. Scott, 5 Texas C. App. 289,	972, 1004	German National Bank v. Louisville Tal-	
Gaskell v. King, 11 East, 165,	301	low Co. (1895), 29 S. W. Rep. 832,	1073
Gaslight, etc., Co. v. New Albany, 139 Ind.		German Savings Bank v. Wulfeckuhler, 19	
660,	1116, 2273	Kan. 60,	1332
Gass v. Stinson, 3 Sumner, 98,	469	Germania Ins. Co. v. Deckard, 3 Ind. App.	
Gassett v. Andover, 21 Vt. 342,	510	361,	113, 896
Gast v. Johnson, 3 St. Rep. 258,	495	Gerner v. Church, 43 Neb. 690,	702
Gaston v. Drake, 14 Nev. 175,	1886, 2081	Gerrens v. Huhn, 10 Nev. 139,	110
Gaston v. Frankum, 2 DeG. & S. 561,	684	Gerrish v. New Bedford Institution, 128	
Gates v. Cornett, 872 Mich. 420,	2276	Mass. 159,	250
Gates v. National Bldg. Co., 46 Minn. 419,	489	Getchell v. Chase, 124 Mass. 366,	447
Gates v. Steele, 58 Conn. 316,	190, 519, 521,	Getty v. Binsse, 49 N. Y. 385,	823
Gath v. Lees, 3 H. & C. 533,	745	Gibbes v. Greenville, etc., R. Co., 13 S. Car.	
Gatling v. Newell, 9 Ind. 572,	234, 969, 2167	228,	1151
Gatrick v. Wason, 4 Ohio St. 566,	2099	Gibbons v. Bell, 45 Texas, 417,	644
Gauch v. St. Louis, etc., Ins. Co., 88 Ill.		Gibbons v. Bente, 51 Minn. 499,	817, 2213
251,	870	Gibbons v. Dunn, 46 Mich. 146,	969
Gault v. Brown, 48 N. H. 183,	647	Gibbons v. Gouverneur, 1 Denio (N. Y.),	
Gault v. Stormont, 51 Mich. 636,	676	170,	1939, 1944
Gauthier v. Cole, 17 Fed. Rep. 716,	2098, 2234	Gibbons v. Grinsel, 79 Wis. 365,	
Gavinzel v. Crump, 22 Wall. 308,	854		817, 888, 889, 2190
Gaw v. Bennett, 25 Atl. Rep. 1114,	1930	Gibbons v. Ogden, 9 Wheat. (U. S.) 1,	2113
Gay v. Ballou, 4 Wend. 403,	777	Gibbons v. Russell, 13 N. Y. Supl. 879,	2252
Gay v. Kingsley, 11 Allen (Mass.), 345,	1745	Gibbons v. Surber, 4 Blackf. (Ind.) 155,	
Gay v. Parpart, 106 U. S. 679,	2016		830, 831
Gay v. Rainey, 89 Ill. 221,	706	Gibbons v. Vouillon, 8 C. B. 483,	567
Gaylord v. Soragen, 32 Vt. 110,	1902	Gibbs v. Benjamin, 45 Vt. 124,	662
Gazelle, The, 123 U. S. 474,	917	Gibbs v. Bryant, 1 Pick. 118,	780
Gazzam v. Kirby, 8 Port (Ala.) 253,	2181	Gibbs v. Consolidated Gas Co., 130 U. S.	
Geary v. Page, 9 Bosw. 290,	527	396,	
Gebb v. Rose, 40 Md. 387,	1672	1424, 1427, 1853, 1983, 1984, 2026, 2058, 2060, 2075	
Gebhard v. Eastman, 7 Minn. 56,	1386	Gibbs v. Fremont, 9 Ex. 25,	696
Geer v. Archer, 2 Barb. 420,	183, 187, 238	Gibbs v. Gas Co., 130 U. S. 396,	1252
Geib v. Reynolds, 35 Minn. 331,	2268	Gibbs v. Smith, 115 Mass. 592,	2001, 2002
Geiger v. Cook, 3 W. & S. 266,	233, 234	Giberson v. Jolley, 120 Ind. 301,	1855
Geiger v. Green, 4 Hill, 472,	1146	Gibert v. Peteler, 38 Barb. 488,	2077
Geiser v. Kershner, 4 Gill & Johns. 305,	519	Giboney v. German Ins. Co., 48 Mo. App.	
Geismer v. Lake Shore R. Co., 102 N. Y.		185,	384, 525
563,	296	Gibson v. Brown (Texas C. App. 1893), 34	
Gelpcke v. Blake, 15 Iowa, 387,	1065	S. W. Rep. 574,	1006
Gelpcke v. Dubuque, 1 Wall. 175,		Gibson v. Cranage, 39 Mich. 49,	130, 131, 160
	862, 1342, 1537, 1970, 2148, 2207	Gibson v. Donnelly, 13 N. Y. Supl. 808,	944
Gelston v. Sigmund, 27 Md. 334,	95, 101	Gibson v. Gibson, 15 Mass. 106,	453
		Gibson v. Holland, L. R. 1 C. P. 1,	675

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Gibson v. Jetes, 6 Ves. 266,	1017	Ginnuth v. Blackenship (Texas App. 1894),	
Gibson v. Jeyes, 6 Ves. 266,	1018, 1030	28 S. W. Rep. 828,	903, 2252
Gibson v. Owens, 115 Mo. 258,	1554	Gipps v. Hums, 2 Johns. & Hem. (Md.) 517,	2008
Gibson v. Renne, 19 Wend. 389,	189, 202	Gipps Brewing Co. v. De France, 91 Iowa,	1861
Gibson v. Smith, 31 Neb. 354,	2253	108,	652
Gibson v. Soper, 6 Gray (Mass.), 279, 1821, 1837		Girard v. Richmond, 2 C. B. 835,	
Gibson v. Taylor, 6 Gray, 310,	490	Girard v. St. Louis Co., 46 Mo. App. 79,	578, 588
Gibson v. Toby, 53 Barb. 191,	455, 456	Girard v. St. Louis Car Co., 123 Mo. 358, 3, 579	
Gibson v. Tyson, 5 Watts, 34,	893	Giselman v. Starr (Cal. 1895), 40 Pac. Rep. 8,	1089
Gibson v. Woodworth, 8 Paige, 132,	234	Given v. Charron, 15 Md. 502,	909
Giddey v. Altman, 27 Mich. 208,	166	Given v. Driggs, 1 Cal. Cases (N. Y.) 450, 2016	
Giddings v. Crosby, 24 Texas, 295,	431	Givens v. Van Studdiford, 86 Mo. 149,	2017
Giddings v. Land and Water Co., 109 Cal. 116,	1218	Givhan v. Dailey, 4 Ala. 836,	283, 286
Giffert v. West, 33 Wis. 617,	364	Glacius v. Black, 50 N. Y. 145,	138, 140, 370, 372, 2194, 2231
Gifford v. Carvill, 29 Cal. 589,	974	Glacken v. Brown, 39 Hun, 294,	434
Gifford v. Thomas, 62 Vt. 34,	474	Glaessner v. Anheuser, etc., Association, 100 Mo. 508,	1581
Gifford v. Whittaker, 6 C. B. 249,	527	Glaholm v. Hays, 2 M. & G. 257,	135
Gilbert v. Baxter, 71 Iowa, 327,	71	Glasgow v. Hobbs, 32 Ind. 440,	233
Gilbert v. Coons, 37 Ill. App. 448,	953	Glass v. Huribert, 102 Mass. 24,	843
Gilbert v. Hunnewell, 12 Heisk. 289,	998	Glasscock v. Hamilton, 62 Texas, 143,	2189
Gilbert v. Moline Co., 119 U. S. 491,	334	Glasscock v. Hazell, 109 N. C. 145,	124
Gilbert v. North American Ins. Co., 23 Wend. 43,	15	Glasscock v. Wells, 23 La. Ann. 517,	1425
Gilbert v. Sanderson, 56 Iowa, 349,	246	Glassell v. Coleman, 94 Cal. 260,	1143
Gilbert v. Stockman, 76 Wis. 62,	885	Glastenbury, Town of, v. McDonald, 44 Ore. 450,	968
Gilbert v. Wetherell, 2 Sim. & Stu. 254,	559	Glaze v. Duson, 40 La. Ann. 692,	190
Gilbert Manufacturing Co. v. Butler, 146 Mass. 82,	294, 489, 2227	Glaze v. Three Rivers, etc., Ins. Co., 87 Mich. 349,	14
Gilbreath v. Dilday, 152 Ill. 207,	1052	Gleason v. Chicago, etc., R. Co. (Iowa), 43 N. W. Rep. 517,	1996
Giles, <i>in re</i> , 11 Paige (N. Y.), 638,	1815	Gleason v. Dyke, 22 Pick. 390,	197
Giles v. Giles, 9 Q. B. 164,	114	Gleason v. Fitzgerald (Mich. 1895), 63 N. W. Rep. 612,	611
Giles v. Halstead, 24 N. J. Law, 366,	95	Gleason v. Smith, 9 Cush. 484,	146
Giles v. San Antonio Foundry Co. (Texas App.), 24 S. W. Rep. 546,	323	Gleason v. Walsh, 43 Maine, 397,	910
Giles v. Simonds, 15 Gray, 441,	640	Gleeson v. Virginia Midland R. Co., 140 U. S. 435,	273, 274, 275
Giles v. Williams, 8 Ala. 316,	2182	Glen v. Hope Ins. Co., 56 N. Y. 379,	238
Gilghian v. Boardman, 29 Maine, 79,	594	Glencross v. Evans (Ariz. 1894), 36 Pac. Rep. 212,	2235
Gilkes v. Leonino, 4 C. B. (N. S.) 485,	126	Glenn v. Burrows, 37 Hun, 602,	456
Gilkeson v. Smith, 15 W. Va. 44,	383	Glenn v. Hunt, 120 Mo. 330,	1331
Gil v. Williams, 12 La. Ann. 219,	1992	Glenn v. Mathews, 44 Texas, 400,	1038
Gill v. Bradley, 21 Minn. 15,	405	Glenn v. Porter, 72 Ind. 525,	1726
Gill v. Ferris, 82 Mo. 156,	2045	Glenn v. Porter, 49 Ind. 500,	2244
Gill v. Griffith, 2 Md. Ch. 270,	1366	Glenn v. Savage, 14 Ore. 567,	185
Gill v. Herrick, 111 Mass. 140,	604	Glenn v. Smith, 2 Gill & J. 92,	452
Gill v. Vogler, 52 Md. 663,	139	Glenn v. Smith, 2 Gill & J. 493,	447
Gillan v. Dixon, 65 Pa. St. 395,	1763	Glenn v. Southern Express Co., 86 Tenn. 594,	1967, 1968
Gillen v. Babcock, 14 N. Y. Supl. 941,	376	Glidden v. Strupler, 52 Pa. St. 400,	1655, 1656
Gillespie v. Bailey, 12 W. Va. 70,	1774	Gliniski v. Zawadzki, 8 Fla. 405,	1167
Gillespie v. Battle, 15 Ala. 276,	630	Globe Light Co. v. Doud, 47 Mo. App. 439,	149
Gillespie v. White, 16 John. 117,	764	Globe Milling Co. v. Minneapolis Elevator Co., 44 Minn. 153,	167, 917, 932
Gillespie Tool Co. v. Wilson, 123 Pa. St. 19,	140, 373	Globe Publishing Co. v. State Bank, 41 Neb. 175,	1385
Gillet v. Campbell, 1 Denio, 520,	1318	Globe Works v. Wright, 106 Mass. 207,	904
Gillet v. Phillips, 13 N. Y. 114,	1886	Gloninger v. Pittsburgh R. Co., 139 Pa. St. 13,	1367
Gillett v. Board, 67 Ill. 256,	1853, 1987, 1998	Gloucester, etc., Glue Co. v. Russia Cement Co., 154 Mass. 92,	1981, 2048, 2055, 2063
Gillett v. Whiting, 120 N. Y. 402,	203	Glover v. Alcott, 11 Mich. 470,	1678
Gillette v. Hartford, 31 Conn. 351,	462	Glover v. Cheatham, 19 Mo. App. 656,	2098, 2112
Gillfannin v. Farrington, 12 Ill. App. 101,	595	Glover v. Rochester, etc., Ins. Co., 11 Wash. 143,	1283
Gillman v. Brown, 43 Miss. 641,	1895	Glover v. Tousley, 101 Mich. 229,	209
Gillespie Tool Co. v. Wilson, 123 Pa. St. 19,	148	Glover v. Taylor, 38 La. Ann. 634,	2080
Gillis v. Hall, 2 Brews. (Pa.) 342,	2038	Gobomey v. German Ins. Co., 48 Mo. App. 185,	527
Gilman v. Brown, 4 Mason, 191,	120	Gockley v. Miller, 162 Pa. St. 271,	1688
Gilman v. Cunningham, 42 Maine, 98,	1950	Goddard v. Foster, 17 Wall. 123,	874, 903
Gilman v. Dwight, 13 Gray (Mass.), 356,	2033, 2049	Goddard v. Fulton, 21 Cal. 430,	2184
Gilman v. Healy, 55 Maine, 120,	549	Goddard v. Hodges, 1 Comp. & M. 33,	471
Gilman v. Hill, 36 N. H. 311,	664	Goddard v. O'Brien, L. R. 9 Q. B. D. 37,	189, 190, 519
Gilman, etc., R. Co. v. Kelly, 77 Ill. 426,	1048, 1979		
Gilmore v. Bangs, 55 Ga. 403,	2208		
Gilmore v. Lewis, 12 Ohio St. 281,	188, 1853		
Gilmore v. Wilbur, 12 Pick. 120,	781		
Gilmore v. Woodcock, 69 Maine, 118,	791		
Gilpatrick v. Foster, 12 Ill. 355,	95		
Gilpatrick v. Glidden, 82 Maine, 201,	31		
Gilpatrick v. Hunter, 24 Maine, 18,	542		
Gilpatrick v. Ricker, 82 Maine, 185,	414		
Gilson v. Gilson, 2 Allen, 115,	490		
Gilson v. Spear, 38 Vt. 311,	1802		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Godcharles v. Wigeman, 113 Pa. St. 431,	2161	Goosey v. Goosey, 48 Miss. 210,	863
Godden v. Kimmell, 99 U. S. 201,	417, 1162, 1169	Goodson v. Whitfield, 5 Ired. Eq. (N. Car.)	1727
Godfrey v. Crisler, 121 Ind. 203,	457	103,	1727
Godfrey v. Haynes, 74 Maine, 96,	778	Goodwin v. Cremer, 83 E. C. L. 757,	445
Godfrey v. Megahan, 38 Neb. 748,	1652	Goodwin v. Griffin, 88 N. Y. 629, 752, 2168, 2169	2169
Godine v. Kidd, 64 Hun. 585,	1211	Goodwin v. Lyon, 4 Port. (Ala.) 297, 1102, 1108	1108
Godson v. Good, 6 Taunt. 587,	821	Goodwin v. May, 23 Ga. 205,	664
Goebel v. Linn, 47 Mich. 489,	199	Goodwin v. Union Screw Co., 34 N. H.	783
Goetting v. Biehler, 21 Wkly. Dig. 100,	1664	378,	783
Goetz v. Foos, 14 Minn. 265,	597, 616	Goodwin v. Werthheimer, 99 N. Y. 149,	1001
Goetz v. Goldbaum (Cal.), 37 Pac. Rep.	466,	Goodwine v. Morey, 111 Ind. 68,	1144
1275		Goodwin Gas, Stove and Meter Co., Ap-	
Goff v. Hankins, 11 Ind. App. 456,	1724	peal of, 117 Pa. St. 514,	966, 1208
Goff v. Mulholland, 28 Mo. 397,	525	Goodyear v. Adams, 5 N. Y. Supl. 275,	1-23
Goff v. Pacific Coast Steamship Co., 9		Gordan v. Preston, 1 Watts, 385,	1259
Wash. 386,	2201	Gorder v. Plattsmouth Canning Co., 36	
Goff v. Rehoboth, 2 Cush. 475,	395	Neb. 548,	1225, 1228, 1295
Goff v. Winchester College, 6 Bush, 443,	260, 1320	Gordon v. Appeal Tax Court, 3 How. (U.S.)	2138
Gogebic Inv. Co. v. Iron Chief Min. Co.,		133,	2138
75 Wis. 427,	1374	Gordon v. Butler, 105 U. S. 553,	982, 989
Goggans v. Turnipseed, 1 S. Car. (N. S.)	80,	Gordon v. Clapp, 111 Mass. 22,	383
2124		Gordon v. Dalby, 30 Iowa, 223,	2040
Goggin v. Railroad Co., 12 Kan. 416,	1432	Gordon v. Gordon, 96 Ind. 134,	14-3
Gold v. Phillips, 10 Johns. 412,	237, 607	Gordon v. Madden, 90 Mo. 310,	634
Goldenberg v. Hoffman, 69 N. Y. 322,	533	Gordon v. Mitchell, 6 Geo. 11,	518
Golden Gate Lumber Co. v. Sahrbacher,		Gordon v. Parmelee, 2 Allen (Mass.), 212,	1-78
105 Cal. 114,	2231	Gordon v. Preston, 1 Watts, 385,	12-36
Goldman v. Blum, 58 Texas, 630,	1925	Gordon v. Price, 10 Ired. Law, 385,	456
Gold Mining Co. v. National Bank, 96		Gordon v. Stockdale, 89 Ind. 240,	1-15
U. S. 640,	1265, 1536	Gore v. Lewis, 109 N. Car. 539,	521
Goldsborough v. Gable, 140 Ill. 269,	8	Gorham v. Fisher, 30 Vt. 428,	664
Goldsby v. Robertson, 1 Blackf. 247,	194, 1079	Gorham v. Keyes, 137 Mass. 583,	1553
Goldsmith v. Fuller, 30 Neb. 563,	1666	Gorman v. Pacific R. Co., 26 Mo. 441,	2133
Goldsmith v. Goldsmith, 145 N. Y. 313,	2260	Goshen v. Stonington, 4 Conn. 209,	2120
Goldsmith v. Guild, 10 Allen, 239,	753	Goshen Nat. Bank v. State, 141 N. Y. 379,	1305
Goldsmith v. Hand, 26 Ohio St. 101,	138, 898	Gosman v. Cruger, 69 N. Y. 87,	1704
Goldsmith v. Sachs, 17 Fed. Rep. 726,	514	Goss v. Ellison, 136 Mass. 503,	542
Goldstein v. Railway Co., 46 Wis. 404,	1132	Goss v. Lord Nugent, 2 Nev. & Man. 28,	2274
Goldstein v. White, 16 N. Y. Supl. 860,	148	Goss v. Lord Nugent, 5 B. & Ad. 58,	689, 690, 950
Goldwin v. Cremer, 83 E. C. L. 757,	543	Goss v. Peters (1893), 98 Mich. 112,	1245
Gompers v. Rochester, 56 Pa. St. 194,	180	Gossard v. Lea, 3 Texas Civ. App. 3,	1722
Gooch v. Holmes, 41 Maine, 523,	661	Gosselin v. Womack, 21 La. Ann. 193,	2022
Good, <i>Ex parte</i> , 5 Ch. Div. 46,	819	Gossler v. Eagle, etc., Refinery, 103 Mass.	331,
Good v. Cheesman, 2 B. & Ad. 328,	525, 532, 535, 1631	331,	348
Good v. Chicago, etc., R. Co. (Iowa), 60		Gottfried v. Miller, 104 U. S. 521,	1231
N. W. Rep. 631,	914	Gottlieb v. Thatcher, 151 U. S. 271,	1664
Good v. Daland, 121 N. Y. 1,	1982	Gough v. Crane, 3 Md. Ch. 119,	849
Good v. Elliott, 3 T. R. 693,	1913, 1944	Gould v. Armstrong, 2 Hall, 266,	212
Good v. Good, 39 W. Va. 357,	1670	Gould v. Banks, 8 Wend. 562,	213
Good v. Singleton, 39 Minn. 340,	447	Gould v. City of Paris, 68 Texas, 511,	1533
Goodale v. Hill, 42 Conn. 311,	1107	Gould v. Cayuga, etc., Bank, 86 N. Y. 75,	972
Gooday v. Colchester, etc., R. Co., 15 Eng.		Gould v. Gould, 4 N. H. 173,	572
Law & Eq. 596,	1316	Gould v. Head, 38 Fed. Rep. 886,	2058
Goode v. United States, 25 Ct. Cl. 261,	7-5	Gould v. Little Rock R. Co., 52 Fed Rep.	680,
Goodenow v. Tyler, 7 Mass. 36,	937	680,	1393, 1405
Goodin v. Cincinnati, etc., Canal Co., 18		Gould v. Mansfield, 103 Mass. 408,	1181
Ohio St. 169,	1300	Gould v. Murch, 70 Maine, 288,	167, 168
Goodkind v. Bartlett, 153 Ill. 419,	1138	Gould v. Stein, 149 Mass. 570,	325, 328
Goodland v. Blewith, 1 Camp. 477,	401	Gould v. Sternburg, 69 Ill. 531,	831
Goodlittle v. Bailey, Cowp. 597,	553	Goulds v. Brophy, 42 Minn. 109,	349, 350, 351
Goodman v. Cohen, 152 N. Y. 205,	597	Gouverneur v. Tillotson, 3 Edw. (N. Y.)	Ch. 348,
Goodman v. Durant, etc., Loan Associa-		348,	746
tion, 71 Miss. 310,	1607	Gove v. City of Biddeford, 85 Maine, 393,	1098, 1099
Goodman v. Gordan, 87 Ind. 126,	2171	Gove v. Downer, 59 Vt. 130,	868
Goodman v. Henderson, 58 Ga. 567,	2039, 2044	Gove v. Island City, etc., Co., 19 Ore. 363,	136
Goodnow v. Hill, 125 Mass. 587,	1753	Gower v. Stewart, 40 Mich. 747,	594
Goodnow v. Smith, 18 Pick. 414,	536, 818	Grace v. Adams, 100 Mass. 505,	64
Goodrich v. Atlanta, etc., Loan Assn., 96		Grace v. Lynch, 80 Wis. 166,	655
Ga. 803,	1626	Grace v. Wade, 45 Texas, 522,	1680, 1682
Goodrich v. Gordan, 15 Johns. (N. Y.) 6,	2020	Gracie's Estate, <i>In re</i> , 158 Pa. St. 521,	1669, 1769
Goodrich v. Houghton, 134 N. Y. 115,	1839	Gracy v. Potts, 4 Baxter, 395,	407
Goodrich v. Johnson, 66 Ind. 258,	652, 1192	Gradle v. Warner, 140 Ill. 123,	394
Goodrich v. Laffin, 1 Pick. 57,	7-0	Gracme v. Wroughton, 11 Exch. 146,	2081
Goodrich v. Reynolds, 31 Ill. 490,	1452	Graff v. Pittsburgh R. Co., 31 Pa. St. 489,	156, 157
Goodrich v. Stanley, 24 Conn. 613, 508, 528, 532		156, 157	157
Goodrich v. Tenney, 144 Ill. 422,	1852, 1871	Graft v. Baltimore, etc., R. Co. (Pa.), 8	586
Goodrich v. Van Nortwick, 43 Ill. 445,	138	Atl. Rep. 237,	586
Goodsell v. Myers, 3 Wend. (N. Y.) 497,	1777	Grafton v. City of Sellwood, 24 Ore. 118,	14-0
Goodsell v. Western Union Tel. Co., 130			
N. Y. 430,	495		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Grafton v. Cummings, 99 U. S. 100,	676, 678, 684, 686	Gray v. Blanchard, 8 Pick. 284,	977
Grafton v. Moir, 130 N. Y. 465,	25	Gray v. Brown, 22 Ala. 262,	543, 577
Graham v. Andrews, 11 N. Y. Misc. 649,	42	Gray v. Conral R. Co., 11 Hun, 70,	131, 133
Graham v. Berryman, 19 N. J. Eq. 29,	1063	Gray v. Clark, 11 Vt. 583,	853, 875, 878, 886
Graham v. Connersville R. Co., 36 Ind. 463,	187	Gray v. Crosby, 13 John. 219,	757
Graham v. Dyer (Ky.), 29 S. W. Rep. 346,	364	Gray v. Davis, 10 N. Y. 285,	671
Graham v. Graham, 34 Pa. St. 475,	756	Gray v. Davis, 1 Woods (U. S.), 420,	2117
Graham v. Graham, 67 Hun, 329,	1714, 1715	Gray v. Gannon, 4 Hun, 57,	376
Graham v. Machado, 6 Duer, 514,	161	Gray v. Green, 9 Hun, 334,	2211
Graham v. Negus, 8 N. Y. Supl. 679,	452	Gray v. Herman, 75 Wis. 453,	445
Graham v. Negus, 55 Hun, 440,	202	Gray v. Hill, Ryan & Moody, 420,	692
Graham v. Railroad Co., 102 U. S. 148,	1396	Gray v. Hook, 4 N. Y. 449,	1988, 2080, 2081
Graham v. Railroad Co., 118 U. S. 761,	1453	Gray v. Journal Pub. Co., 21 N. Y. Supl. 967,	501
Graham v. Theis, 47 Ga. 479,	843	Gray v. McClune, 23 Pa. St. 447,	551
Granby, etc., Smelting Co. v. Richards, 95 Mo. 106,	1336	Gray v. Murray, 3 John. Ch. 167,	285, 948, 2206
Grand Chute v. Winegar, 15 Wall. 355,	1524	Gray v. National, etc., Association, 111 Ind. 531,	321
Grand Haven, City of, v. Grand Haven Waterworks Co., 99 Mich. 106,	1044	Gray v. Paine, 5 How. Pr. 107,	161
Grandin v. Grandin, 49 N. J. Law, 508,	213	Gray v. Palmer, 9 Cal. 616,	644
Grandin v. Rochester German Ins. Co., 107 Pa. St. 26,	896	Gray v. Portland Bank, 3 Mass. 364,	280
Grand Lodge v. City of New Orleans, 44 La. Ann. 659,	2140	Gray v. Roberts, 2 A. K. Marsh. (Ky.) 208,	1873
Grand Lodge v. Farnham, 70 Cal. 158, 258, 259		Gray v. Seigler, 2 Strob. 117,	1880
Grand Rapids, City of, v. Blakely, 40 Mich. 367,	805	Gray v. Shaw (Ky. 1895), 30 S. W. Rep. 402,	1010
Grand River Bridge Co. v. Rollins, 13 Colo. 4,	1314	Gray v. Shepard, 147 N. Y. 177,	855
Grand Tower R. Co. v. Walton, 150 Ill. 428,	979	Gray v. Smith, L. R. 43 Ch. Div. 208,	644, 645
Granger v. Collins, 6 Mes. & Wels. 458,	193, 194	Graybill v. Brugh, 89 Va. 895,	1136
Granger v. Original, etc., Mining Co., 59 Cal. 678,	1866	Gray Co. v. Taylor Iron Works Co., 66 Fed. Rep. 686,	701
Granger v. Worms, 4 Camp. 83,	423	Grayville v. Gray, 19 Ill. App. 210,	1521
Granger's, etc., Ins. Co. v. Kamper, 73 Ala. 325,	1644	Groat Western R. Co. v. Braid, 1 Moore P. C. (N. S.) 101,	275
Grangiac v. Arden, 10 John. 292,	559	Great West Mining Co. v. Woodmas of Alston Mining Co., 14 Colo. 90,	1169
Granite State, etc., Assn. v. Monk (N. J. Eq. 1895), 30 Atl. Rep. 872,	1623	Greaves v. Legg, 11 Ex. 642,	117, 940
Grannis v. Brandon, 5 Day, 260,	797	Greeley v. Thurston, 4 Maine, 479,	385
Grant v. City of Davenport, 36 Iowa, 396,	1519, 1565	Green v. Armstrong, 1 Denio, 550,	638
Grant v. Diebold Lock Co., 77 Wis. 72,	2210	Green v. Barney (Cal.), 36 Pac. Rep. 1026,	380, 397
Grant v. Duluth, etc., R. Co. (Minn.), 63 N. W. Rep. 1026,	264	Green v. Biddle, 8 Wheat. (U. S.) 1,	2116, 2126
Grant v. Fletcher, 5 B. & C. 436,	685	Green v. Brookins, 23 Mich. 48,	616, 661
Grant v. Grant, 63 Conn. 530,	1181	Green v. Brooks, 81 Cal. 328,	1977
Grant v. Holmes, 75 Mo. 109,	576	Green v. Carlill, L. R. 4 Ch. Div. 882,	1671
Grant v. Johnson, 5 N. Y. 247,	115	Green v. City of Cape May, 41 N. J. Law, 45,	1564
Grant v. Law, 29 Wis. 99,	990	Green v. Cole, 103 Mo. 70,	4, 69
Grant v. Lexington, etc., Ins. Co., 5 Ind. 23,	896	Green v. Cole, 127 Mo. 587,	4
Grant v. Maddox, 15 Mees. & W. 737,	919	Green v. Collins, 3 Cliff. (U. S.) 494,	1902
Grant v. Morris, 81 N. Car. 150,	2124	Green v. Covillaud, 10 Cal. 317,	752, 1162
Grant v. Sutton, 90 Va. 771,	1678, 1687	Green v. Cresswell, 10 Ad. & E. 453,	596, 614, 616
Grant v. Wallis, 60 Texas, 350,	2087	Green v. Finin, 35 Conn. 178,	846
Grant v. Walsh, 145 N. Y. 502,	2281	Green v. Gilbert, 21 Wis. 395,	283, 286
Grape Sugar Manufacturing Co. v. Small, 40 Md. 395,	1316	Green v. Green, 69 N. Y. 553,	1780, 1781, 1792, 1796, 1798, 1803
Grant v. Wolf, 34 Minn. 32,	600	Green v. Green, 9 Cow. 47,	411
Grapel v. Hodges, 112 N. Y. 419,	949	Green v. Grissom, 53 Texas, 432,	1760
Grase v. McElroy, 1 Allen (Mass.), 563,	1949	Green v. Haley, 5 R. L. 260,	496
Grasselli v. Lowden, 11 Ohio St. 349,	2032	Green v. Hart, 1 Johns. 580,	626
Grath v. Barnes, 13 S. Car. 328,	1880	Green v. Hughtitt Township (S. Dak.), 59 N. W. Rep. 224,	438
Gravelly v. Barnard, 43 L. J. Ch. 659,	2039	Green v. Jones, 76 Maine, 563,	844
Graves v. Glass, 86 Iowa, 261,	2213	Green v. Langdon, 28 Mich. 221,	547, 555
Graves v. Hartford Steamboat Co., 38 Conn. 143,	124	Green v. Louthain, 49 Ind. 139,	2171
Graves v. Key, 3 B. & Ad. 313,	463	Green v. Merriam, 28 Vt. 801,	668
Graves v. Key City Gas Co. (Iowa 1895), 61 N. W. Rep. 937,	857	Green v. Moffett, 22 Mo. 529,	870
Graves v. Legg, 2 Hurl. & N. 210,	937	Green v. North Car., etc., Railroad, 77 N. C. 95,	630, 640
Graves v. Legg, 9 Exch. 709,	126, 135	Green v. Paul, 155 Pa. St. 126,	950
Graves v. Mono, etc., Mining Co., 81 Cal. 303,	1300, 1303	Green v. Pennsylvania Steel Co., 75 Md. 109,	646
Graves v. Waite, 59 N. Y. 156,	2165	Green v. People (Ill.), 21 N. E. Rep. 605,	2058
Gravier v. Carraby, 17 La. 132,	1869	Green v. Price, 13 M. & W. 694,	756, 1860, 2047
Gray v. Angier, 62 Geo. 596,	382	Green v. Richards, 23 N. J. Eq. 32,	843, 1111
		Green v. Rochester, etc., Co., 1 T. & C. (N. Y.) 5,	—
		Green v. Scranage, 19 Iowa, 461,	1723
		Green v. Smith, 29 Hun, 166,	398
		Green v. Tatum, 19 N. J. Eq. 364,	1662

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Green v. Town of Dyersburg, 2 Flip. 472,	854	Griffin v. Farrier, 32 Minn. 474,	1879
Green v. Van Buskirk, 7 Wall. 139,	722, 723	Griffin v. Petty, 101 N. Car. 380,	190
Green v. Vardiman, 2 Blackf. 324,	475	Griffith v. Crocker, 18 Ont. App. 370,	476
Green v. Wilding, 2 Grant's Cas. (Pa.) 96,	1786	Griffith v. Grogan, 12 Cal. 317,	447, 455
Green County v. Conness (1883), 109 U. S. 104,	2149	Griffith v. Happersberger, 86 Cal. 605,	138, 149, 375
Greenbaum v. Elliott, 60 Mo. 25,	184	Griffith v. Wells, 3 Denio (N. Y.) 226,	1891
Green Bay R. Co. v. Steamboat Co., 147 U. S. 598,	1226	Griffiths v. Hardenbergh, 41 N. Y. 464,	874, 1975
Green Bay & M. R. Co. v. Union Steamboat Co., 107 U. S. 98,	1225, 1252, 1576	Griffiths v. Sears, 112 Pa. St. 523,	1929, 1930
Greenblatt v. Hermann, 144 N. Y. 13,	420	Griggs v. Austin, 3 Pick. (Mass.) 20,	2228
Greenbrier Lumber Co. v. Ward, 36 W. Va. 573,	149	Grigsby v. Combs (Ky.), 21 S. W. Rep. 37,	625, 635
Green County v. Conness, 109 U. S. 104,	1456	Grim's Appeal, 105 Pa. St. 375,	1655
Greene, <i>In re</i> , 52 Fed. Rep. 104,	1982, 2036	Grim v. Byrd, 32 Gratt. (Va.) 293,	1876
Greene v. Burton, 59 Vt. 423,	602	Grim v. Weissenberg School District, 57 Pa. St. 434,	806
Greene v. Day, 31 Iowa, 328,	854	Grimes v. French, 2 Atk. 141,	1013
Greene v. Godfrey, 44 Maine, 25,	2108	Grimes v. Shaw, 2 Texas Civ. App. 20,	1813
Greene v. Harris, 9 R. I. 401,	653	Grimley v. Santa Clara Co., 68 Cal. 575,	805
Greene v. Railway Co., L. R. 13 Eq. 44,	1097, 1101	Grimoldy v. Wells, L. R. 10 C. P. 391,	347
Greenhow v. Coutts, 4 Hen. & Mun. 485,	224	Grindle v. Stone, 78 Maine, 176,	1319
Greenhow v. Vashon, 81 Va. 336,	2159	Grinnell v. Spink, 128 Mass. 25,	437
Greeley v. De Cottes, 24 Fla. 475,	1076	Grinstead v. Fonte, 32 Miss. 120,	549
Greeley-Burnham Grocer Co. v. Capen, 23 Mo. App. 301,	83, 685	Grissell v. Housatonic R. Co., 54 Conn. 417,	2133
Greenfield's Estate, 14 Pa. St. 489,	1006, 1015	Griswold v. Board of Trustees, 58 Ill. 290, 257	
Greenfield v. Getman, 40 N. Y. 168,	2031	Griswold v. Illinois Cent. R. Co., 90 Iowa, 265,	1971
Greenfield v. Gilman, 140 N. Y. 168,	2046	Griswold v. Miller, 15 Barb. (N. Y.) 520, 1314	
Greentree v. Rosenstock, 61 N. Y. 583,	2165	Griswold v. Sheldon, 4 N. Y. 581,	170, 1646
Greenville Compress Co. v. Planters' Compress Co., 70 Miss. 669,	1246	Griswold v. Waddington, 16 Johns. (N. Y.) 438,	2020
Greenwald v. Kaster, 86 Pa. St. 45,	576	Grizzle v. Sutherland, 88 Va. 584,	1136
Greenwich v. Easton, etc., R. R. Co., 24 N. J. Eq. 217,	1570	Groesbeck v. Marshall (S. Car. 1895), 22 S. E. Rep. 743,	1880
Greenwich Ins. Co. v. Waterman, 54 Fed. Rep. 839,	935, 937, 938	Groetzinger v. Kann, 165 Pa. St. 578,	326
Greenwood v. Curtis, 6 Mass. 358,	708, 717, 2198	Grogan v. Express Co., 114 Pa. St. 523,	1958
Greenwood v. Freight Co., 105 U. S. 13,	1531, 2132, 2133, 2146	Grogan v. San Francisco, 18 Cal. 590,	783
Greenwood v. Lidbetter, 12 Price, 183,	535	Gronstadt v. Withoff, 21 Fed. Rep. 253,	876
Greenwood v. Sutcliffe, L. R. (1892) 1 Ch. 1,	405	Groppengieser v. Lake, 103 Cal. 37,	991
Greer v. Herren 99 N. Car. 492,	2173	Grose v. Hennessey, 95 Mass. 389,	359
Greer v. Laws, 56 Ark. 37,	447, 452	Gross v. Davis, 87 Tenn. 226,	827
Greer v. Nutt, 54 Mo. App. 4,	1988	Gross v. Jordan, 83 Maine, 380,	163
Greer v. People's Co., 13 J. & S. 110,	465	Gross v. Kierski, 41 Cal. 111,	354, 358
Greer v. Shriver, 53 Pa. St. 259,	1632	Grossman v. Dodd, 137 N. Y. 599,	1964
Greer v. Tweed, 13 Abb. Pr. (N. S.) 427,	755	Grosvender v. Magill, 37 Ill. 239,	761
Gregg v. James, 1 Ill. 143,	543	Grotenkemper v. Carver, 9 Lea (Tenn.), 281,	1698
Gregg v. Pierce, 53 Barb. 387,	188	Grove v. Hodges, 55 Pa. St. 504,	214
Gregor v. Hyde (C. C. App. 1894), 62 Fed. Rep. 107,	1829	Grove v. Jeager, 60 Ill. 249,	1672
Gregory v. Gleed, 33 Vt. 405,	2242	Grover, etc., Co. v. Missouri Pacific Ry. Co., 70 Mo. 672,	738
Gregory v. Lee, 64 Conn. 407,	1800	Groves v. Clark, 21 La. Ann. 567,	1385
Gregory v. Marks, Fed. Cas. No. 5802; 8 Biss. 44,	867	Groves v. Nutt, 13 La. Ann. 117,	708
Gregory v. Mighell, 18 Ves. 326,	845, 1212	Groves v. Sentell, 153 U. S. 465,	812
Gregory v. Washburn R. Co., 46 Mo. App. 571,	273	Grow v. Seligman, 47 Mich. 607,	2039
Gregory v. Wendell, 40 Mich. 432,	1914, 1917	Grubb v. Starkey, 90 Va. 831,	1096
Gregory v. Wendell, 39 Mich. 337,	1917, 1919, 1920, 1922	Grube v. Schultheiss, 57 N. Y. 669,	747
Gregson v. Ruck, 4 Q. B. 737,	685	Gruetzner v. Aude Co., 25 Mo. App. 263,	136
Greig v. Smith, 29 S. Car. 426,	1683	Gruhan v. Smith, 81 N. Y. 25,	1920
Grey v. Pearson, 6 H. L. C. 61,	884	Grymes v. Blofield, Cro. Eliz. (2 Croke) 541, 543,	445
Gray v. Tubbs, 43 Cal. 359,	749, 1059	Grymes v. Sanders, 93 U. S. 55,	1009, 1037
Gribble v. Maxwell, 34 Kan. 8,	1821	Guaranty, etc., Association v. Rutan, 6 Ind. App. 83,	866
Gribble v. Columbus Brewing Co., 100 Cal. 67,	1275, 1276	Guardian, etc., Building Soc., <i>In re</i> , L. R. 23 Ch. Div. 440,	1604
Grieb v. Cole, 60 Mich. 397,	524	Guengerich v. Smith, 36 Iowa, 587,	395
Grief v. Lomax, 54 Ala. 641,	992, 1877	Guenther v. Birkicht, 22 Mo. 439,	791
Grisomer v. Mut. Life Ins. Co., 10 Wash. 202,	713	Guenther v. Dewien, 11 Iowa, 133,	1890
Grisomer v. Mut. Life Ins. Co., 38 Pac. Rep. 1034,	713	Guernand v. Dandeleit, 32 Md. 63,	2040, 2044
Griffin v. Ransdell, 71 Ind. 440,	643	Guernsey v. Cook, 120 Mass. 501,	872, 1880, 1986, 2001
Griffin v. West Ford, 60 Texas, 501,	1760	Guernsey v. Wilson, 134 Mass. 482,	186
Griffin v. Clay County, 63 Iowa, 413, 1512, 2088		Guest v. Homfray, 5 Ves. 818,	1165

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Guillon v. Earnshaw, 169 Pa. St. 463,	916	Hadley v. Latimer, 3 Yerr. (Tenn.) 537,	1026
Guilmartin v. Urquhart, 82 Ala. 570, 1054,	1068	Hadlock v. Hadlock, 22 Ill. 384,	13
Guinault v. Railroad Co., 42 La. Ann. 52,	1453	Hafer v. Hafer, 33 Kan. 449,	1713
Guion v. Doherty, 43 Miss. 538,	532	Haffey v. Lynch, 143 N. Y. 241,	1159
Guldager v. Rockwell, 14 Colo. Rep. 459,	465	Hafford v. City of New Bedford, 16 Gray,	1496
Gulf, etc., R. Co. v. Eddins, 7 Tex. C. App.	116	Hagar v. Cleveland, 36 Md. 476,	155
Gulf, Colorado R. Co. v. Gatewood, 89	1968	Hagerman v. Bates, 5 Colo. App. 391,	1169
Texas, 89,	297	Hagerman v. Buchanan, 45 N. J. Eq. 292,	1676, 1711
Gulf R. Co. v. Harriett, 80 Texas, 73,	523, 651	Hagerman v. Ohio Bldg. Ass'n, 25 Ohio	1621
Gulf, etc., R. Co. v. Hume (Tex. 1894), 27	1969	St. 186,	29
S. W. Rep. 110,	2104	Hagerty v. Bryne, 75 Ind. 499,	1797
Gulf, etc., Ry. Co. v. Levy, 59 Texas, 542,	920	Hagerty v. Nashua Lock Co., 62 N. H. 576,	387
Gulf, etc., R. Co. v. McGown (Texas 1894),	1279	Haggard v. Holmes, 90 Iowa, 308,	1658
25 S. W. Rep. 435,	1983	Haggerty v. Johnston, 48 Ind. 41,	1183
Gulf, etc., R. Co. v. Pittman, 4 Texas C.	1969	Haggerty v. Palmer, 6 John. Ch. 437,	123
App. 167,	2019	Hahn v. Concordia Society, 42 Md. 460,	2073
Gulf C. & S. F. R. Co. v. State, 72 Texas,	549	Haigh v. Brooks, 10 Ad. & E. 30,	610
404,	1566	Haigh v. Kaye, L. R. 7 Ch. App. 469,	681
Gulf Railway Co. v. Trawick, 80 Texas,	2117, 2153, 2157	Haines v. Haines, 6 Md. 435,	1211
270,	1548	Haines v. Lewis, 54 Iowa, 301,	1383
Gulick v. Ward, 10 N. J. Law, 87,	1897	Haines v. Tucker, 50 N. Y. 307,	150, 496, 498
1123, 1883,	859	Hakes v. Hotchkiss, 23 Vt. 231,	204
Gulledge v. Berry, 31 Miss. 346,	541, 574	Haldane v. Johnson, 20 Eng. Law & Eq.	406
Gum Elastic Roofing Co. v. Mexico Pub.	1366	408,	406
Co., 140 Ind. 158,	904	Haldeman v. Jennings, 14 Ark. 329,	757
Gunn v. Barry, 15 Wall. (U. S.) 610,	1133	Haldeman v. Simonton, 55 Iowa, 144,	2039
2117, 2153, 2157	331	Haldeman's App., 104 Pa. 251,	1845
Gunning Gravel, etc., Co. v. City of New	225	Hale v. Cheshire Ry. Co., 161 Mass. 443,	1462
Orleans, 45 La. Ann. 911,	1294	Hale v. Christy, 8 Neb. 264,	1652, 1723, 1741
Gunter v. Leckey, 30 Ala. 591,	390	Hale v. Cravener, 128 Ill. 408,	416, 419
Gunnison v. Bancroft, 11 Vt. 490,	239	Hale v. Gerrish, 8 N. H. 374,	1771, 1777, 1778
Gunther v. Lee, 45 Md. 60,	1466, 1498	Hale v. Gladfelder, 52 Ill. 91,	1032
541, 574	2151	Hale v. New Jersey Steam Navigation	733
Gunther v. Mayer, 67 Hun, 116,	1509	Co., 15 Conn. 539,	126
Guptill v. Damon, 62 Maine, 271,	1176	Hale v. Rawson, 4 C. B. (N. S.) 85,	183
Gupton v. Gupton, 42 Mo. 101,	28	Hale v. Rice, 124 Mass. 292,	818
1133	465	Hale v. Spaulding, 145 Mass. 482,	573, 576, 818
Gurney v. Atlantic R. Co., 58 N. Y. 358,	694, 850	Hale v. Sharp, 4 Coldw. (Tenn.) 275,	2021
331	1841	Haley v. City of Alton, 152 Ill. 113,	1498
Gurvin v. Cromartie, 11 Ired. (Law) 174,	1184	Haley v. Philadelphia, 68 Pa. St. 45,	2121
225	111, 306	Haley v. Appeal, 60 Pa. St. 458,	2044, 2261, 2264
Gushee v. Leavitt, 5 Cal. 160,	1749	Hall v. Arnott, 80 Cal. 348,	422
1294	1761	Hall v. Banks, 79 Wis. 229,	2120
Guthman v. Kearn, 8 Neb. 502,	1749	Hall v. Bergen, 19 Barb. (N. Y.) 122,	1935
239	1749	Hall v. Butterfield, 59 N. H. 408,	1790, 1797
Guthrie v. Kerr, 85 Pa. St. 303,	1683	Hall v. Callahan, 66 Mo. 316,	1707
1466, 1498	111, 306	Hall v. Cannon, 4 Harr. 360,	795
Gutta Percha, etc., Co. v. Mayor, etc., of	1749	Hall v. Cazenove, 4 East, 477,	277
Houston, 108 N. Y. 276,	1749	Hall v. Center, 40 Cal. 63,	1108, 1109
Gutta Percha Mfg. Co. v. Ogalalla Vil-	1683	Hall v. City of Virginia, 91 Ill. 535,	257
lage, 40 Neb. 775,	1749	Hall v. Corcoran, 107 Mass. 251,	1043
Guy v. Barnes, 29 Ind. 103,	1749	Hall v. Dyson, 16 Jur. 270,	1852
1176	1749	Hall v. Eccleston, 37 Md. 510,	1185
Guyer v. Guyer, 6 Houst. (Del.) 430,	1749	Hall v. Finch, 29 Wis. 278,	789, 792
28	1749	Hall v. Gray, 54 Maine, 230,	573
Guyette v. Town of Bolton, 46 Vt. 228,	1749	Hall v. Guthridge, 52 Iowa, 408,	1729
465	1749	Hall v. Huntoon, 17 Vt. 244,	240
Guyon v. McCauley, 32 Ark. 97,	1749	Hall v. Jones, 32 Ill. 38,	27
694, 850	1749	Hall v. Klinck, 25 S. Car. 348,	1381
Gwaltney v. Cannon, 31 Ind. 227,	1749	Hall v. Lanning, 91 U. S. 160,	834, 835
1841	1749	Hall v. Leigh, 8 Cranch, 50,	820
Gwaltney v. Wheeler, 26 Ind. 415,	1749	Hall v. Levy, L. R. 10 C. P. 154,	568
1184	1749	Hall v. Loomis, 63 Mich. 709,	1155
Gwillim v. Daniell, 2 Cromp. M. & R. 61,	1749	Hall v. Marston, 17 Mass. 575,	237
111, 306	1749	Hall v. Merrill, 5 Bosw. 266,	534, 1633
Gwyn v. Gwyn, 27 S. Car. 525,	1749	Hall v. Norwalk Co., 57 Conn. 105,	391
1749	1749	Hall v. Otterson, 52 N. J. Eq. 522,	1008, 1009, 1017, 1019
Gwynn v. Dierssen, 101 Cal. 563,	1749	Hall v. Palmer, 3 Hare, 532,	88, 89
1749	1749	Hall v. Parker, 37 Mich. 590,	171, 2107
Gwynn v. Gwynn, 27 S. Car. 525,	1749	Hall v. Plaine, 14 Ohio St. 417,	231, 248
1683	1749	Hall v. School District, 24 Mo. App. 213,	292
Gwynn v. Gwynn, 31 S. Car. 482,	1683	Hall v. Sheehan, 69 N. Y. 618,	553
1683	1683	Hall v. Smith, 15 Iowa, 584,	532
		Hall v. Solomon, 61 Conn. 476,	646
		Hall v. Stevens, 116 N. Y. 201,	447, 457
		Hall v. Storrs, 7 Wis. 253,	932

H

Haacke v. Knights of Liberty, etc., Club,

76 Md. 429,	2102
Haas v. Fenlon, 8 Kan. 601,	2080
Haas v. Hudmon, 83 Ala. 174,	907
Haas v. Kansas City R. Co., 81 Ga. 792,	296
Haak v. Linderman, 64 Pa. St. 499,	162
Haas v. Myers, 111 Ill. 429,	76
Haas v. Shaw, 91 Ind. 384,	1754
Haase v. Mitchell, 58 Ind. 213,	969, 2167
Habenicht v. Rawls, 24 S. Car. 461,	1746
Hackensack Water Co. v. DeKay, 36 N. J.	1338, 1438
Eq. 548,	19, 180
Hacker's Appeal, 121 Pa. St. 192,	803
Hackley v. Headley, 45 Mich. 569,	1680
Hackett v. Moxley, 65 Vt. 71,	1527
Hackett v. Ottawa, 99 U. S. 86,	1748
Hackettstown Nat. Bank v. Ming, 52 N. J.	452, 453
Eq. 156,	
Hadley v. Bordo, 62 Vt. 285,	

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Hall v. Thompson, 1 Sm. & M. (Miss.) 443,	2231	Hamilton Gas Light and Coke Co. v. City of Hamilton, 37 Fed. Rep. 832,	1564
Hall v. Vermont, etc., R. Co., 28 Vt. 401,	1315	Hamilton Gas Light and Coke Co. v. City of Hamilton, 146 U. S. 258,	1564
Hall v. Wisconsin, 103 U. S. 5,	2127	Hamlett v. Tallman, 30 Ark. 505,	383
Hall v. Wright, E. B. & E. 746,	283	Hamlyn v. Talisker Distillery, L. R. A. C. 202; 6 The Reports, 188,	709
Hallam v. Indianola Hotel Co., 56 Iowa, 178,	1296, 1393,	Hammerquist v. Swensson, 44 Ill. App. 627,	863, 875
Halle v. Einstein, 34 Fla. 589,	1699,	Hammersley v. De Biel, 12 C. & F. 45,	1717, 1718
Halleck v. Guy, 9 Cal. 181,	674	Hammock v. Loan and Trust Co., 105 U. S. 77,	1417
Hallen v. Runder, 1 Cr. M. & R. 266,	635	Hammond v. American Mutual, etc., Co., 10 Gray, 306,	766
Hallenbeck v. Dewitt, 2 John. 404,	1006	Hammond v. Pennock, 61 N. Y. 145,	975, 2240
Hallgarten v. Oldham, 135 Mass. 1,	722	Hammond v. Slocum, 50 How. Pr. 415,	465
Hallett, <i>In re</i> , L. R. 13 Ch. Div. 696,	2279	Hampe v. Pittsburgh Traction Co., 165 Pa. St. 468,	1413, 1414
Hallett v. Hallett (Pa. 1893), 26 Atl. Rep. 101,	1711	Hampton v. Speckenagle, 9 Serg. & R. 212,	397, 1163
Hallett v. Oakes, 1 Cush. (Mass.) 296,	2276	Hanauer v. Doane, 12 Wall. (U. S.) 342,	1862, 1902, 1953, 2019
Halliday v. St. Louis, etc., Ry. Co., 74 Mo. 159,	738	Hanauer v. Gray, 25 Ark. 350,	2024
Halliday v. White, 21 N. Y. Supl. 878,	1055	Hanchett v. Briscoe, 22 Beav. 496,	1153
Hallock v. Commercial Ins. Co., 26 N. J. Law, 268,	76	Hanchett v. Weber, 17 Ill. App. 114,	1551
Halpin v. Phenix Ins. Co., 118 N. Y. 165,	383, 399, 400	Hanche v. Hooper, 7 Car. & P. 81,	797
Halsey v. Peters, 79 Va. 60,	850	Hancock v. Kelly, 81 Ala. 368,	2250
Halsey v. Reed, 9 Paige, 446,	236	Hancock v. Louisville and Nashville R. Co., 145 U. S. 409,	1411, 1542
Halstead v. Ives, 73 Hun, 56,	1633	Hancock v. New York Life Ins. Co., 13 Am. Law Reg. 103,	496
Halstead v. Mayor of New York, 3 N. Y. 430,	2242	Hancock v. Watson, 18 Cal. 137,	894
Halstead v. Straus, 32 Fed. Rep. 279,	724	Hancock v. Yaden, 121 Ind. 366,	2162
Halstead Lumber Co. v. Sutton, 46 Kan. 192,	2216	Hancock Ins. Co. v. Worcester, etc., R. Co., 149 Mass. 214,	1454
Halsted v. Francis, 31 Mich. 113,	239	Hand v. Brookline, 126 Mass. 324,	1575
Halt haus v. Kuntz, 17 Ill. App. 434,	1553	Hand v. Weidner, 151 Pa. St. 363,	1067
Ham v. Goodrich, 33 N. H. 32,	544	Hanel v. Freund, 17 Mo. App. 618,	148
Ham v. Johnson, 55 Minn. 115,	679, 1120	Handforth v. Jackson, 150 Mass. 149,	2042, 2288
Ham v. Kendall, 111 Mass. 297,	643	Handforth v. Jackson, 150 Mass. 149,	2049
Ham v. Van Orden, 4 Hun, 709,	663	Handley v. Stutz, 139 U. S. 417, 1298, 1375, 1398	
Hambel v. Tower, 14 Iowa, 530,	2197	Handley v. Tibbetts (Ky.), 16 S. W. Rep. 131,	418
Hambley v. Delaware, etc., R. Co., 21 Fed. Rep. 541,	748	Handy v. Draper, 89 N. Y. 335,	1376, 1388
Hamburger v. Rottenberg, 61 N. Y. St. Rep. 102,	141	Handy v. Munsell, 109 Ill. 362,	379
Hamer v. Sidway, 124 N. Y. 538,	206, 230, 693	Handy v. St. Paul Globe Pub. Co., 41 Minn. 183,	2098
Hamil v. Henry, 69 Iowa, 725,	1685, 1686	Handy v. Waldron, 18 R. I. 567,	1875, 1879
Hamill v. German Nat. Bank, 13 Colo. 203,	438	Hanel v. Freund, 17 Mo. App. 618,	146
Hamilton v. Bates (Cal. 1893), 35 Pac. Rep. 304,	1349	Haney v. Manning, 21 La. Ann. 166,	2021
Hamilton v. City of Shelbyville, 6 Ind. App. 538,	1513	Hanford v. Paine, 32 Vt. 442,	724, 725
Hamilton v. Chopard, 9 Wash. 352,	1645	Hangen v. Hachmeister, 49 N. Y. Sup. Ct. Rep. 34,	1795
Hamilton v. England, 95 Ga. 693,	1106, 1105	Hanks v. Brown, 79 Iowa, 560,	1935
Hamilton v. Gray, 67 Vt. 233,	2242	Hanlon v. Doherty, 109 Ind. 37,	29
Hamilton v. Gridley, 54 Barb. (N. Y.) 542,	2098	Hanna v. Shields, 34 Ind. 84,	969, 2167
Hamilton v. Hamilton, 89 Ill. 349,	2007	Hannah v. Fife, 27 Mich. 172,	1426, 1985
Hamilton v. Harvey, 121 Ill. 469,	1107, 1197, 1198, 2273	Hannan v. Englemann, 49 Wis. 278,	470
Hamilton v. Home Ins. Co., 137 U. S. 370,	121	Hannem v. Pence, 40 Minn. 127,	275
Hamilton v. Hulet, 57 Minn. 208,	418	Hannig v. Mueller, 82 Wis. 235,	867
Hamilton v. Jones, 3 Gill & J. 127,	847	Hannon v. Hounihan, 85 Va. 429,	223, 619
Hamilton v. Liverpool Ins. Co., 136 U. S. 242,	121	Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209,	2223
Hamilton v. Lockhart, 158 Pa. St. 452,	1828	Hanover Junction R. Co. v. Grubb, 82 Pa. St. 36,	155
Hamilton v. Lomax, 26 Barb. (N. Y.) 615,	1806	Hanover Nat. Bank v. Blake, 142 N. Y. 404,	1635, 1637, 1638
Hamilton v. Lycoming Ins. Co., 5 Pa. St. 339,	76, 82, 700	Hansard v. Robinson, 7 B. & C. 90,	399
Hamilton v. McLaughlin, 145 Mass. 20,	1228	Hanselman v. Doyle, 90 Mich. 142,	518
Hamilton v. Nickerson, 13 Allen, 351,	935	Hanson v. Armitage, 5 B. & Ald. 557,	663, 672
Hamilton v. Taylor, 18 N. Y. 358,	863, 867	Hanson v. Cordano, 96 Cal. 441,	469
Hamilton v. Vaughan, etc., Elec. Co., 8 The Reports (Eng.) 730,	1796	Hanson v. Donkersley, 37 Mich. 184,	1373
Hamilton-Brown Shoe Co. v. Whitaker, 4 Texas Civ. App. 3-0,	1690	Hanson v. Jones, 20 Mo. App. 595,	798
Hamilton College v. Stewart, 1 N. Y. 581,	256	Hanson v. Meyer, 6 East, 614,	491
Hamilton County, Board, etc., of v. Newlin, 132 Ind. 27,	2248	Hanson v. Roter, 64 Wis. 622,	670
Hamilton, etc., Co. v. Cincinnati, etc., R. (1896), 29 Ohio St. 341,	635	Hans v. State, 24 Fed. Rep. 55,	2126
Hamilton, etc., Co. v. Rice, 7 Barb. 157,	260	Hanson v. Tarbox, 47 Minn. 433,	453
		Hanson v. Todd, 95 Ala. 328,	397, 407
		Hapgood v. Hewitt, 119 U. S. 226,	1136
		Hapgood v. Rosenstock, 23 Fed. Rep. 86,	1203

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Happe v. Stout, 2 Cal. 460,	684	Harriman v. Park, 55 N. H. 471,	2256
Harang v. Blanc, 34 La. Ann. 632,	1472	Harrington v. Dannie, 13 Mass. 93,	281
Harbach v. Elder, 18 Pa. St. 33,	826	Harrington v. Dill, 1 Houst. (Del.) 410,	1524
Harbeck v. Craft, 4 Duer. 122,	452	Harrington v. Fall River Works, 119 Mass.	82,
Harbeck v. Pupin, 145 N. Y. 70,	575		285
Harbeck v. Pupin, 23 Abb. New Cas. 190,	819	Harrington v. Fitchburg Ins. Co., 124	Mass. 126,
Harbeck v. Vanderbilt, 20 N. Y. 395,	819,		117
Harbinger, The, 50 Fed. Rep. 941,	936	Harrington v. Rich, 6 Vt. 666,	54
Hard v. Seeley, 47 Barb. (N. Y.) 428,	2033	Harrington v. Smith, 138 Mass. 92,	324
Harden v. Hays, 9 Pa. St. 151,	2278	Harrington v. Victoria Graving Dock Co.,	L. R. 3 Q. B. D. 549,
Hardenbrook v. Sherwood, 72 Ind. 403,	1817,		1860, 1973
	1850	Harris's Case, L. R. 7 Ch. App. 587,	56
Hardesty v. Smith, 3 Ind. 39,	234	Harris v. Brain, 33 Ill. App. 510,	57
Hardey v. Coe, 5 Gill, 139,	519	Harris v. Brooks, 2 Am. L. C. 425,	152
Hardin v. Construction Co., 78 Iowa, 725,	1276	Harris v. Carmody, 131 Mass. 51,	1827, 1852
Hardin v. Jordan, 140 U. S. 371,	35, 36	Harris v. Central R. Co., 91 Ga. 317,	1218
Harding v. Commercial Loan Co., 84 Ill.	251,	Harris v. Clark (Iowa), 62 N. W. Rep. 854,	206
	394, 854	Harris v. Grand Trunk Ry. Co., 15 R. I.	371,
Harding v. Davies, 2 C. & P. 77,	390, 404		738
Harding v. Parshall, 56 Ill. 219,	1160	Harris v. Great Western Ry. Co., L. R. 1	Q. B. D. 515,
Hardingham v. Allen, 5 C. B. 793,	397		64
Hardman v. Bellhouse, 9 M. & W. 596,	526	Harris v. Harris, 89 Va. 762,	544
Hardman v. Sage, 124 N. Y. 25,	1370, 1377,	Harris v. Harris, 23 Gratt. 737,	182, 231, 234
Hardy v. Holly, 84 N. Car. 661,	1741	Harris v. Harris, 69 Ind. 131,	561
Hardy v. Hunt, 11 Cal. 343,	1942	Harris v. Huntbach, 1 Burr. 373,	608
Hardy v. Matthews, 38 Mo. 121,	901	Harris v. Knickerbacker, 5 Wend. 638,	693, 845
Hardy v. Van Harlingen, 7 Ohio St. 208,	1671, 1747		1999
Hare v. London, etc., R. Co., 2 Johns. &	H. 80,	Harris v. More, 70 Cal. 502,	1999
	2054, 2063	Harris v. Roof's Exrs., 10 Barb. (N. Y.) 489,	1989, 1992, 1993, 1994
Hargadine v. Henderson, 97 Mo. 375,	1391		1795
Harger v. McCullough, 2 Denio, 119,	1373	Harris v. Ross, 86 Mo. 89,	1795
Hargrave v. Conroy, 19 N. J. Eq. 281,	2226	Harris v. Runnels, 12 How. (U. S.) 79,	1891, 1897
Hargrave v. Melbourne, 86 Ala. 270,	14		69
Harkness v. Russell, 118 U. S. 663,	162	Harris v. Scott (N. H.), 32 Atl. Rep. 770,	791
Harkrader v. Leiby, 4 Ohio St. 602,	1643	Harris v. Smith, 79 Mich. 54,	791
Harkrader v. Eubanks (Miss.), 12 So.	Rep. 210,	Harris v. White, 81 N. Y. 532,	1945, 2205
	496	Harris v. Woodruff, 124 Mass. 205,	1043
Harlan v. Stuffbeem, 87 Cal. 508, 138, 139,	371	Harrison v. Cage, 1 L. Raym. 386,	227, 617
Harlem Gas Light Co. v. Mayor, etc., of	New York, 3 Robt. 100,	Harrison v. Close, 2 Johns. 418,	520, 562, 819
	782	Harrison v. Cooley, 34 N. J. Eq. 283,	1662
Harless v. Petty, 98 Ind. 53,	1195	Harrison v. Edwards, 12 Vt. 643,	710, 711, 715
Harley v. Harley, 54 Md. 340,	559	Harrison v. Guest, 6 D. M. & G. 424,	234
Harley v. Heist, 86 Ind. 196,	1757	Harrison v. Handley, 1 Bibb, 443,	194
Harloe v. Foster, 53 N. Y. 335,	1636, 1638	Harrison v. Harrison, 36 W. Va. 556,	1179
Harlow v. Curtis, 121 Mass. 320,	2, 67	Harrison v. Hicks, 1 Port. (Ala.) 423,	445
Harman v. Moore, 112 Ind. 221,	116, 217	Harrison v. Johnson, 27 Ala. 445,	470
Harmon v. Auditor of Public Accounts,	123 Ill. 122,	Harrison v. Lockhart, 25 Ind. 112,	2044
	2149	Harrison v. McCormick, 89 Cal. 327,	2202
Harmon v. Harmon, 61 Maine, 227,	803, 1830, 1831	Harrison v. Milwaukee, 49 Wis. 247,	460
	1023	Harrison v. Missouri Pacific Railroad, 74	Mo. 364,
Harmon v. Harmon, 63 Ill. 512,	1023		270
Harmon v. Hunt, 116 N. C. 678,	1382	Harrison v. Moran, 163 Mass. 495,	443
Harmon v. Magee, 57 Miss. 410,	391	Harrison v. Polar Star Lodge, 116 Ill.	279,
Harmon v. Siler, 99 Ala. 306,	1658		1198
Harmony v. Bingham, 12 N. Y. 99,	270, 276, 946, 2283	Harrison v. Sawtel, 10 John. 242,	596
	2264	Harrison v. Simons, 55 Ala. 510,	1738
Harms v. Parsons, 32 Beav. 328,	2264	Harrison v. Sterry, 5 Cranch, 289,	725
Harned v. Missouri Pac. R. Co., 51 Mo.	App. 482,	Harrison v. Trustees Phillips Academy, 12	Mass. 456,
	1968		90
Harner v. Dipple, 31 Ohio St. 72,	1772, 1773	Harrod v. Mamer, 32 Wis. 162,	1384
Harney v. Indianapolis, 32 Ind. 244,	1521	Harrow v. Myers, 29 Ind. 469,	2148
Harper v. Alb. Mut. Ins. Co., 17 N. Y. 194,	885	Harshbarger v. Foreman, 81 Ill. 364,	429
Harper v. Dotson, 43 Iowa, 232,	359, 360	Hart v. Alexander, 2 M. & W. 484,	537
Harper v. Harper, 85 Ky. 160,	2290	Hart v. Boller, 15 S. & R. 162,	779
Harper v. Harper, 57 Ind. 547,	652	Hart v. Carpenter, 24 Conn. 427,	162
Harper v. New York City Ins. Co., 22	N. Y. 441,	Hart v. Deamer, 6 Wend. (N. Y.) 497,	1814
	869, 872, 885	Hart v. Gould, 62 Mich. 262,	513
Harper v. Terry, 70 Ind. 264,	43	Hart v. Grigsby, 14 Bush (Ky.), 542, 1724, 1754	692
Harper v. Union Manfg. Co., 100 Ill. 225,	1382	Hart v. Hammett, 18 Vt. 127,	976
Harper v. Young, 112 Pa. St. 419,	1930	Hart v. Handlin, 43 Mo. 171,	2009
Harold v. Stobart, 46 Ohio St. 397,	1373	Hart v. Hart, L. R. 18 Ch. Div. 670,	795
Harraison v. Barrett, 99 Cal. 607,	482	Hart v. Hart's Admr., 41 Mo. 441, 778, 794,	1740
Harrell v. Godwin, 102 N. C. 330,	109	Hart v. Hart, 109 N. Car. 368,	133
Harrell v. Hill, 19 Ark. 102,	110, 424	Hart v. Hart, 22 Barb. 606,	2250
Harrell v. Miller, 35 Miss. 700,	639	Hart v. Kendall, 82 Ala. 144,	714
Harrell v. Watson, 63 N. Car. 454, 182, 231,	235	Hart v. Livermore Mach. Co., 72 Miss. 809,	1557
Harrell v. Zimbleman, 66 Texas, 292,	942	Hart v. Mayor, etc., 3 Paige, 213,	304
Harrett v. Kinney, 44 Mich. 457,	2277	Hart v. Mills, 15 M. & W. 85,	304
Harre v. Wallner, 80 Ill. 197,	1768	Hart v. Pennsylvania R. Co., 112 U. S. 331,	1965, 1966
Harthy v. Wall, 1 B. & Ald. 103,	567		565
Harriman v. Harriman, 12 Gray, 341,	190, 534	Hart v. Taylor, 70 Miss. 665,	1461
		Harter v. Kernochan, 103 U. S. 562,	

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Harter Medicine Co. v. Hopkins, 83 Wis.	2174	Hatch v. Hatch, 9 Ves. 292,	1293, 1308
809,	1838	Hatch v. Kelly, 63 N. H. 29,	2289
Hartfield v. Roper, 21 Wend. 615,	765	Hatch v. Mann, 15 Wend. 44,	188
Hartford Bank v. Barry, 17 Mass. 94,	132	Hatch v. Oil Co., 100 U. S. 124,	96
Hartford, etc., Co. v. Brush, 43 Vt. 528,	260	Hatch v. Spooner, 37 N. Y. Supl. 296,	335
Hartford, etc., Co. v. Kennedy, 12 Conn.	499,	Hatcher v. Andrews, 5 Bush (Ky.), 561,	2044
499,	130, 134	Hatchett v. Blanton, 72 Ala. 423,	1644
Hartford, etc., Manufacturing Co. v.	130, 134	Hathaway v. Moran, 44 Maine 67,	1902
Brush, 43 Vt. 528,	130, 134	Hathaway v. Noble, 55 N. H. 508,	2289
Hartford, etc., R. Co. v. Crosswell, 5 Hill,	1254	Hathaway v. Payne, 34 N. Y. 92,	17
383,	1254	Hathaway v. Sabin, 63 Vt. 527,	302
Hartford Fire Ins. Co. v. Chicago, etc., R.	1954, 1955	Hathorn v. Richmond, 48 Vt. 557,	797
Co., 62 Fed. Rep. 904,	1730	Hatton, <i>In re</i> , L. R. 7 Ch. App. 723,	530, 533
Hartley v. Frosh, 6 Texas, 216,	238	Hatton v. Gray, 2 Cas. in Ch. 164,	1108
Hartley v. Harrison, 24 N. Y. 170,	411	Hatzfield v. Gulden, 7 Watts (Pa.), 153,	1883
Hartley v. James, 50 N. Y. 38,	692	Hauer's Estate, <i>In re</i> , 140 Pa. St. 420,	1673
Hartley v. Wharton, 11 Ad. & E. 934,	271,	Hauerwas v. Goodloe, 101 Ala. 162,	2112
Hartman's Appeal, 3 Grant's Cas. (Pa.)	786	Haughton v. Maurer, 55 Mich. 323,	1278
Hartman v. Blackburn, 7 Pittsburgh Leg.	131	Havana Drill Co. v. Ashurst, 148 Ill. 115,	198
Jour. 140,	32, 2159	Havelock v. Geddes, 10 East, 555,	135
Hartman v. Greenhow, 102 U. S. 672,	1779	Havemeyer v. Iowa County, 3 Wall. (U. S.)	2149, 2207
Hartman v. Ogborn, 54 Pa. St. 120,	148	294,	1232
Hartman v. Rogers, 69 Cal. 643,	1290, 1298, 1359, 1406	Haven v. Adams, 4 Allen, 80,	1232
Harts v. Brown, 77 Ill. 226,	43	Haven v. Foster, 9 Pick. 112,	801
Hartsfield v. Chamblin (S. C.), 21 S. E.	579	Havens v. American Ins. Co., 11 Ind. App.	815,
Rep. 798,	454	815,	80
Hartshorn v. Day, 19 How. 211,	490	Havens v. Havens, 3 N. Y. Supl. 219,	789
Hartshorn v. Hartshorn (N. H.), 29 Atl.	389	Haverly v. Becker, 4 N. Y. 169,	434
Rep. 406,	651, 692	Haviland v. Halstead, 34 N. Y. 643,	678
Hartshorn v. Hubbard, 2 N. H. 453,	1718	Haviland v. Willetts, 21 N. Y. Supl. 1112,	578, 987, 988
Hartsock v. Mort, 76 Md. 21,	280	Haverstock v. Sarbach, 1 Watts & Serg.	390,
Hartupee v. City of Pittsburgh, 131 Pa.	851	390,	560
St. 535,	1, 37	Hawes v. Armstrong, 1 Bing. N. C. 761,	683
Hartwell v. Jackson, 7 Texas, 576,	643	Hawes v. Burlington, etc., R. Co., 64 Iowa,	315,
Hartwell v. Kelly, 117 Mass. 235,	557	315,	1784
Hartwell v. Rice, 1 Gray, 587,	651, 692	Hawes v. Dunton, 1 Bailey L. (S. Car.)	146,
Hartwell v. Young, 67 Hun, 472,	1718	146,	1750
Harvey v. Alexander, 1 Rand. (Va.) 219,	280	Hawes v. Oakland, 104 U. S. 450,	1450
Harvey v. Coffin, 44 N. H. 563,	690, 951	Hawes v. Smith, 12 Maine, 429,	853, 871
Harvey v. Gibbons, 2 Lev. 161,	1640	Hawes v. Woolcock, 23 Wis. 629,	214, 255
Harvey v. Grabham, 5 Ad. & El. 61,	811	Hawken v. Bourne, 8 M. & W. 703,	1359
Harvey v. Hunt, 119 Mass. 279,	54	Hawkes v. Pike, 105 Mass. 560,	67, 90, 91
Harvey v. Irvine, 11 Iowa, 82,	1869, 1917, 1931	Hawkes v. Saunders, 183	
Harvey v. Johnson, 6 C. B. 295,	637	Hawkeye Ins. Co. v. Brainard, 72 Iowa,	130,
Harvey v. Merrill, 150 Mass. 1,	1964	130,	1996
Harvey v. Million, 67 Ind. 90,	1022	Hawkins, <i>Ex parte</i> , 25 L. J. Ch. 221,	260
Harvey v. Railroad Co., 74 Mo. 538,	445	Hawkins v. Americus, etc., Loan Assn.,	96 Ga. 206,
Harvey v. Sullens, 46 Mo. 147,	1701, 1737	96 Ga. 206,	1625
Harvey v. Tama Co., 53 Iowa, 228,	11	Hawkins v. Ball's Admrs., 18 B. Mon. 816,	821
Harwood v. Root, 20 Fla. 940,	379, 414	Hawkins v. Barney's Lessee, 5 Pet. (U. S.)	457,
Hasbrouck v. Winkler, 48 N. J. Law, 431,	1492	457,	2158
Haskell v. Brewer, 11 Maine, 258,	154, 155	Hawkins v. Berry, 5 Gilman (Ill.), 36,	327, 353
Haskell v. New Bedford, 108 Mass. 208,	2207, 2208	Hawkins v. Chace, 19 Pick. 502,	675, 692
Haskell v. Worthington, 94 Mo. 560,	1136	Hawkins v. Clermont, 15 Mich. 511,	490
Haskett v. Maxey, 134 Ind. 182,	1643	Hawkins v. Gilbert, 19 Ala. 54,	2181
Haskin v. Agricultural Ins. Co., 78 Va. 700,	172	Hawkins v. Hawkins, 50 Cal. 553,	1056
Haskins v. Alcott, 13 Ohio St. 210,	532	Hawkins v. Pemberton, 51 N. Y. 198,	325, 328, 345
Haskins v. Lombard, 16 Maine, 140,	934	Hawkshaw v. Parkins, 2 Swanst. 539,	543
Haskins v. Newcomb, 2 John. 405,	146	Hawkshaw v. Rawlings, 1 Strange, 23,	445
Haskins v. Warren, 115 Mass. 514,	814	Hawley v. Bibb, 69 Ala. 52,	1916, 1918, 1923
Haslack v. Mayes, 26 N. J. Law, 284,	2174	Hawley v. Cramer, 4 Cow. 717,	1289
Haslet v. Haslet, 6 Watts, 464,	1434	Hawley v. Farrar, 1 Vt. 420,	183
Hasselman v. Carroll, 102 Ind. 153,	1869	Hawley v. Gray, etc., Paving Co., 106 Cal.	337,
Hasselman v. United States Mortgage	1237	337,	1272
Co., 97 Ind. 363,	1775	Hawley v. James, 5 Paige (N. Y.), 318,	1715
Hastelow v. Jackson, 8 Barn. & Cress. 221,	10, 11, 954	Hawley v. Kansas Coal Co., 48 Kan. 593,	1984
Hastings v. Brooklyn Life Ins. Co., 138	325, 327	Hawley v. Screven, 62 Ga. 347,	737
N. Y. 473,	2043, 2044	Hawley v. Upton, 102 U. S. 314,	1400
Hastings v. Dollarhide, 24 Cal. 195,	1711	Haworth v. Montgomery, 91 Tenn. 16,	1909
Hastings v. Lovejoy, 140 Mass. 261,	1231	Hawralty v. Warren, 18 N. J. Eq. 124,	1105, 1108, 1109, 1113
Hastings v. Lovering, 2 Pick. 214,	1161	Hawthorne v. Calef, 2 Wall. 10,	1385
Hastings v. Whitley, 2 Exch. 611,	1168	Haxtun v. Bishop, 3 Wend. (N. Y.) 13,	2196
Haston v. Castner, 31 N. J. Eq. 697,	1759	Hay's Case, L. R. 10 Ch. App. 593,	1980
Hatch v. Barr, 1 Ohio, 330,	1380	Hayden v. Cook, 34 Neb. 670,	960
Hatch v. Burroughs, 1 Wodd's, 439,		Hayden v. Demets, 53 N. Y. 426,	388
Hatch v. Cobb, 4 Johns. Ch. 559,		Hayden v. Directory Co., 42 Fed. Rep. 875,	1445
Hatch v. Coddington, 95 U. S. 54,		Hayden v. Lincoln Elec. R. Co., 43 Neb.	680,
Hatch v. Dana, 101 U. S. 205,			1273

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Hayden v. Nutt, 4 La. Ann. 65,	1674	Heath v. Stevens, 48 N. H. 251,	1790
Hayden v. Westcott, 11 Conn. 129,	1642	Heath v. West, 20 N. H. 101,	1779, 1791
Haydon v. Haydon (Ky. 1894), 27 S. W. Rep. 975,	1131	Heavenrich v. Steele, 57 Minn. 221,	543
Hayes v. Allen, 160 Mass. 236,	453	Heaver v. Lanahan, 74 Md. 493,	280, 282
Hayes v. Boylan, 141 Ill. 400,	1194	Hebbard v. Haughian, 70 N. Y. 54,	495
Hayes v. Davidson, 70 N. C. 573,	190, 518, 524	Hobburn v. Auld, 5 Cranch, 262,	753
Hayes v. Fenn, 89 Ga. 264,	544	Heckman v. Manning, 4 Colo. 543,	540
Hayes v. Harmony, etc., Cemetery, 108 Mass. 400,	1141	Heckman v. Swartz, 50 Wis. 267,	2014
Hayes v. Hayes, 8 La. Ann. 468,	1899	Heckmann v. Pinkney, 81 N. Y. 211,	138, 140, 370
Hayes v. Morrison, 33 N. H. 90,	2197	Hedge v. Lowe, 47 Iowa, 137,	2030, 2039, 2040
Hayes v. Moynahan, 60 Ill. 409,	635	Hedges v. Dixon Co., 150 U. S. 182,	1516, 1526, 1527, 1538, 1885
Hayes v. Warren, 2 Strange, 933,	192	Hedges v. Hudson R. Co., 6 Robt. 119,	124
Hayes v. Willio, 11 Abb. Pr. N. S. (N. Y.) 167,	2072	Hedges v. Strong, 3 Ore. 13,	651
Haynard v. Board, etc., of Red Cliff, 20 Colo. 33,	1474	Heebner v. Eagle Ins. Co., 10 Gray, 131,	732
Haynes v. Farley, 4 Port. (Ala.) 528,	219	Heffelfinger v. Shurtz, 16 Serg. & R. 44,	1656
Haynes v. Nice, 100 Mass. 327,	471, 592	Hefferlin v. Sinsinderfer, 2 Kan. 401,	715
Haynes v. Rudd, 83 N. Y. 251,	1940, 2012, 2013	Heffron v. Brown, 155 Ill. 322,	23, 51
Haynes v. Second Baptist Church, 12 Mo. App. 536,	285	Heffron v. Flanigan, 37 Mich. 274,	90, 91
Haynes v. Thom, 29 N. H. 386,	212, 214	Heflin v. Milton, 69 Ala. 354,	628, 646
Hays v. City of Oil City (Pa. Sup.), 11 Atl. Rep. 63,	1512	Hegeman v. City of Passaic, 51 N. J. Law, 109,	1549
Hays v. Gas Light, etc., Co., 29 Ohio, St. 330,	1223	Hegeman v. Johnson, 35 Barb. 200,	674
Hays v. Jordan, 85 Ga. 741,	163	Heggie v. People's, etc., Assn., 107 N. C. 581,	1383
Hays v. Kennedy, 3 Grant (Pa.), 357,	276	Heichew v. Hamilton, 3 Greene (Iowa) 596,	2032, 2040, 2044
Hays v. Kennedy, 41 Pa. St. 373,	275, 276	Heidenheimer v. Baumgarten (Texas 1894), 29 S. W. Rep. 208,	2252
Hays v. Leonard, 155 Pa. St. 474,	1728	Heidenheimer v. Cleveland (Texas Sup. 1891), 17 S. W. Rep. 524,	1924
Hays v. McConnell, 42 Ind. 285,	789	Heidenrich v. Leonard, 21 La. Ann. 623,	2021
Hays v. Midas, 104 N. Y. 602,	945	Heilman v. Lebanon R. Co., 145 Pa. St. 23,	528
Hays v. Ottawa, etc., R. Co., 68 Ill. 422,	1426	Heim v. Butin (Cal.), 40 Pac. Rep. 264,	264
Hays v. Richardson, 1 Gill & J. 366,	643	Heim v. Vogel, 69 Mo. 529,	75
Hayton v. Irwin, L. R. 5 C. P. D. 130,	917	Heindockle v. Zugbaum, 5 Mont. 344,	164, 165
Hayward v. Barker, 52 Vt. 429,	1651	Heindokel v. National, etc., Association, 58 Minn. 340,	175, 1616
Hayward v. Leonard, 7 Pick. 181,	139, 146, 897, 2232	Heine v. Mayor, 61 N. Y. 171,	280, 282
Hayward v. Munger, 14 Iowa, 516,	395	Heine v. Mechanic's Ins. Co., 45 La. Ann. 770,	1675
Hayward v. Young, 2 Chit. 407,	2044	Heineman v. Newhan, 55 Ga. 262,	1889
Haywood v. School District, 2 Cush. 419,	1492	Heinrichs v. Woods, 7 Mo. App. 236,	1644
Haywood v. Lincoln Lumber Co., 64 Wis. 639,	1365, 1392	Heirn v. Carron, 11 S. & M. 361,	532
Hazard v. Day, 14 Allen (Mass.), 487,	2008	Heirs of Watrous v. McKie, 54 Texas, 65,	854
Hazard v. Loring, 10 Cush. 267,	343, 390, 886	Heisch v. Adams, 81 Texas, 94,	187
Hazel v. Chicago, etc., R. Co., 82 Iowa, 477,	734	Heisen v. Heisen, 145 Ill. 658,	952
Hazlehurst v. Savannah, etc., R. Co., 43 Ga. 13,	1262, 1427, 2054, 2056	Heisley v. Swanstron, 40 Minn. 196,	689, 1182
Hazlehurst Compress Co. v. Boomer Compress Co., 43 Fed. Rep. 803,	330	Heitsch v. Cole, 47 Minn. 320,	201, 203
Hazleton v. Putnam, 3 Pinney (Wis.), 107,	641, 642	Hekelkaemper v. German Bldg. Ass'n, 22 Kan. 549,	1621
Hazleton Boiler Co. v. Fargo Gas Co., 4 N. Dakota, 355,	96, 329	Helbreg v. Schumann, 150 Ill. 12,	1815
Hazleton, etc., Coal Co. v. Buck Mountain Coal Co., 57 Pa. St. 301,	864	Helfenstein's Estate, 77 Pa. St. 328,	258
Hazard v. Hoxsie, 53 Hun. 417,	292	Helfenstein's Estate, 26 W. N. C. 194,	32
Head v. Meloney, 111 Pa. St. 99,	2263	Hellams v. Abercrombie, 15 S. Car. 110,	2108
Head v. Tattersall, L. R. 7 Ex. 7,	294	Heller, <i>In re</i> , 3 Paige (N. Y.) 199,	1814
Head v. University, 19 Wall. (U. S.) 526, 2127	520, 543	Heli, <i>In re</i> , 3 Ark. 635,	1846
Headley v. Hackley, 50 Mich. 43,	520, 527	Helling v. United Order, 29 Mo. App. 309,	190, 519
Heady v. Bexar Building Assn. (Texas 1894), 26 S. W. Rep. 468,	1604, 1619	Hellreigel v. Manning, 97 N. Y. 56,	417
Healy v. O'Brien, 66 Cal. 517,	422	Helms v. Chadbourne, 45 Wis. 61,	1556
Heane v. Rogers, 9 B. & C. 586,	463	Helms v. Kearns, 40 Ind. 124,	1184
Heaphy v. Hill, 2 Sim. & S. 29,	1165	Helprey v. Chicago, Rock Island Co., 29 Iowa, 480,	396
Heard v. Bowers, 23 Pick. 455,	487, 488, 496	Helshaw v. Langley, 11 L. J. Ch. 17,	687
Heard v. Wadham, 1 East, 619,	120	Hemkleman v. Peterson, 154 Ill. 419,	1057
Hearn v. Griffin, 2 Chitty, 407,	2063	Hemmenway v. Stone, 7 Mass. 58,	811
Hearn v. Kiehl, 38 Pa. St. 146,	525, 527	Hemminger v. Western Assurance Co., 95 Mich. 355,	840, 2212
Hearne v. Chadbourne, 65 Maine, 302,	653	Hemphill v. Yerkes, 132 Pa. St. 545,	447
Hearst v. Sybert, Cheves, 177,	1880	Hemstead v. Reed, 6 Conn. 480,	2125
Heaston v. Cincinnati, etc., R. Co., 16 Ind. 275,	1337	Henas v. Henas, 5 Ind. App. 100,	565
Heath v. Doyle, 18 R. I. 252,	545	Henderson v. Cass County, 107 Mo. 50,	398
Heath v. Heath, 31 Wis. 223,	649, 652	Henderson v. Hudson (1810), 1 Munf. 510,	1179
Heath v. Mahoney, 12 N. Y. Weekly Dig. 404,	1796	Henderson v. Indiana Trust Co. (Ind. 1895), 40 N. E. Rep. 516,	1397
		Henderson v. McDuffe, 5 N. H. 38,	826
		Henderson v. Moss, 82 Texas, 60,	30
		Henderson v. Palmer, 71 Ill. 579,	1853

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Henderson v. San Antonio, etc., R. Co., 17 Texas, 560,	1543	Herrman v. Merchants' Ins. Co., 81 N. Y.	896
Henderson v. Schaas, 35 Ill. App. 155,	725	Herrmann v. Orcutt, 152 Mass. 405,	530
Henderson v. Stevenson, L. R. 2 H. L. Sc. 470,	65	Hersh v. Northern, etc., R. Co., 74 Pa. St. 181,	1420
Henderson v. Stobart, 5 Ex. 99,	532, 535	Herron v. Dibrell, 87 Va. 239,	326
Henderson v. Stokes, 42 N. J. Eq. 586,	465	Hersey v. Bennett, 28 Minn. 86,	470
Henderson v. Waggoner, 2 Lea (Tenn.), 133,	1902	Herson v. Henderson, 1 Foster (N. H.), 224,	343
Henderson v. Warmack, 27 Miss. 830,	1678	Hertz v. Wilder, 10 La. Ann. 199,	2016
Henderson v. Wheaton, 139 Ill. 581,	2183	Hertzog v. Hertzog, 29 Pa. St. 465,	772, 791
Henderson and Nashville R. Co. v. Dickerson, 17 B. Mon. (Ky.) 173,	2121	Hervey v. Rhode Island L. Works, 93 U. S. 664,	163, 722
Henderson, etc., Association v. Johnson, 88 Ky. 191,	1598, 1600	Hervey v. Savery, 43 Iowa, 313,	1065
Hendrick v. Lindsay, 93 U. S. 143,	173, 237, 1443, 2210	Herzo v. San Francisco, 33 Cal. 134,	1507
Hendricks v. Gilchrist, 76 Ind. 369,	2273	Hesketh v. Fawcett, 11 M. & W. 356,	397
Hendricks v. Isaacs, 117 N. Y. 411,	1632, 1653, 1659, 1754	Hess's Estate, 150 Pa. St. 346,	594
Hendricks v. Lindsay, 93 U. S. 143,	247	Hess v. Lowrey, 122 Ind. 225,	2169, 2170
Hendrix v. Gore, 8 Ore. 407,	1363	Hoss v. Powell, 29 Mo. App. 411,	2198
Henke v. Eureka Endowment Assn., 100 Cal. 429,	2201, 2183	Hoss v. Rau, 95 N. Y. 353,	203
Henkle v. Assurance Co., 1 Ves. Sr. 817,	1066, 1080	Hester v. Sample (Iowa 1895), 63 N. W. Rep. 463,	1021
Henkleman v. Peterson, 154 Ill. 419,	1051, 1058	Hester v. Thomson, 58 Miss. 108,	1708
Hennel v. Vanderburgh County, 132 Ind. 32,	1823	Hestonville, etc., R. Co. v. Philadelphia, 89 Pa. St. 210,	2143
Hennessey v. Hill, 52 Ill. 281,	198	Hetfield v. Dow, 27 N. J. Law, 440,	598
Hennessey v. Manhattan, etc., Co., 28 Hun, 95,	897	Heth v. Woolldridge (1828), 6 Rand. (Va.) 605,	1179
Hennessey v. Gore, 35 Ill. App. 594,	868	Hewes v. Jordan, 39 Md. 472,	666
Hennessey v. Woolworth, 128 U. S. 438,	1129, 1166	Hewitt v. Brown, 21 Minn. 163,	689
Henrici v. Davidson, 149 Pa. St. 323,	234	Hewitt v. Wheeler, 22 Conn. 557,	639
Henrici v. Kehr, 90 Wis. 344,	1028	Hewlins v. Shippam, 5 Barn. & C. 221,	643
Henry v. Allen, 93 Ala. 197,	992	Hewitt v. Warren, 10 Hun, 560,	1801
Henry v. Carson, 96 Ind. 412,	13	Hewson v. Paxson, 38 Leg. Int. 308,	75
Henry v. Dietrich, 7 N. Y. Supl. 505,	471, 477	Hexter v. Baer, 125 Pa. St. 52,	990
Henry v. Gibson, 55 Mo. 570,	832	Heywood v. Heywood, 42 Maine, 229,	864
Henry v. Henry, 27 Ohio St. 121,	618	Heyman v. Neale, 2 Camp. 337,	685
Henry v. Henry, 29 Ind. 564,	618	Heywood v. Porrin, 10 Pick. 225,	99, 863
Henry v. Mt. Pleasant Tp., 70 Mo. 500,	829	Heyward v. Wallace, 4 Strobl. 181,	343
Henry v. Patterson, 57 Pa. St. 346,	533, 1633	Hiatt v. Harris, 28 Ind. 379,	387
Henry v. Ritenour, 31 Ind. 136,	1826	Hiatt v. Williams, 72 Mo. 214,	848
Henry v. Root, 83 N. Y. 528,	1773, 1777, 1793	Hibbard v. Western Union Telegraph Co., 33 Wis. 558,	1961
Henry v. Sneed, 59 Mo. 407,	1707	Hibbard v. Whitney, 13 Vt. 21,	836
Henry v. Tupper, 29 Vt. 353,	490	Hibblewhite v. McMorine, 6 M. & W. 200,	13
Henry Bill Pub. Co. v. Utley, 155 Mass. 365,	470	Hibernia National Bank v. Lacombe, 84 N. Y. 367,	725, 728
Henschel v. Mabler, 3 Hill. 132,	873	Hibernia, etc., Institution v. Luhn, 34 S. Car. 175,	1683
Henschel v. Mamero, 120 Ill. 660,	1134	Hibbert v. MacKinnon, 79 Wis. 673,	234, 1197
Henschaw v. Robins, 9 Metc. 83,	323, 324, 327, 345, 353	Hick v. Rodocanachi, 65 L. T. R. N. S. 300,	297
Hensley v. Baker, 10 Mo. 157,	356, 360	Hickerson v. Benson, 8 Mo. 8,	1937
Hensley v. Hensley (Ky. 1895), 30 S. W. Rep. 613,	1045	Hickey v. Morrell, 102 N. Y. 454,	348
Heuthorn v. Fraser, L. R. (1892), 2 Ch. 27,	56, 57, 58, 79, 80	Hickling v. Wilson, 104 Ill. 54,	1380
Hentig v. James, 22 Kan. 326,	1332	Hickman v. Green, 133 Mo. 165,	345
Henwood v. Oliver, 1 Q. B. 409,	399	Hickman v. Haynes, L. R. 10 C. P. 598,	690
Hepburn v. Auld, 1 Cranch, 321,	398	Hickman v. Hickman, 1 Wash. 257,	1840
Hepburn v. Griswold, 8 Wall. (U. S.) 603,	392, 2115	Hickman v. Macon County, 42 Fed. Rep. 759,	26
Herald v. Harper, 8 Blackf. 170,	549	Hickox v. Elliott, 27 Fed. Rep. 830,	1856
Herberger v. Hlusman, 90 Cal. 583,	380	Hickmott's Case, 9 Rep. 52 b,	550
Herbert v. Kenton Bldg. Assn., 11 Bush (Ky.), 294,	1620	Hicks v. Brown, 12 John. 142,	728
Herbst v. Lowe, 65 Wis. 316,	699, 868, 2214	Hicks v. Burhans, 10 Johns. 243,	186
Herndon v. Henderson, 41 Miss. 584,	2097	Hicks v. Skinner, 71 N. Car. 539,	360, 361
Herndon v. The Triple Alliance, 45 Mo. App. 426,	117	Hicks v. Whitmore, 12 Wend. 548,	674
Heron v. Davis, 3 Bosw. 336,	132	Hiern v. Mill, 13 Ves. Jr. 114,	1135
Herschhoff v. Boutineau, 17 R. I. 3,	2030, 2045	Hiatt v. Shull, 36 W. V. 563,	1031
Herrin v. Butters, 20 Maine, 119,	651	Higby v. New York R. Co., 3 Bos. 497,	435
Herrin v. Libbey, 36 Maine, 357,	974, 2282	Higdon v. Thomas, 1 H. & G. 152,	688
Herring v. Peaslee (Iowa 1895), 60 N. W. Rep. 650,	1064, 1068	Higgins v. Brown, 78 Maine, 473,	803, 804, 1828, 1830, 1831
Herring v. Skaggs, 73 Ala. 446,	907, 932	Higgins v. Delaware R. Co., 60 N. Y. 553,	747
Herring v. Wickham, 29 Gratt. 628,	221, 223, 224, 1711	Higgins v. Lansing, 154 Ill. 301,	1047, 1290, 1292
		Higgins v. Lessig, 49 Ill. App. 459,	7
		Higgins v. Miner, 13 Ind. 346,	1956
		Higgins v. Moore, 34 N. Y. 417,	919, 932, 2247
		Higgins v. Wortell, 18 Cal. 330,	447
		Higginson v. Clowes, 15 Ves. 516,	684
		High's Appeal, 21 Pa. St. 283,	557
		High v. Board, 92 Ind. 580,	1482
		Higham v. Harris, 108 Ind. 246,	1834

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Highberger v. Stiffier, 21 Md. 338,	1824	Hinckley v. Southgate, 11 Vt. 428,	651
Highland Co. v. McKean, 11 Johns. 98,	156	Hinde v. Whitehouse, 7 East, 558,	662, 665
Highlands Chemical Co., The, v. Matthews, 76 N. Y. 145,	805	Hine v. Roberts, 48 Conn. 267,	165
Highley v. Barron, 49 Mo. 103,	1781	Hinely v. Margaritz, 3 Pa. St. 428,	215, 1772, 1777
Higman v. Hood, 3 Ind. App. 456,	2214	Hineman v. Matthews, 138 Pa. St. 204,	165, 168
Hight v. Ripley, 19 Maine, 137,	657	Hines v. Board, 93 Ind. 266,	1835
Hight v. Taylor, 97 Ind. 392,	553, 2245	Hinkle v. Fisher, 104 Ind. 84,	646
Highton v. Dessau, 19 N. Y. Supl. 395,	127, 140, 299	Hinkle v. Higgins, 83 Texas, 615,	468
Hilbish v. Hilbish, 71 Ind. 27,	794	Hinkle v. Minneapolis, etc., R. Co., 31 Minn. 434,	523
Hilborn v. Bucknam, 78 Maine, 482,	803, 1830	Hinnen v. Newman, 35 Kan. 709,	1128, 1984, 2013
Hildreth v. O'Brien, 10 Allen, 104,	343	Hinson v. Bush, 84 Ala. 368,	1768
Hileman v. Hileman, 85 Ind. 1,	1672	Hinton v. Insurance Co., 63 Ala. 488,	1069
Hiles v. Fisher, 144 N. Y. 306,	1765	Hinton v. Leigh, 102 N. Car. 28,	1778
Hill v. Beach, 12 N. J. Eq. 31,	1335, 1384	Hinton v. Locke, 5 Hill, 437,	48, 918, 926
Hill v. Blake, 97 N. Y. 216,	149, 951, 956, 2192	Hintze v. Taylor, 57 N. J. Law, 239,	1870
Hill v. Burlington, etc., R. Co., 60 Iowa,	196,	Hipwall v. Knight, 1 You. & C. (Exch.) 401,	749, 751
Hill v. Bush, 19 Ark. 522,	738	Hirn v. State, 1 Ohio St. 15,	2128
Hill v. Carter, 101 Mich. 158,	397, 403, 410	Hirshfeld v. Bopp, 145 N. Y. 84,	1370, 1375, 1376, 1378
Hill v. Cheatam, 129 Mo. 71,	1124, 1168	Hirshfeld v. Fort Worth National Bank, 83 Texas, 452,	766, 767
Hill v. City of Boston, 122 Mass. 344,	1497	Hirschman v. Iron Range R. Co., 97 Mich. 384,	1277
Hill v. Davis, 3 N. H. 384,	2168	Hirschfeld v. London, etc., Railway Co., L. R. 2 Q. B. Div. 1,	531
Hill v. Day, 34 N. J. Eq. 150,	1813	Hirshhorn v. Stewart, 49 Iowa, 418,	666
Hill v. Duluth City, 57 Minn. 231,	881	Hiscock v. Norton, 42 Mich. 320,	429
Hill v. Dunham, 7 Gray (Mass.), 543,	2113	Hiss v. Weik, 78 Md. 439,	1024
Hill v. Gomme, 1 Beav. 540,	248, 1128	Hitchcock v. Coker, 6 A. & E. 438,	180, 231, 2043, 2044, 2045
Hill v. Gould, 129 Mo. 106,	1290, 1311	Hitchcock v. Davis, 87 Mich. 629,	565
Hill v. Grigsby, 35 Cal. 656,	1143	Hitchcock v. Galveston, 96 U. S. 341,	783
Hill v. Heller, 27 Hun, 416,	146	Hitchcock v. Taylor, Genessee Probate Judge, 99 Mich. 123,	1714
Hill v. Henry, 17 Ohio, 9,	196	Hitchcock v. Watson, 13 Ill. 289,	430
Hill v. Hobart, 16 Maine, 164,	2260	Hitchens v. Congreve, 1 Russ. & M. 150,	1980
Hill v. Hooper, 1 Gray, 131,	651	Hitchens v. Shallor, 32 Mich. 496,	641
Hill v. Huntress, 43 N. H. 480,	867	Hitchin v. Groom, 17 L. J. C. P. 145,	902
Hill v. Jamieson, 16 Ind. 125,	649, 652	Hitchings v. St. Louis, etc., Transp. Co., 68 Hun, 33,	1355
Hill v. John P. King Mfg. Co., 79 Ga. 105,	859	Hitt v. Allen, 13 Ill. 592,	1948
Hill v. Johnson, 38 Mo. App. 383,	1924	Hix v. Whittemore, 4 Metc. (Mass.) 545,	1812, 2278
Hill v. Lord, 43 Maine, 83,	642	Hoad v. Grace, 7 H. & N. 494,	220
Hill v. McLaughlin, 158 Mass. 307,	474	Hoadley v. Northern Transportation Co., 115 Mass. 304,	717
Hill v. Miller, 76 N. Y. 32,	885	Hoadly v. McLaine, 10 Bing. 482,	677, 776
Hill v. Nisbet, 100 Ind. 341,	1226	Hoag, <i>Ex parte</i> , 7 Paige (N. Y.), 312,	1844
Hill v. Palmer, 56 Wis. 123,	645	Hoag v. Town of Greenwich, 133 N. Y. 152,	434
Hill v. Parker, 10 Ill. App. 323,	854	Hoagland v. Segur, 38 N. J. Law, 230,	2038, 2044
Hill v. Paul, 8 Clark & F. 295,	2084	Hoare v. Niblett, L. R. 1 Q. B. 781,	833
Hill v. Pioneer Lumber Co., 113 N. Car. 173,	1379	Hoare v. Parker, 2 Term. R. 376,	1706
Hill v. Place, 7 Robt. 389,	402	Hoare v. Rennie, 5 H. & N. 19,	150
Hill v. Rich Hill Coal Co., 119 Mo. 9,	1155, 1206	Hobart v. Young, 63 Vt. 363,	193, 325, 327, 333, 334, 363
Hill v. School District, 17 Maine, 316,	746	Hobbs v. Columbia Falls Brick Co., 157 Mass. 109,	2235
Hill v. Sherwood, 3 Wis. 343,	2100	Hobbs v. McLean, 117 U. S. 567,	700, 871
Hill v. Smith, Morris (Iowa), 70,	1890, 1891	Hoboken v. Gear, 27 N. J. Law, 265,	2127
Hill v. Spear, 50 N. H. 253,	708, 709, 1901	Hoboken, etc., Bank v. Phelps, 34 Conn. 92,	15
Hill v. Taylor, 125 Mo. 331,	1773	Hoch v. Cocks, 73 Hun, 253,	1106
Hill v. Townsend, 69 Ala. 236,	166	Hochster v. De La Tour, 2 E. & B. 678,	492, 494, 2213
Hill v. Webb, 43 Minn. 545,	55	Hochster v. De Latour, 20 Eng. Law & Eq. 157,	2221
Hill v. Wilson, 88 Cal. 92,	381	Hocking v. Hamilton, 158 Pa. St. 107,	102
Hillebert v. Porter, 23 Minn. 496,	2154, 2155	Hockenbury v. Meyers, 34 N. J. Law, 346,	200
Hillebrant v. Brewer, 6 Texas, 45,	559	Hodge v. Sloan, 107 N. Y. 244,	2036, 2074, 2076, 2078
Hillegas v. Stephenson, 75 Mo. 118,	828	Hodgens v. Hodgens, 4 Cl. & F. 323,	1659
Hilliard v. Cagle, 46 Miss. 309,	1366	Hodges v. Buffalo, 2 Denio (N. Y.), 110,	1515, 2242
Hilliard v. Noyse, 58 N. H. 312,	523	Hodges v. Coleman, 76 Ala. 103,	1364
Hillman v. Newington, 57 Cal. 56,	821	Hodges v. Hodges, 9 R. I. 32,	1665
Hills v. Chicago, 60 Ill. 86,	1587		
Hills v. Mitson, 8 Exch. 751,	1882		
Hills v. Place, 43 N. Y. 520,	2196		
Hills v. Rix, 43 Minn. 543,	898		
Hills v. Sommer, 6 N. Y. Supl. 469,	190, 512, 518, 522, 544		
Hillyard v. Crabtree, 11 Texas, 264,	136		
Hilton v. Dinsmore, 21 Maine, 410,	607		
Hilton v. Eckersley, 6 El. & Bl. 47,	1953, 2060		
Hilton v. Houghton, 35 Maine, 143,	2112, 2113		
Hilton v. Southwick, 17 Maine, 303,	74		
Hilton v. Woods, L. R. 4 Eq. 432,	2005		
Himmelman v. Danos, 35 Cal. 441,	161		
Hinchliff v. Hinman, 18 Wis. 130,	92		
Hinchman v. Lincoln, 124 U. S. 38,	663, 671		
Hinckley v. Pittsburgh Steel Co., 121 U. S. 264,	2213, 2218		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Hodges v. New England Screw Co., 1 R. I. 312, 1260, 2284	Holloway v. Sherman, 12 Iowa, 282, 2155
Hodges v. Richmond Mfg. Co., 9 R. I. 482, 646	Hollowbush's Estate, 13 Phila, 217, 614
Hodges v. Taylor, 57 Texas, 196, 1662	Hollowell, etc., Bank v. Hamlin, 14 Mass. 178, 1341
Hodges v. Thompson (Ala. 1893), 13 So. Rep. 679, 1156	Holm v. Colman, 89 Wis. 233, 858
Hodges v. Wilkinson, 111 N. Car. 56, 354, 355, 358, 359	Holme v. Guppy, 3 M. & W. 387, 299
Hodsdon v. Wilkins, 7 Greenl. (Maine) 113, 1853	Holman v. Johnson, Cowper, 341, 1572, 1889, 2062, 2101
Hodson v. Carter, 2 Pinney, 212, 215	Holmes v. Blogg, 8 Taunt. 508, 1782, 1793
Hodson v. Eugene Glass Co. (Ill. 1895), 40 N. E. Rep. 9711, 1048	Holmes v. Briggs, 131 Pa. St. 233, 446, 447, 448, 452, 455
Hodson v. Eugene Glass Co., 156 Ill. 397, 1321	Holmes v. Chartiers Oil Co., 138 Pa. St. 546, 373, 905, 2253
Hodgson v. Temple, 5 Taunton, 181, 1862	Holmes v. Corthell, 80 Maine, 31, 1576
Hoe v. Sanborn, 21 N. Y. 552, 349	Holmes v. Durkee, 1 Cababe & E. 23, 683
Hoefinger v. Wells, 47 Wis. 628, 457	Holmes v. Evans, 48 Miss. 217, 677
Hoerster v. Kraeka, 29 Texas, 450, 1662	Holmes v. Fisher, 13 N. H. 9, 490
Hoffman v. Aetna Ins. Co., 32 N. Y. 405, 869, 883	Holmes v. Fresh, 9 Mo. 201, 1065
Hoffman v. Bloomsburg R. Co., 157 Pa. St. 174, 75	Holmes v. Gilman, 138 N. Y. 369, 1002, 2279
Hoffman v. Brooks, 11 Week. Law B. 258, 2060	Holmes v. Hall, 8 Mich. 66, 858
Hoffman v. Carow, 22 Wend. 285, 721	Holmes v. Holmes, 4 Barb. 295, 2123
Hoffman v. Felt, 39 Cal. 109, 846	Holmes v. Hoskins, 9 Ex. 753, 663, 672
Hoffman v. Gallaher, 6 Daly, 42, 131	Holmes v. Hubbard, 60 N. Y. 183, 872
Hoffman v. John Hancock, etc., Ins. Co., 92 U. S. 161, 1349	Holmes v. Laraway, 64 Vt. 175, 446
Hoffman v. Johnson, 2 Bland, 103, 110	Holmes v. Martin, 10 Ga. 503, 869, 2082
Hogan v. Burns (Cal.), 33 Pac. Rep. 631, 525, 544	Holmes v. McKay, 51 Ind. 533, 644
Hogan v. Hogan, 89 Ill. 427, 1731	Holmes v. Parker, 25 Ill. App. 225, 872, 885
Hogan v. Kyle, 7 Wash. 595, 1137, 1143, 1144, 1145	Holmes v. Peck, 1 R. I. 242, 797
Hogg v. Laster, 56 Ark. 382, 793	Holmes v. Powell, 8 De Gex, M. & G. 572, 426
Hogan v. Weyer, 5 Hill, 39, 554	Holmes v. Remsen, 28 John. 229, 725
Hoge v. Railroad Co., 99 U. S. 348, 2140	Holmes v. Reynolds, 55 Vt. 239, 1752
Hogg's Appeal, 22 Pa. St. 479, 884	Holmes v. Richey, 56 Cal. 807, 2224
Hoggatt v. Thomas, 35 La. Ann. 298, 614	Holmes v. Smythe, 100 Ill. 413, 1600
Hoghton v. Hoghton, 11 Eng. Law and Eq. 134, 1030	Holmes v. Tyson, 147 Pa. St. 305, 321, 328
Hoghton v. Hoghton, 15 Beav. 278, 1018	Holmes v. Willard, 125 N. Y. 75, 1237, 1264
Hogins v. Plympton, 11 Pick. 97, 193	Holmes v. Whitaker, 23 Ore. 319, 928, 932, 935
Hoitt v. Holcomb, 23 N. H. 535, 588	Holmes v. Wilson, 10 Adol. & E. 503, 575
Hoitt v. Moulton, 21 N. H. 568, 617	Holmes, etc., Manufacturing Co. v. Holmes, etc., Metal Co., 127 N. Y. 252, 1264
Hoke v. Fleming, 10 Ired. L. 263, 549	Holt v. Bennett, 146 Mass. 437, 1296
Hoker v. Boggs, 63 Ill. 161, 1731, 1746	Holt v. Clarendieux, 2 Str. 937, 1772
Holbrook v. Armstrong, 10 Maine, 31, 655	Holt v. Collyer, L. R. 16 Ch. Div. 718, 869
Holbrook v. Blodget, 5 Vt. 520, 465	Holt v. Creamer, 34 N. J. Eq. 181, 1662
Holbrook v. Chamberlain, 116 Mass. 155, 2185	Holt v. Green, 17 Mass. 253, 2101
Holbrook v. Waters, 9 How. Pr. (N. Y.) 335, 2039	Holt v. Holt, 58 N. H. 276, 699
Holcomb v. Thompson, 50 Kan. 598, 1067	Holroyd v. Marshall, 10 H. L. Cas. 191, 1435
Holcombe v. Richards, 38 Minn. 33, 14	Holt v. Pie, 120 Pa. St. 425, 326
Holdeman v. Simonton, 55 Iowa, 144, 2039	Holt v. Rogers, 3 Pot. 420, 1166
Holder v. Curry, 83 Wis. 504, 1804	Holsapple v. Rome, etc., R. Co., 86 N. Y. 275, 1963
Holden Co. v. Westervelt, 67 Me. 446, 146	Holt v. Wilson, 75 Ala. 58, 1768
Holder v. LaFayette, etc., Railroad Co., 71 Ill. 106, 1300	Holton v. Brown, 18 Vt. 224, 398
Holderbaugh v. Turpin, 75 Ind. 84, 938	Holton v. Noble, 83 Cal. 7, 190, 527
Holdich's Case, L. R. 14 Eq. 72, 487	Holyoke v. Loud, 69 Maine, 59, 829
Holladay v. Patterson, 5 Ore. 177, 1977	Holtz v. Schmidt, 59 N. Y. 253, 18
Holland v. Long, 57 Ga. 36, 903	Homan v. Stewart, 103 Ala. 644, 1103, 1116
Holland v. Rea, 48 Mich. 218, 108, 109	Home Bank v. Drumgoole, 109 N. Y. 63, 299
Holland v. Wilson, 76 Cal. 434, 2222	Home Benefit Assn. v. Sargent, 142 U. S. 691, 119
Holley v. Haldeman, 78 Geo. 323, 474	Home Ins. Co. v. Augusta, 50 Ga. 530, 2128
Holliday v. Atkinson, 5 B. & C. 501, 183	Home Ins. Co. v. Favorite, 46 Ill. 233, 913
Holliday v. Poole, 77 Ga. 153, 189	Home of the Friendless v. Rouse, 8 Wall. (U. S.) 430, 2138, 2139, 2140
Hollins v. Railroad Co., 9 N. Y. Supl. 909, 1447	Homer v. Ashford, 11 Moore 91, 47
Hollins v. Brierfield, etc., Iron Co., 150 U. S. 371, 1396, 1399, 1403	Homer v. Ashford, 3 Bing. 322, 180
Hollis v. Chapman, 36 Tex. 1, 143, 290, 890, 2226	Homer v. Perkins, 124 Mass. 431, 951
Hollister v. Nowlen, 19 Wend. 234, 274	Homestead Cases, 22 Gratt. (Va.) 266, 2157
Holliway v. Holliway, 77 Mo. 322, 1011	Homuth v. Metropolitan R. Co., 129 Mo. 629, 581
Holloway v. Davis, Wright (Ohio), 129, 373	Honegger v. Wettstein, 47 N. Y. Super. Ct. 125, 541, 1874
Holloway v. Griflith, 32 Iowa, 409, 496, 2222	Honeyman v. Marratt, 6 H. L. C. 112, 68
Holloway v. Hampton, 4 B. Mon. 415, 651	Hood v. Hayward, 124 N. Y. 1, 819, 1975
Holloway v. Jacoby, 120 Pa. St. 553, 326	Hood v. League, 102 Ala. 223, 775
Holloway v. Memphis, etc., R. Co., 23 Texas, 465, 1407	Hood v. Mayor,

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Hooker v. Vandewater, 4 Denio, 349, 1426, 1983, 2020, 2037, 2060,	2069	Hough v. May, 4 A. & E. 954,	394
Hooks v. Browns, 62 Ala. 258,	1728	Hough v. People's Ins. Co., 36 Md. 398,	895
Hooks v. Lee, 8 Ired. Eq. (N. Car.) 157,	1713	Hough v. Richardson, 3 Story, 659,	1602
Hooksett v. Concord R. Co., 38 N. H. 242,	2133	Houghton v. City of Boston, 159 Mass. 138,	451
Hool v. Kinkhead, 16 Nev. 217,	1546	Houghkirk v. President, etc., of Canal Co., 92 N. Y. 219,	365
Hooper v. Hooper, 81 Md. 155,	52, 571	Houghton v. Houghton, 14 Ind. 505,	1716
Hooper v. Scheimer, 23 How. (U. S.) 235,	2277	Houghwout v. Boisabuin, 18 N. J. Eq. 815,	57, 58
Hooser v. Hunt, 65 Wis. 71,	1856	Houlditch v. Milne, 3 Esp. 86,	610
Hoover v. Buck (Va. 1895), 21 S. E. Rep. 474,	1136	Houlston v. Parsons, 9 Up. Can. (Q. B.) 681,	2114
Hoover v. Pennsylvania R. Co., 156 Pa. St. 220,	1420	Houlton v. Dunn, 60 Minn. 26,	1991
Hope v. Balen, 58 N. Y. 380,	47	House v. Fowle, 20 Ore. 163,	1735
Hope v. Hope, 8 DeG., M. & G. 731,	696	House v. Houston Water-Works Co. (Texas Civ. App. 1893), 22 S. W. Rep. 277	1575
Hopkins v. Alvis, 2 A. K. Marsh. 374,	631	House v. Walch, 144 N. Y. 418,	41, 42, 2178
Hopkins v. Appleby, 1 Stark. 383,	666	Household Fire, etc., Co. v. Grant, L. R. 4 Exch. D. 216,	57
Hopkins v. City of Butte, 40 Pac. Rep. 171,	461	Houser v. Reynolds, 1 Hay. (N. Car.) 143,	1778
Hopkins v. Detwiler, 25 W. Va. 734,	456	Houston v. Darling, 16 Maine, 413,	573
Hopkins v. Ensign, 122 N. Y. 144,	201	Houston v. Evans (Texas), 17 S. W. Rep. 925,	456
Hopkins v. Grinnell, 28 Barb. 533,	356	Houston v. Faul, 86 Ala. 232,	1066
Hopkins v. Langton, 30 Wis. 379,	1856	Houston v. Feesser, 76 Texas, 365,	804
Hopkins v. Mazyck, 1 Hill (S. Car.), 250,	1071	Houston v. Houston (Texas 1891), 18 S. W. Rep. 688,	1791
Hopkins v. St. Louis, etc., R. Co., 29 Kan. 544,	40	Houston v. Williamson, 81 Ala. 482,	1768
Hopkins v. Upshur, 20 Texas, 89,	1327	Houghton v. Manufacturers' etc., Insur- ance Co., 8 Mete. (Mass.) 115,	317
Hopkinson v. Lee, 6 Ad. & El. (N. S.) 964,	828	Houston, etc., R. Co. v. Shirley, 54 Texas, 125,	1458
Hopkinson v. Leeds, 78 Pa. St. 396,	1853	Hovey v. Hobson, 53 Maine, 451,	1821, 2276
Hopper, <i>In re</i> , 5 Paige (N. Y.), 439,	1814	Hovey v. McDonald, 109 U. S. 150,	2267
Hopper v. Callahan, 78 Md. 529,	1705, 1706	Howard, Appeal of, 162 Pa. St. 374,	1577
Hopper v. Lovejoy, 47 N. J. Eq. 573,	1229	Howard v. Burgen, 4 Dana, 137,	648, 652
Hopper v. Sage, 112 N. Y. 530,	932	Howard v. Digby, 2 Cl. & F. 634,	1841
Hopwood v. Patterson, 2 Ore. 49,	2224	Howard v. Brower, 37 Ohio St. 402,	622
Hord v. Taubman, 79 Mo. 101,	1707	Howard v. Bugbee, 24 How. (U. S.) 461,	2155
Horgan v. McKenzie, 17 N. Y. Supl. 174,	374	Howard v. Burgen, 4 Dana (Ky.), 137,	647
Horan v. Strachan, 86 Ga. 408,	915	Howard v. Daly, 61 N. Y. 362,	66, 76, 495, 507, 2211, 2215, 2222
Horn v. Bray, 51 Ind. 555,	616	Howard v. East Tennessee, etc., R. Co., 91 Ala. 268,	106
Hornbeck v. Westbrook, 9 Johns. 73,	26	Howard v. Gresham, 27 Ga. 347,	626
Horn Mining Co. v. Ryan, 42 Minn. 196,	2284	Howard v. Hopkyns, 2 Atk. 371,	2073
Horne v. Railroad Co., 62 N. H. 454,	1453	Howard v. Howard, 11 How. Pr. 80,	42
Horne v. Rouquette, L. R. 3 Q. B. Div. 514,	728	Howard v. Howard (Ky. 1895), 29 S. W. Rep. 235,	633
Hornor v. Frazier, 65 Md. 1,	655	Howard v. Ives, 1 Hill, 263,	766
Hornor v. Graves, 7 Bing. 735,	2026, 2033, 2044, 2047,	Howard v. Kirwin, 19 La. Ann. 432,	2021
2026, 2033, 2044, 2047,	2264	Howard v. Kitchens, 31 S. Car. 490, 1683,	1742
Horne v. Webster, 33 N. J. Law, 387,	790	Howard v. Matthews, 19 La. Ann. 432,	2021
Hornor v. Henning, 93 U. S. 228,	1338	Howard v. Pensacola, etc., R. Co., 24 Fla. 560,	2223
Horsburg v. Baker, 1 Pet. 232,	433	Howard v. Rohlfs, 36 Kan. 357,	1859
Horse v. Graham, L. R. 5 C. P. 9,	645	Howard v. Smedley, 140 Pa. St. 81,	133
Horsley v. Moss, 5 Texas Civ. App. 341,	575	Howard v. Smith, 56 Mo. 314,	1856
Hortman v. Miller, 3 Jones & Sp. (N. Y.) 29,	1631	Howard v. Stillwell Manufacturing Co., 139 U. S. 199,	506
Hort v. Norton, 1 McCord (S. C.), 22,	784	Howard v. Walker, 92 Tenn. 452,	914, 922
Horton v. Buffington, 105 Mass. 399,	2102	Howard v. Yale, 20 La. Ann. 451,	2021
Horton v. Mayor, etc., 4 Lea, 39,	1099	Howard County v. Baker, 119 Mo. 397,	960
Horton v. Morgan, 19 N. Y. 170,	412	Howe v. Boston Carpet Co., 16 Gray (Mass.), 493,	1260
Horton v. Nashville, 4 Lea (Tenn.), 39,	1513	Howe v. Carpenter, 49 Wis. 697,	422
Horton v. Town of Thompson, 71 N. Y. 513, 1532, 1535	1532, 1535	Howe v. Hayward, 108 Mass. 54,	673
Hortsman v. Miller, 35 N. Y. Super. Ct. 29,	534	Howe v. Howe, 99 Mass. 88,	1811
Hosack v. Rogers, 25 Wend. 313,	819	Howe v. Keeler, 27 Conn. 538,	1276
Hoskins v. Mechanics', etc., Association, 84 N. Car. 838,	1609	Howe v. Lewis, 121 Ind. 110,	32
Hoskins v. White, 13 Mont. 70,	1805	Howe, Matter of, 1 Paige, 125,	434
Hosler v. Hursh, 151 Pa. St. 415,	515	Howe v. Moore, 14 N. Y. Supl. 236,	338
Hosley v. Black, 28 N. Y. 438,	161	Howe v. O'Mally, 1 Murphy, 287,	214
Hosmer v. Wilson, 7 Mich. 299,	496, 2212	Howe v. Palmer, 3 B. & Ald. 321,	663, 672
Hospes v. Northwestern Car Co., 48 Minn. 174,	1375, 1384, 1393, 1398, 1404	Howe v. Bachelder, 49 N. H. 204,	639
Hospital v. Philadelphia County, 24 Pa. St. 229,	2140	Howe v. Richards, 102 Mass. 64,	234
Hostetter v. Gray, 11 Fed. Rep. 179,	933	Howe v. Rogers, 32 Texas, 218,	645
Hostetter v. Park, 137 U. S. 30,	913	Howe v. Smith, L. R. 27 Ch. Div. 89,	672, 673
Hotchin v. Kent, 8 Mich. 527,	1350	Howe v. Taggart, 133 Mass. 284,	200, 204, 205
Hotchkiss v. Barnes, 34 Conn. 27,	882, 899	Howe v. Wildes, 34 Maine, 566,	1746
Hotchkiss v. Olmstead, 37 Ind. 74,	15	Howe v. Woodruff, 12 Ind. 214,	29
Hotel Co. v. Wade, 97 U. S. 13, 1296, 1429, 1446, 1448	1326		
Hotel Co. v. West, 13 La. Ann. 545,	1326		
Hough v. Brown, 19 N. Y. 111,	67		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Howell v. Coupland, L. R. 1 Q. B. D. 258,	295	Hughes v. Antietam Co., 34 Md. 316,	155
Howell v. Fountain, 3 Ga. 176,	2016	Hughes v. Davis, 40 Cal. 117,	281
Howell v. Knight, 100 N. C. 254,	856	Hughes v. Eschback, 7 D. C. 66,	381, 414
Howell v. McCrie, 36 Kan. 636,	1350	Hughes v. Fisher, 10 Colo. 383,	609, 612
Howell v. Peoria, 90 Ill. 104,	1521	Hughes v. Jones, 116 N. Y. 67,	1814
Howell v. Roberts, 29 Neb. 483,	1385	Hughes v. Klingender, 14 La. Ann. 52,	708
Howden v. Haigh, 11 Ad. & E. 1033,	1637, 1638, 1639, 1640	Hughes v. Lane, 11 Ill. 123,	872
Howland v. Inhabitants of Maynard, 159 Mass. 434,	1497	Hughes v. Morris, 2 De G. M., & G. 349,	843
Howlands v. Lounds, 51 N. Y. 604,	60	Hughes v. Patton, 12 Wend. 234,	762
Howorth v. Scarce, 29 Ind. 278,	2171	Hughes v. Prewitt, 5 Texas, 264,	2197
Hoxsie v. Empire Lumber Co., 41 Minn. 518,	525	Hughes v. Shull, 33 Kan. 127,	1859
Hoyle, <i>In re</i> , L. R. 1 Ch. 84,	675	Hughes v. Tinsley, 80 Va. 259,	43
Hoyle v. Bush, 40 Mo. App. 408,	655	Hughes v. Wells, 9 Hare. 749,	1671
Hoyle v. Hoyle, L. R. (1893), 1 Ch. 84,	597, 598	Hughes v. Matson, Scotland (1846) (Not reported),	1293
Hoyle v. Plattsburgh Railroad, 54 N. Y. 314,	1307, 1417	Huguenin v. Baseley, 14 Ves. 273,	1015, 1018, 1030, 1747, 1824
Hoyle v. Stowe, 2 Dev. & Bat. L. (N. Car.) 320,	1778	Huguenin v. Baseley, 2 White & T. Lead Cas. Eq. (Text Book Series) 597,	1018
Hoyt v. Bradley, 27 Maine, 242,	490	Huguenin v. Baseley, 2 White & Tudor's Lead Cas. in Eq., pt. 2, pp. 1156, 1215,	1747
Hoyt v. Brynes, 11 Maine, 475,	393, 402, 403	Huguley v. Lanier, 86 Ga. 636,	2006
Hoyt v. Clarkson, 23 Ore. 51,	544	Hugus v. Walker, 12 Pa. St. 173,	851
Hoyt v. Cross, 108 N. Y. 76,	1933	Hull v. Caldwell, 3 South Dakota, 451,	358, 359, 360
Hoyt v. Gooding, 99 Mich. 71,	1076	Hull v. Chicago, etc., Ry. Co., 41 Minn. 510,	1958
Hoyt v. Hall, 3 Bosw. 42,	381	Hull v. Hull, 2 Strob. Eq. 174,	704
Hoyt v. Intercean Building Assn., 58 Minn. 345,	1616	Hull v. Louth, 109 Ind. 315,	1850
Hoyt v. Smith, 4 Wash. St. 440,	396	Hull v. Pitrat, 45 Fed. Rep. 94,	123
Hoyt v. Thompson, 5 N. Y. 320,	725	Hull v. Ruggles, 56 N. Y. 424,	1956
Hoyt v. Tuxbury, 70 Ill. 331,	1161	Hull v. State, 29 Fla. 79,	2154
Hubbard v. Belden, 27 Vt. 645,	286	Hullhorst v. Scharner, 15 Neb. 57,	2014
Hubbard v. Brainard, 35 Conn. 563,	805	Hulme v. Tenant, 1 Brown Ch. 16,	1703
Hubbard v. Bugbee, 58 Vt. 172,	1651	Hulme v. Tenant, 1 White & T. Lead. Cas. Eq. (*481), 679,	1699, 1703
Hubbard v. Callahan, 42 Conn. 524,	2124	Hulse v. Bonsack Machine Co., 65 Fed. Rep. 864,	235
Hubbard v. Camperdown Mills, 26 S. Car. 581,	32	Hulse v. Hulse, 17 C. B. 711,	10
Hubbard, Inhabitants of, v. Brainard, 35 Conn. 563,	2120	Humbert v. Brisbane, 25 S. C. 506,	842
Hubbard v. Long (Mich. 1895), 63 N. W. Rep. 644,	596	Humble v. Hunter, 12 Q. B. 310,	2184
Hubbard v. Miller, 27 Mich. 15,	2047, 2069	Humble v. Mitchell, 11 A. & E. 205,	660
Hubbard v. President Chenango Bank, 8 Cow. 85,	394	Humbolt Min. Co. v. American Mfg. Co., 62 Fed. Rep. 356,	1258, 1259
Hubbell v. Meigs, 50 N. Y. 580,	982	Hume v. Beale's Executrix, 17 Wall. 336,	1162
Hubbell v. Von Schoening, 49 N. Y. 326,	753	Hume v. Flint Co., 11 N. Y. Supl. 431,	376
Hubbell v. Woolf, 15 Ind. 204,	835	Hume v. Peplow, 8 East, 163,	387
Hubble v. Cole, 85 Va. 87,	43	Hume v. Taylor, 63 Ill. 43,	12
Huber v. United, etc., Ger. Con., 16 Ohio, St. 371,	1894	Humes v. Decatur, etc., Co., 98 Ala. 461,	776, 1317
Hubert v. Aitken, 5 N. Y. Supl. 829,	371	Humes v. Knoxville, 1 Humph. (Tenn.), 403,	1513
Hubert v. Moreau, 2 Car. & P. 528,	687	Humes v. Scruggs, 94 U. S. 22,	1666, 1676, 1839
Hutching v. Engel, 17 Wis. 230,	1838	Hummel v. Bank, 75 Iowa, 689,	1288
Huckins v. Hunt, 138 Mass. 366,	1640	Hummel v. Seventh Street Co., 20 Ore. 401,	276
Hudelson v. Armstrong, 70 Ind. 99,	821	Humphreston's Case, 2 Leon 216,	1772
Hudelson v. State, 94 Ind. 426,	1:55	Humphrey v. Douglas, 10 Vt. 71,	1838
Hudson v. Archer, 4 S. D. 128,	2204	Humphrey v. Merriam, 46 Minn. 413,	334, 335
Hudson v. Green Hill Seminary, 113 Ill. 618,	257, 1434	Humphrey v. Ringler (Iowa 1895), 62 N. W. Rep. 645,	2255
Hudson v. Hudson, 87 Ga. 678,	7:5	Humphreys v. Magee, 13 Mo. 435,	1937
Hudson v. Hudson, 5 Bac. Ab. 700,	519	Humphreys v. Reed, 6 Whart. 435,	274
Hudson v. Swift, 20 Johns. 24,	411	Humphreys v. St. Louis, etc., Co., 37 Fed. Rep. 307,	1413
Hudson Canal Co. v. Pennsylvania Coal Co., 8 Wall. 276,	863	Humphries v. Bicknell, 2 Litt. 296,	452
Hudson Electric Co. v. Hudson, 163 Mass. 346,	1569	Humphries v. Green, L. R. 10 Q. B. Div. 148,	842
Hudson Real Estate Co. v. Tower, 156 Mass. 82,	1327	Hund v. Peake, 5 Cow. (N. Y.) 475,	1507
Hudson Real Estate Co. v. Tower, 161 Mass. 10,	1328	Hungerford v. Rosenstein, 19 N. Y. Supl. 471,	334, 335
Hudson Tel. Co. v. Jersey City, 49 N. J. Law, 303,	1556	Hunkins v. Hunkins, 65 N. H. 95,	846
Huebler v. Smith, 62 Conn. 186,	1032	Hunneman v. Inhabitants of Grafton, 10 Met. (Mass.) 454,	2218
Huey v. Grinnell, 50 Ill. 179,	890	Hunsaker v. Borden, 5 Cal. 290,	2207
Huey v. Huey, 65 Mo. 689,	14	Hunsaker v. Sturges, 29 Cal. 142,	1294
Huff v. McCauley, 53 Pa. St. 206,	642	Hunstock v. Palmer, 4 Texas Civ. App. 459,	2017
Huffman v. Hendry, 9 Ind. App. 324,	993, 994	Hunt v. Amidown, 4 Hill, 345,	777
Huffman v. Hummer, 18 N. J. Eq. 83,	955, 1170	Hunt v. Brown, 146 Mass. 253,	454
Huffman v. Wyrick, 5 Ind. App. 183,	790	Hunt v. City of San Francisco, 11 Cal. 250,	1514
Hug v. Van Burkleo, 58 Mo. 202,	1212		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Hunt v. City of Utica, 18 N. Y. 442,	1558	Hutchings v. Munger, 41 N. Y. 155,	166
Hunt v. Coe, 15 Iowa, 197,	836	Hutchins v. Brines, 9 Gray, 367,	1232
Hunt v. Elliott, 80 Ind. 245,	872	Hutchins v. Brynes, 9 Gray, 367,	1231
Hunt v. Elliott, 77 Cal. 588,	876	Hutchins v. Dixon, 11 Md. 29,	1713
Hunt v. Gleason, 22 N. Y. Supl. 366,	466	Hutchins v. Hebbard, 34 N. Y. 380,	47
Hunt v. Hecht, 8 Ex. 814,	664, 672	Hutchins v. Weldin, 114 Ind. 80,	1899
Hunt v. Higman, 70 Iowa, 406,	456	Hutchinson v. Bowker, 5 M. & W. 535,	68, 903, 904
Hunt v. Hunt, 13 N. J. Eq. 161,	1813	Hutchinson v. First Nat. Bank, 133 Ind. 271,	1397
Hunt v. Hunt, 131 U. S. clxv (Appendix),	2122	Hutchinson v. Green, 91 Mo. 367,	1389
Hunt v. Johnson, 44 N. Y. 27,	1736	Hutchinson v. Hutchinson, 46 Maine, 154,	649, 652
Hunt v. Jones, 12 R. I. 265,	717	Hutchinson v. Tatham, L. R. 8 C. P. 482,	891
Hunt v. Le Grand, etc., Rink Co., 143 Ill. 113,	1391	Hutchinson v. Tindall, 3 N. J. Eq. 357,	1668
Hunt v. Maynard, 6 Pick. 489,	626	Hutchison v. Cullum, 23 Ala. 622,	2181
Hunt v. McConnell, 1 T. B. Mon. 219,	409	Huth v. Carondelet, etc., Dock Co., 56 Mo. 202,	1794
Hunt v. Memphis Gas Light Co. (Tenn.) (1895), 31 S. W. Rep. 1006,	1222	Hutt v. Hickey (N. H.), 29 Atl. Rep. 456,	263
Hunt v. Robinson, 1 Texas, 748,	2087	Hutt v. Zimmer, 78 Hun, 23,	885
Hunt v. Rousmanier, 8 Wheat. 174,	822, 949	Huttig Bros. Manfg. Co. v. Denny Hotel Co., 6 Wash. 122,	1888
Hunt v. Rousmainere's Admrs., 1 Pet. 16,	822, 1071, 1074, 1092, 1701	Hutton v. Eyre, 6 Taunt. 289,	558
Hunt v. Sackett, 31 Mich. 18,	355, 360	Hutton v. Padgett, 26 Md. 228,	683
Hunt v. Silk, 5 East, 449,	2288	Hutton v. Parker, 7 Dow. Pr. C. 739,	47
Hunt v. Stearns, 5 Wash. 167,	1760	Hutton v. Stoddard, 83 Ind. 539,	511
Hunt v. Turner, 9 Texas, 385,	1038	Hyams v. Bamberger, 10 Utah, 3,	379, 411
Hunt v. Wyman, 100 Mass. 196,	905, 906	Hyatt v. McBurney, 18 S. C. 199,	495
Hunter, <i>In re</i> , 1 Edw. Ch. 1,	1108	Hyde v. Baldwin, 17 Pick. 303,	558
Hunter v. Agee, 5 Humph. (Tenn.), 57,	2091	Hyde v. Cookson, 21 Barb. 92,	165, 707, 711, 716, 732
Hunter v. Caldwell, 16 L. Jour. Q. B. 274,	797	Hyde v. Larkin, 35 Mo. App. 365,	1344
Hunter v. Daniel, 4 Harv. 420-432,	397	Hyde Park, Village of, v. Oakwoods Cemetery Assn., 119 Ill. 141,	2146
Hunter v. Holmes, 60 Minn. 496,	2288	Hyde Park, Village of, v. Carton, 132 Ill. 100,	1546
Hunter v. Jameson, 6 Ired. 252,	345	Hydraulic Engineering Co. v. McHaffie, L. R. 4 Q. B. Div. 670,	769
Hunter v. Lanius, 82 Tex. 677,	209	Hyer v. Hyatt, 3 Cranch C. C. 276,	1789
Hunter v. Leavitt, 36 Ind. 141,	138	Hyland v. Anderson, 20 N. Y. Supl. 707,	544
Hunter v. Le Conte, 6 Cow. 728,	406	Hyland v. Hyland, 19 Ore. 51,	1086
Hunter v. McLaughlin, 43 Ind. 38,	234	Hyman v. Cain, 3 Jones L. (N. Car.) 111, 1801	
Hunter v. Mills, 29 S. C. 72,	234, 235, 850	Hynds v. Hays, 25 Ind. 1,	1155, 1860, 1970
Hunter v. Moul, 98 Pa. St. 13,	455, 536		
Hunter v. Nolf, 71 Pa. St. 282,	2080		
Hunter v. Pfeiffer, 108 Ind. 197,	2000		
Hunter v. Southern, etc., Ry. Co., 76 Tex. 195,	738		
Hunter v. Stuge, 12 N. Y. Supl. 557,	326		
Hunter v. Walters, L. R. 7 Ch. App. 75,	466		
Hunter v. Warner, 1 Wis. 141,	398		
Hunter v. Wetsell, 17 Hun, 135,	673		
Hunting v. Blun, 143 N. Y. 511, 1376, 1377, 1378			
Hunting v. Damon, 160 Mass. 441,	1139		
Huntingdon v. Hall, 36 Maine, 501,	354, 355, 357, 358		
Huntington v. Attrill, 118 N. Y. 365,	1352	Iddo Kimball, The Barque, 8 Ben. 297,	124
Huntington v. Attrill, 146 U. S. 657,	1370	Ide v. Sayer, 129 Ill. 230,	1617
Huntington v. Clark, 39 Conn. 540,	1636	Ide v. Stanton, 15 Vt. 655,	657, 677
Huntington v. Harvey, 4 Conn. 124,	2197	Idle v. Thornton, 3 Camp. 274,	125
Huntington v. Knox, 7 Cush. (Mass.) 371,	2184	Iasigi v. Rosenstein, 141 N. Y. 414,	910
Huntington v. Wellington, 12 Mich. 10,	601	Iasigi v. Rosenstein, 20 N. Y. Supl. 491,	2191
Huntley v. Merrill, 32 Barb. 626,	732	Iglehart v. Thousand Island Hotel Co., 109 N. Y. 454,	1290
Huntsman v. Fish, 36 Minn. 148,	1804	Ijams v. Hoffman, 1 Md. 423,	682
Huot v. Wise, 27 Minn. 68,	831	Ikerd v. Beavers, 106 Ind. 483,	1827, 2270, 2271, 2272
Hurlbutt v. Spaulding, etc., Co., 93 Cal. 55,	831	Ikarid v. Thompson, 81 Texas, 291,	1730
Hurley v. Brown, 98 Mass. 545,	676, 691, 1118, 1176	Iles v. Elledge, 18 Kan. 296,	1144
Hurley v. McIver, 119 Ind. 53,	1716	Ilges v. Dexter, 77 Ga. 36,	873
Hurley v. Watson, 68 Mich. 531,	449	Illingsworth v. Slosson, 19 Ill. App. 612,	138
Huron Printing Co. v. Kittleson, 4 S. D. 620,	1239	Illinois Cent. R. Co. v. Baltimore, etc., R. Co., 23 Ill. App. 531,	952
Huron Water-Works Co. v. Huron City (S. Dak. 1895), 62 N. W. Rep. 975,	1501	Illinois Central R. Co. v. Frankenberg, 54 Ill. 83,	737
Hurst v. Beach, 5 Madd. 351,	559	Illinois Central R. Co. v. Illinois, 146 U.S. 387,	35, 36
Hurst v. Hite, 20 W. Va. 183,	475	Illinois Central R. Co. v. Johnson, 34 Ill. 389,	737
Hurst v. Trow's Printing Co., 30 Abb. N. C. 1,	945	Illinois Central R. Co. v. Johnson, 40 Ill. 35,	21, 1243
Hurt v. Salisbury, 55 Mo. 310,	1310, 1336	Illinois Central R. Co. v. Kerr, 68 Miss. 14,	738
Huson v. Pitman, 2 Hayw. (N. Car.) 331,	1058	Illinois Paper Co. v. Northwestern Nat. Bank, 43 Ill. App. 499,	1648
Hussey v. Horne-Payne, L. R. 4 App. Ca. 311,	55	Illinois River Co. v. Zimmer, 20 Ill. 654,	261
Hussey v. Thornton, 4 Mass. 405,	664	Illinois R. Co. v. Read, 37 Ill. 484,	550
Husted v. Ingraham, 75 N. Y. 251,	224	Illinois R. Co. v. Welch, 52 Ill. 183,	465
Hutcheson v. Cantril, 11 Leigh. 136,	224	Illinois Savings Bank v. Arkansas Water Co., 67 Fed. Rep. 196,	1504
Hutcheson v. Blakeman, 3 Metc. (Ky.) 80,	76		
Hutchings v. Miner, 46 N. Y. 456,	238		

I

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Imboden v. Etowah, etc., Mining Co., 70 Ga. 86,	1435	Inhabitants of Township of Montclair v. New York & G. L. R. Co., 45 N. J. Eq. 436,	1439
Imhof v. Imhof, 45 La. Ann. 706,	1674	Inhabitants of Waltham v. Brookline, 119 Mass. 479,	1849
Imhoff v. Witmer, 31 Pa. St. 243,	1812	Inhabitants of West Cambridge v. Lexington, 1 Pick. 506,	708
Imlay v. Huntington, 20 Conn. 146,	1696	Inhabitants of Worcester v. Eaton, 11 Mass. 368,	1827, 2016
Imperial Land Company (Harris's Case), <i>In re</i> , L. R. 7 Ch. App. 587,	56	Inhabitants of Yarmouth v. North Yarmouth, 34 Maine, 411,	2142
Imperial Wine Co., <i>In re</i> , 42 L. J. C. 5,	488	Inman v. Western Fire Ins. Co., 12 Wend. 452,	743, 744, 765
Importers' and Traders' Nat. Bank v. Peters, 123 N. Y. 272,	1002	<i>In re</i> Agra Bank, L. R. 5 Eq. Cas. 160,	491
Independent Bldg. Assn. v. Real Est. Title Co., 156 Pa. St. 181,	452	<i>In re</i> Agra and Masterman's Bank, L. R. 2 Ch. 391,	51
India Bagging Assn. v. Kock, 14 La. Ann. 168,	1425, 1869, 2037, 2058,	<i>In re</i> Andrew, L. R. 1 Ch. Div. 358,	398
Indiana Insurance Co. v. Capehart, 108 Ind. 270,	138	<i>In re</i> Appeal of Lewis, 85 Mich. 340, 1764,	1769
Indiana, etc., Ins. Co. v. Byrckett, 36 N. E. Rep. 779,	315	<i>In re</i> Argus Co., 138 N. Y. 557,	944
Indiana, etc., Insurance Co. v. Rundell, 7 Ind. App. 426,	315, 318	<i>In re</i> Axtell's Petition, 95 Mich. 244,	2256
Indiana R. Co. v. Adamson, 114 Ind. 282, 270		<i>In re</i> Ayers, 123 U. S. 443,	32
Indianola R. Co. v. Fryer, 56 Texas, 609,	1458	<i>In re</i> Badcock, L. R. 17 C. D. 261,	226
Indianapolis, City of, v. Consumers' Gas, etc., Co., 140 Ind. 107,	1481, 1572	<i>In re</i> Barker, L. R. 17 Ch. Div. 241,	1444
Indianapolis v. Imberry, 17 Ind. 175,	1489	<i>In re</i> Bininger, 7 Blatch. 262,	153
Indianapolis v. Indianapolis Gas, etc., Co., 66 Ind. 396,	1481, 1564	<i>In re</i> Bramberry's Estate, 156 Pa. St. 623,	1763, 1764
Indianapolis v. Kingsbury, 101 Ind. 200,	876	<i>In re</i> British Seamless Paper Box Co., L. R. 17 Ch. Div. 467,	1040
Indianapolis v. McAvooy, 86 Ind. 587,	459	<i>In re</i> Campbell's Estate, 7 Pa. St. 100,	559
Indianapolis v. Skeen, 17 Ind. 628,	1931	<i>In re</i> Cheshire Banking Co., L. R. 32 Ch. Div. 301,	61
Indianapolis Cabinet Co. v. Herrman, 7 Ind. 462,	107, 865	<i>In re</i> City of Brooklyn, 143 N. Y. 596,	1239
Indianapolis, etc., Mining Co. v. Herkimer, 46 Ind. 142,	1325	<i>In re</i> City of Northampton, 158 Mass. 299,	1439
Indianapolis Gas Light and Coke Co., 66 Ind. 396,	1482	<i>In re</i> Clarke, L. R. 36 Ch. Div. 348,	95
Indianapolis R. Co. v. Hyde, 122 Ind. 188,	190	<i>In re</i> Colling, L. R. 32 Ch. Div. 333,	1173
Indianapolis, etc., R. Co. v. Jones, 29 Ind. 465,	1455	<i>In re</i> Cooper, 6 Misc. R. (N. Y.) 501,	785
Indianapolis Rolling Mill v. St. Louis, etc., R. Co., 120 U. S. 256,	1277, 1282, 1359,	<i>In re</i> Cork R. Co., 4 Ch. App. 748,	1246
	1448	<i>In re</i> Corning, 51 Fed. Rep. 205,	1982
Ingalls v. Hahn, 47 Hun, 104,	410	<i>In re</i> County Life Assur. Co., L. R. 5 Ch. App. 288,	1339
Ingalls v. Rowell, 149 Ill. 163,	1033	<i>In re</i> Cumming, L. R. 5 Ch. App. 72,	1173
Ingersoll v. Knights of the Golden Rule, 47 Fed. Rep. 272,	119	<i>In re</i> Curtis, 64 Conn. 501,	881, 899, 900
Ingersoll v. Randall, 14 Minn. 400,	1890	<i>In re</i> Denny's Estate, 8 Ir. R. Eq. Series, 427,	887
Ingles v. Patterson, 36 Wis. 373,	846	<i>In re</i> Dey, 9 N. J. Eq. 181,	146
English v. Ayer, 92 Mich. 370,	2233	<i>In re</i> Dodds, 60 L. J. Q. B. 599,	88
Ingraham v. Baldwin, 9 N. Y. 45,	1822, 2276	<i>In re</i> Direct, Exeter R. Co., 3 De G. & Sm. 234,	260
Ingraham v. Gilbert, 20 Barb. 151,	784	<i>In re</i> Emigrant Industrial Sav. Bank, 75 N. Y. 388,	1551
Ingram v. Ilges, 98 Ala. 511,	1694	<i>In re</i> Foulkes v. Hughes, 3 The Reports, 682,	1806
Ingram v. Stiff, 5 Jur. N. S. 947,	2044	<i>In re</i> Gaffney's Estate, 146 Pa. St. 49,	254
Inhabitants, etc., v. Wood, 13 Mass. 193,	1473	<i>In re</i> Garnet, L. R. 31 Ch. Div. 1,	1009
Inhabitants of Amherst v. Shelburne, 11 Gray (Mass.), 107,	1849	<i>In re</i> Giles, 11 Paige (N. Y.), 638,	1815
Inhabitants of Berlin v. New Britain, 9 Conn. 180,	1249	<i>In re</i> Gracie's Estate, 153 Pa. St. 521,	1669, 1769
Inhabitants of Brookfield v. Allen, 6 Allen (Mass.), 585,	1660	<i>In re</i> Greene, 52 Fed. Rep. 104,	1982, 2036
Inhabitants of First Parish, etc., v. Jones, 8 Cush. 184,	186	<i>In re</i> Hallett, L. R. 13 Ch. Div. 696,	2279
Inhabitants of Frankfort v. Winterport, 64 Maine, 250,	1853	<i>In re</i> Harris (Del. 1893), 28 Atl. Rep. 329,	1846
Inhabitants of Goshen v. Stonington, 4 Conn. 209,	2120	<i>In re</i> Hatton, L. R. 7 Ch. App. 723,	530, 533
Inhabitants of Greenwich v. Easton, etc., R. Co., 25 N. J. Eq. 565,	1570	<i>In re</i> Hauer's Estate, 140 Pa. St. 420,	1673
Inhabitants of Hubbard v. Brainard, 35 Conn. 563,	2120	<i>In re</i> Heli, 3 Atk. 635,	1846
Inhabitants of Medway v. Milford, 21 Pick. 349,	210, 1473	<i>In re</i> Heller, 3 Paige (N. Y.), 199,	1814
Inhabitants of Milford v. Commonwealth, 144 Mass. 64,	773	<i>In re</i> Hopper, 5 Paige (N. Y.), 489,	1814
Inhabitants of Monson v. Williams, 6 Gray (Mass.), 416,	1660	<i>In re</i> Hoyle, L. R. 1 Ch. 84,	675
Inhabitants of Nobleboro v. Clark, 68 Maine, 87,	893	<i>In re</i> Hunter, 1 Edw. Ch. 1,	1108
Inhabitants of Otisfield v. Mayberry, 63 Maine, 197,	399	<i>In re</i> Imperial Land Company (Harris's Case), L. R. 7 Ch. App. 587,	56
Inhabitants of the Town of Montville v. Haughton, 7 Conn. 543,	1057	<i>In re</i> Imperial Wine Co., 42 L. J. C. 5,	488
		<i>In re</i> Insurance Co., 22 Fed. Rep. 109,	732
		<i>In re</i> Jacobs, 98 N. Y. 98,	1478, 2148
		<i>In re</i> James Estate, 78 Hun, 121,	227
		<i>In re</i> Karstorp's Estate, 158 Pa. St. 30,	1689
		<i>In re</i> King, 46 Fed. Rep. 903,	2094
		<i>In re</i> Kinmer, 14 N. Y. St. Rep. 618,	1659
		<i>In re</i> Klein, 1 How. (U. S.) 277,	2118
		<i>In re</i> Kurtz, 68 Cal. 412,	1478
		<i>In re</i> Mahan, 20 Hun, 301,	1552
		<i>In re</i> Marsh, 27 Ch. Div. 166,	1766

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Jackson v. Hunt, 6 Johns. 16,	194	James v. Emery, 8 Taunt. 245,	814
Jackson v. Ivory (Tex. App.), 30 S. W. Rep. 716,	431	James v. Fulcod, 5 Texas, 512,	214
Jackson v. Jackson, 94 Cal. 446,	1747	James v. Hackley, 16 Johns. 273,	455
Jackson v. Jackson, 105 N. Car. 433,	2205	James v. Hacks, 81 Texas, 373,	30
Jackson v. Krafts, 18 Johns. 110,	411	James v. Morgan, 1 Lev. 111,	270
Jackson v. Leek, 12 Wend. 105,	15	James v. O'Driscoll, 2 Bay. 101,	186
Jackson v. Lever, 3 Brown Ch. 605,	1103	James v. Williams, 3 Nev. & Man. 196,	683
Jackson v. Litch, 62 Pa. St. 451,	635	Jamison v. Dimock, 95 Pa. St. 52,	842, 844
Jackson v. Ludeling, 21 Wall. 616,	1401	Jamison v. Houston (Miss. 1894), 15 So. Rep. 114,	1525
Jackson v. Lynn (Iowa 1895), 62 N. W. Rep. 704,	1046	Janes v. Scott, 59 Pa. St. 178,	2237
Jackson v. McChesney, 7 Cow. 360,	466	Janin v. Browne, 59 Cal. 37,	288, 2217
Jackson v. McConnell, 19 Wend. 75,	424	Janson v. Paxton, 22 Up. Can. (C. P.) 505,	823
Jackson v. McConnell, 19 Wend. (N. Y.) 175,	1766, 1768	Jaques v. Horton, 76 Ala. 238,	2250
Jackson v. McLean, 36 Fed. Rep. 213,	1425	Jaques v. The Public Administrator, Bradford's Surrogates' Rep. 499,	1840
Jackson v. Meek, 37 Tenn. 69,	1373, 1382	Jarchow v. Pickens, 51 Iowa, 381,	1418
Jackson v. Miner, 101 Ill. 550,	1665	Jarrett v. Cope, 68 Pa. St. 67,	1597
Jackson v. Moore, 6 Cowen, 706,	424, 425	Jarrett v. Goodnow, 39 W. Va. 602,	356
Jackson v. Myers, 43 Md. 452,	22	Jarrett v. Jarrett, 11 W. Va. 584,	1031
Jackson v. New York, etc., R. Co., 2 Thompson & C. 653,	1316	Jarvis v. Manhattan Beach Co., 148 N. Y. 652,	1344
Jackson v. Perrine, 35 N. J. Law, 137,	876	Jarvis v. Peck, 10 Paige (N. Y.), 118,	2033
Jackson v. Phipps, 12 Johns. 418,	90	Jarvis v. Sutton, 3 Ind. 289,	211
Jackson v. Pierce, 2 Johns. 222,	836	Jassoy v. Horn, 64 Ill. 379,	1948
Jackson v. Richards, 2 Cai. R. 343,	767	Jansch v. Lewis, 1 S. Dak. 609,	1643
Jackson v. Rutledge, 3 Lea (Tenn.), 626,	1750	Jeffers v. Philo, 35 O. S. 173,	92
Jackson v. Shawl, 29 Cal. 267,	1866	Jefferson v. Jefferson, 96 Ill. 551,	844
Jackson v. Shelton, 89 Tenn. 82,	1763	Jefferson Branch Bank v. Skelly, 1 Black (U. S.), 436,	217, 2136
Jackson v. Sill, 11 Johns. 201,	801	Jeffersonville, etc., R. Co. v. Hendricks, 41 Ind. 43,	1455
Jackson v. Stackhouse, 1 Cow. 122,	566, 568	Jeffery v. Walton, 1 Stark. 213,	46, 313
Jackson v. Stevens, 16 Johns. (N. Y.) 109,	1672	Jefford v. Ringgold, 6 Ala. 544,	1778
Jackson v. Topping, 1 Wend. 388,	894	Jeffrey v. Picklin, 3 Ark. 227,	1942
Jackson v. Torrence, 83 Cal. 521,	1187	Jeffrey v. Fleming, 26 Neb. 685,	1723
Jackson v. Traer, 64 Iowa, 469,	1400	Jeffrey v. Grant, 37 Maine, 236,	854
Jackson v. Union, etc., Ins. Co., L. R. 10 C. P. 125,	284	Jeffrey v. Owen, 41 N. J. Law, 260,	1549
Jackson v. Vanderheyden, 17 Johns. (N. Y.) 167,	1731	Jeffries v. Life Insurance Co., 22 Wall. 47,	311, 320
Jackson v. Van Dusen, 5 Johns. 144,	12	Jemmison v. Gray, 29 Iowa, 537,	135
Jackson v. Wood, 88 Mo. 76,	969	Jenkins v. Cain, 72 Texas, 88,	431
Jackson County Horse R. Co. v. Interstate Rapid Transit Ry. Co., 24 Fed. Rep. 306,	1504	Jenkins v. French, 58 N. H. 532,	2170
Jackson Iron Co. v. Negaunee Co., 65 Fed. Rep. 298,	647, 960	Jenkins v. Hall, 26 Ore. 79,	1734, 1759
Jackson Sharp Co. v. Holland, 14 Fla. 384,	1408	Jenkins v. Harrison, 66 Ala. 345,	622, 623, 1117, 1163
Jacksonville, etc., R. Co. v. Woodworth, 26 Fla. 368,	956	Jenkins v. Hiles, 6 Ves. 646,	1148
Jacob v. Carter (Cal.), 36 Pac. 381,	158	Jenkins v. Jenkins, 12 Iowa, 195,	1789, 1803
Jacobs, <i>In re</i> , 98 N. Y. 98,	1478, 2148	Jenkins v. Morris, L. R. 14 Ch. Div. 674,	1819
Jacobs v. Ballenger, 130 Ind. 231,	475	Jenkins v. Reynolds, 3 Brod. & Bing. 14,	683
Jacobs v. Credit Lyonnais, L. R. 12 Q. B. Div. 589,	711	Jenkins v. Stetson, 9 Allen, 128,	487
Jacobs v. Daugherty, 73 Texas, 682,	182	Jenkins v. Temples, 39 Ga. 655,	2038
Jacobs v. Hesler, 113 Mass. 157,	1677, 1707	Jenkins v. Tucker, 1 Hen. Bl. 90,	184, 186
Jacobs v. Mitchell, 46 Ohio St. 601,	2241	Jenks v. Pawlowski, 98 Mich. 110,	2077
Jacobs v. Pollard, 10 Cush. (Mass.) 287,	1950	Jenne v. Marble, 37 Mich. 319,	1507
Jacobs v. Smallwood, 63 N. Car. 112,	2153	Jenners v. Howard, 6 Blkf. (Ind.) 240,	1826
Jacobs v. Spalding, 71 Wis. 177,	815	Jenness v. Mount Hope Iron Co., 53 Maine, 20,	67, 68, 71
Jacobson v. Miller, 41 Mich. 90,	2233	Jenning v. Atkins, 1 Hump. 294,	444
Jacoby v. Whitmore, 49 Law T. R. (N. S.) 335,	2046	Jennings v. Blocker, 25 Ala. 518,	557
Jacomb v. Harwood, 2 Ves. Sen. 265,	549	Jennings v. Broughton, 17 Beav. 234,	982
Jacox v. Jacox, 40 Mich. 473,	1030	Jennings v. Camp, 13 Johns. 94,	897
Jacques v. Methodist Episcopal Church, 17 Johns. (N. Y.) 548,	1659	Jennings v. Chenango, etc., Ins. Co., 2 Denio, 75,	320
Jaffee v. Jacobson, 1 C. C. A. 11; 48 Rep. 21,	1211	Jennings v. City of Fort Worth, 7 Texas Civ. App. 329,	651
Jaffrey v. Cornish, 10 N. H. 505,	455, 458	Jennings v. Grand Trunk Railway Co., 127 N. Y. 438,	735, 1967
Jaffray v. Davis, 124 N. Y. 164,	189, 190, 192, 519, 520, 538	Jennings v. Lyons, 39 Wis. 553,	234
Jaffray v. Mathews, 120 Mo. 317,	1391, 1643	Jennings v. Reeves, 101 N. C. 447,	417
Jagger Iron Co., The, v. Walker, 76 N. Y. 521,	452	Jennings v. Rundall, 8 T. R. 335,	1838
James Estate, <i>In re</i> , 78 Hun, 121,	227	Jennings v. Whitehead, etc., Co., 138 Mass. 594,	874
James v. Adams, 16 W. Va. 245,	496	Jennings v. Willer (Tex. App.), 32 S. W. Rep. 24 and 375,	—
James v. David, 5 T. R. 141,	525	Jelliff v. Newark, 48 N. J. Law, 101,	1519
		Jernigan v. Flowers, 94 Ala. 508,	1744
		Jerome v. Bigelow, 66 Ill. 452,	1986
		Jerome v. Ortman, 66 Mich. 668,	179

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Jersey City v. Lehigh Valley Terminal R. Co., 55 N. J. Law, 203,	1581	Johnson v. Laffin, 9 Cent. Law J. 124,	1333
Jersey City v. Riker, 38 N. J. Law, 225,	458	Johnson v. Laybourn, 56 Minn. 332,	356
Jersey City v. State, 30 N. J. Law, 521,	1477	Johnson v. Legard, 6 M. & S. 60,	224
Jersey City R. Co. v. Morgan, 52 N. J. Law, 60,	413	Johnson v. Maine, etc., Insurance Co., 83 Maine, 182,	310
Jervis v. Berridge, L. R. 8 Ch. Ap. 360,	55	Johnson v. McCabe, 37 Ind. 535,	234
Jesserich v. Walruff, 51 Mo. App. 270,	788	Johnson v. McDonald, 9 M. & W. 600,	125
Jesson v. Solly, 4 Taunt. 52,	2172	Johnson v. Mercantile Trust Co., 94 Ga. 324,	1253, 1268
Jeter v. Glenn, 9 Rich. Law, 374,	367	Johnson v. Milling, L. R. 16 Q. B. D. 460,	493
Jewdine v. Slade, 2 Esp. 572,	324	Johnson v. Mount Merry Granite Co., 53 Fed. Rep. 569,	577, 578
Jewelers' League v. De Forest, 80 Hun, 376,	1836	Johnson v. Northwestern Mut. Life Ins. Co., 56 Minn. 365,	1782, 1785
Jewell v. Knight, 123 U. S. 426,	723, 1066	Johnson v. Northwestern National Ins. Co., 39 Wis. 87,	895
Jewell v. Rock River Co., 101 Ill. 57,	156	Johnson v. People, 42 Ill. App. 594,	2099
Jewett v. Earle, 21 Jones & Spencer, 349,	400	Johnson v. Philadelphia, 2 Pa. Dist. Rep. 229,	568
Jewett v. Lawrenceburgh R. Co., 10 Ind. 589,	156	Johnson v. Philadelphia, etc., R. Co., 63 Md. 106,	2234
Jewett v. Miller, 10 N. Y. 402,	1293, 1307	Johnson v. Pontious, 118 Ind. 270,	629
Jewett v. Perrette, 127 Ind. 97,	94	Johnson v. Railroad Co., 163 Pa. St. 127,	587
Jewett v. Petit, 4 Mich. 508,	520, 543	Johnson v. Rayner, 6 Gray, 107,	894
Jewett v. Tomlinson, 137 Ind. 326,	29	Johnson v. Runyon, 21 Ind. 115,	1690
Jewell v. Wright, 30 N. Y. 259,	731	Johnson v. Skillman, 29 Minn. 95,	640
Jewsbury v. Mummery, L. R. 8 C. P. 56,	30	Johnson v. Standard Mining Co., 148 U. S. 360,	998
J. I. Case, etc., Co. v. Campbell, 14 Ore. 460,	1644	Johnson v. Stark Co., 24 Ill. 75,	1539
Joannin v. Ogilvie, 49 Minn. 564,	1829	Johnson v. State, 73 Ala. 523,	46
Jockusch v. Towsey, 51 Texas, 129,	941	Johnson v. Stevenson, 26 Mich. 63,	67
Johnson v. Stephanson, 154 U. S. 625,	979	Johnson v. Stone, 35 Hun, 380,	1823
John v. Sabattis, 69 Maine, 473,	621	Johnson v. Storie, 32 Neb. 610,	1790
John v. The Frank S. Hall, 38 Fed. Rep. 258,	775	Johnson v. Sutherland, 39 Mich. 579,	1696
John Shillito Co. v. McConnell, 130 Ind. 41,	1397	Johnson v. Taylor, 43 Texas, 121,	1760
Johns v. Bailey, 45 Iowa, 241,	2101, 2113	Johnson v. Thomas, 77 Ala. 367,	477
Johns v. Norris, 27 N. J. Eq. 485,	1041	Johnson v. Titus, 2 Hill. 606,	232
Johnson v. Armstrong, 97 Ala. 731,	2277	Johnson v. Townsend, 77 Texas, 639,	431
Johnson v. Bailey, 17 Colo. 59,	124	Johnson v. Trinity Church Soc., 11 Allen, 123,	675
Johnson v. Baird, 3 Blackf. (Ind.) 153,	2197	Johnson v. Trippe, 33 Fed. Rep. 530,	1111
Johnson v. Baker, 4 Barn. & Ald. 440,	172	Johnson v. Union Switch Co., 129 N. Y. 653,	944, 1349
Johnson v. Belden, 20 Conn. 322,	560	Johnson v. Wabash, etc., Plank Road Co., 16 Ind. 389,	153
Johnson v. Blazer, 33 Neb. 341,	476	Johnson v. Watson, 1 Ga. 348,	655
Johnson v. Board of Commissioners, 107 Ind. 15,	1496	Johnson v. Weatherwax, 9 Kan. 75,	172
Johnson v. Bowden, 37 Texas, 621,	846	Johnson v. Weed, 9 Johns. 310,	455
Johnson v. Brooks, 93 N. Y. 337,	1208, 1209	Johnson v. Willis, 7 Gray (Mass.), 164,	2096
Johnson v. Brown, 13 Kan. 529,	2098	Johnson Harvester Co. v. Bartley, 81 Ind. 406,	2174
Johnson v. Bucklen, 9 Ind. App. 154,	137	Johnston v. Board of County Comrs., 27 Minn. 64,	1574
Johnson v. Butler, 2 Iowa, 535,	2151	Johnston v. Eichelberger, 13 Fla. 230,	162
Johnson v. Clarkson (Texas App. 1894), 30 S. W. Rep. 71,	628	Johnston v. Griest, 85 Ind. 503,	2174
Johnson v. Cleaves, 15 N. H. 332,	458	Johnston v. Jones, 1 Black (U. S.), 425,	2277
Johnson v. Common Council, 16 Ind. 227,	1489	Johnston v. Nicholl, 1 C. B. 251,	220
Johnson v. Corser, 34 Minn. 355,	1384	Johnston v. Spicer, 107 N. Y. 185,	1713
Johnson v. Cowan, 59 Pa. St. 275,	688	Johnston v. Standard Mining Co., 148 U. S. 360,	1010, 1170
Johnson v. Cranage, 5 Mich. 14,	340	Johnston v. Trask, 40 Hun, 415,	160, 161
Johnson v. Cattle, 105 Mass. 447,	669	Johnston v. Trippe, 33 Fed. Rep. 530,	1109
Johnson v. De Peyster, 50 N. Y. 666,	131, 934, 2194	Johnston v. Wabash College, 2 Ind. 555,	215
Johnson v. Dodgson, 2 M. & W. 653,	675	Johnston v. Wadsworth, 24 Ore. 494,	1109, 1131, 1137, 1143, 1173
Johnson v. Duer, 115 Mo. 366,	1554	Johnston v. Whittemore, 27 Mich. 463,	166
Johnson v. Filkington, 39 Wis. 62,	57	Johnstone v. Marks, L. R. 19 Q. B. D. 509,	1799
Johnson v. Gibson, 78 Ind. 282,	876	Johnstone v. Milling, L. R. 16 Q. B. D. 460,	497, 498, 945
Johnson v. Gilmore (S. D. 1894), 60 N. W. Rep. 1070,	2218	Johnstone v. Richmond, etc., R. Co., 39 S. Car. 55,	1962
Johnson v. Granger, 51 Texas, 42,	676, 679	Joliff v. Bendell, Ry. & Moo. 136,	333
Johnson v. Gwin, 100 Ind. 466,	2077	Jolliffe v. Collins, 21 Mo. 338,	234
Johnson v. Harvey, 84 N. Y. 363,	777, 821, 2077	Jonassohn v. Young, 4 B. & S. 296,	150
Johnson v. Howard, 20 Minn. 370 (Gil. 322),	840	Jones' Appeal, 62 Pa. St. 324,	224
Johnson v. Hubbell, 10 N. J. Eq. 332,	7, 1211, 1212, 2006	Jones, <i>Ex parte</i> , L. R. 18 Ch. Div. 109,	1807
Johnson v. Hudson, 11 East, 180,	1891	Jones, Matter of, 10 St. Rep. (N. Y.) 176,	465
Johnson v. Hunt, 81 Ky. 321,	525	Jones v. Alabama R. Co., 72 Miss. 32,	582
Johnson v. Johnson, 6 Watts, 370,	632	Jones v. Anderson, 82 Ala. 302,	296, 491
Johnson v. Johnson (Ky. 1894), 24 S. W. Rep. 628,	1702	Jones v. Arthur, 8 Dowl. Prac. Cas. 442,	400
Johnson v. Jouchert, 124 Ind. 105,	1720, 1724, 1725	Jones v. Ashburnham, 4 East, 455,	192, 212, 221
Johnson v. Kincade, 2 Ired. Eq. (N. Car.) 470,	1840		
Johnson v. Knapp, 36 Iowa, 616,	602		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Jones v. Bacon, 72 Hun, 506,	613	Jones v. United States, 96 U. S. 24,	
Jones v. Bacon, 145 N. Y. 446,	615		270, 745, 746, 946
Jones v. Barkley, 2 Doug. 684,	113, 1870	Jones v. Walker, 13 B. Mon. 356,	615
Jones v. Beach, 2 De G., M. & G. 886,	823	Jones v. Western, etc., Gas Co., 146 Pa. St.	
Jones v. Bright, 5 Bing. 533,	331		204, 959
Jones v. Brittan, 1 Woods, 667,	1066	Jones v. Whitworth, 94 Tenn. 602,	1374, 1375
Jones v. Broadhurst, 67 E. C. L. 173,	445, 543	Jones v. Williams, 41 Texas, 390,	1038
Jones v. Butler, 146 N. Y. 55,	1373, 1379	Jones v. Wilson, 3 Johns. 434,	136
Jones v. Caswell, 3 Johns. Cas. (N. Y.) 29,	2000	Jones v. Wilson, 104 N. Car. 9,	190, 518
		Jones v. Woods, 76 Pa. St. 408,	784
Jones v. Cavanaugh, 149 Mass. 124,	1949	Jordan v. Collins (Ala. 1895), 18 So. Rep.	
Jones v. Cincinnati, etc., Foundry Co., 14			137, 1274
Ind. 89,	1336	Jordan v. Elliott (Pa.), 15 Cent. Law J.	
Jones v. Clark, 42 Cal. 180,	1275		232, 1039
Jones v. Concord, etc., R. Co. (1892 N. H.),		Jordan v. Elliott, 12 Wkly. Notes Cas. 56,	1832
30 Atl. Rep. 614,	1414	Jordan v. Everett, 93 Tenn. 390,	1698
Jones v. Craigmiles, 44 N. Car. 613,	1703	Jordan v. Fay, 98 Cal. 264,	1761
Jones v. Crosthwaite, 17 Iowa, 393,	1746	Jordan v. Garner, 101 Ala. 411,	1156
Jones v. Daniel, L. R. (1894) 2 Ch. 332,	72	Jordan v. Keeble, 85 Tenn. 412,	1699, 1750
Jones v. Davenport, 44 N. J. Eq. 33,	1671	Jordan v. Miller, 75 Va. 442,	653
Jones v. Dunn, 3 Watts & S. 109,	887	Jordan v. Smith, 83 Ala. 299,	1744
Jones v. Flint, 10 A. & E. 753,	636	Jordan v. Stevens, 61 Maine, 78,	985
Jones v. George, 61 Texas, 345,	345	Jordan v. Money, 5 H. L. C. 185,	223
Jones v. Graham etc., Transportation		Joseph v. Decatur Land Imp. Co., 102 Ala.	
Co., 51 Mich. 539,	160		346, 979, 1742
Jones v. Grantham, 80 Ga. 472,	190	Joseph v. Holt, 37 Cal. 250,	679
Jones v. Green (Texas App. 1895), 31 S.		Joslin v. New Jersey Car Spring Co., 36	
W. Rep. 1087,	647	N. J. Law, 141,	245
Jones v. Hart, 2 Salk. 441,	411	Joslyn v. Capron, 64 Barb. 598,	464
Jones v. Hathaway, 77 Ind. 14,	1037	Jourdan v. Long Island, etc., R. Co., 115	
Jones v. Heavens, L. R. 4 Ch. Div. 636,	2073	N. Y. 380,	1269
Jones v. Higgins, 80 Ky. 409,	246	Jowers v. Blandy, 58 Geo. 379,	162
Jones v. Hoar, 5 Pick. 285,	781	Joy v. Bitzer, 77 Iowa, 73,	333
Jones v. Hopkins, 26 Ind. 450,	1496	Joy v. Metcalf, 161 Mass. 514,	2005
Jones v. Hughes, 15 Abb. N. Car. (N. Y.)		Joy v. St. Louis, 138 U. S. 1,	
141,	1820		883, 886, 1101, 1113, 1122, 1212
Jones v. Hurlburt, 13 Neb. 125,	1543	Joyce v. Adams, 8 N. Y. 291,	295
Jones v. Jincey, 9 Gratt. (Va.) 708,	786	Joyce v. Shafer, 97 Cal. 335,	963
Jones v. Jones, 17 N. Y. Supl. 905,	1810	Joyner v. Third School District, 3 Cush.	
Jones v. Jones, 1 Colo. App. 23,	2010		567, 459
Jones v. Jones, 18 Ala. 243,	716	Judah v. Insurance Co., 4 Ind. 333,	1452
Jones v. Jones, 13 N. J. Eq. 236,	1524	Judd v. Fulton, 10 Barb. 117,	762
Jones v. Jones, 108 N. Y. 415,	705	Judd v. Harrington, 139 N. Y. 105,	2068
Jones v. Judd, 4 N. Y. 412,		Judefind v. Maryland, 78 Md. 510,	2094
	271, 281, 282, 947, 948, 2226	Judd v. Day, 50 Iowa, 247,	71
Jones v. Just, L. R. 3 Q. B. 197,	349, 351, 365	Judy v. Gilbert, 77 Ind. 96,	629, 844, 1193
Jones v. Kent, 80 N. Y. 585,	863	Judy v. Louderman, 48 Ohio St. 562,	181, 231
Jones v. Lees, 1 Hurl. & N. 189,	2056	Judson v. Bowden, 1 Ex. 162,	114
Jones v. Letcher, 13 B. Mon. 363,	614, 615	Jugla v. Troutet, 120 N. Y. 21,	860, 1271
Jones v. Mechanics' Bank, 29 Md. 237,	662	Juilliard v. Rogay, 21 La. Ann. 259,	2021
Jones v. Merionethshire Building Society,		Juilliard v. Chaffee, 92 N. Y. 529,	46
L. R. (1891) 2 Ch. 587,	2012	Juilliard v. Greenman, 110 U. S. 421,	
Jones v. Morris, 61 Ala. 518,	151		392, 393, 2118
Jones v. Morrison, 31 Minn. 140,	1300	Julia Bldg. Assn. v. Bell Tel. Co., 88 Mo.	
Jones v. National Building Assn., 94 Pa.			258, 1580
St. 215,	1603	Juniata, etc., Association v. Mixell, 84 Pa.	
Jones v. Nebraska City, 1 Neb. 176,	702	St. 313,	1601, 1605
Jones v. Neeley, 72 Ill. 449,	1134, 2287	Junkins v. Lovelace, 72 Ala. 303,	842
Jones v. Newport News, etc., Co., 65 Fed.		Justice v. Lang, 42 N. Y. 493,	215
Rep. 736,	860		
Jones v. Noble, 3 Bush (Ky.), 694,	1108	K	
Jones v. Orton, 65 Wis. 9,	2248		
Jones v. Owen, 5 A. & E. 222,	397	Kabus v. Frost, 50 N. Y. Super. Ct. 72,	2170
Jones v. Parker, 163 Mass. 564,	1101	Kadish v. Garden City, etc., Association,	
Jones v. Pincheon, 6 Ind. App. 460,	2186		47 Ill. App. 602, 1601, 1604
Jones v. Randall, Cowp. 37,	1883, 1913	Kadish v. Young, 108 Ill. 170,	492, 2220
Jones v. Ran-om, 3 Ind. 327,	537	Kahn v. Gumberts, 9 Ind. 430,	533, 1634
Jones v. Rice, 92 Ga. 236,	1695	Kahn v. Walton, 46 Ohio St. 195,	1869, 2014
Jones v. Ricketts, 7 Md. 108,	519	Kahnweiler v. Phoenix Ins. Co., 57 Fed.	
Jones v. Robins-on, 17 L. J. Ex. 36,	182		Rep. 562, 121
Jones v. Shorter, 1 Ga. 294,	596, 614	Kain v. Postley, 2 Edm. Sel. Cas. (N. Y.)	
Jones v. Sikes, 85 Ga. 546,	201		132, 1771
Jones v. Singer Mfg. Co., 38 W. Va. 147,		Kaiser v. Lawrence, etc., Bank, 56 Iowa,	
	2198, 2199		104, 1335, 1384
Jones v. Smoot, 2 Cranch C. Ct. (U. S.)		Kalamazoo Axle Co. v. Winans (Mich.	
207,	2210		1895), 64 N. W. Rep. 23,
Jones v. State, 31 Texas Cr. App. 177,	1795		1273
Jones v. Swayze, 42 N. J. Law, 279,	15	Kalfus v. Kalfus, 92 Ky. 542,	1753
Jones v. Tilton, 139 Mass. 418,	1641	Kalklosh v. Haney, 4 Texas C. App. 118,	1126
Jones v. Turner, 80 Hun, 157,	862	Kallander v. Neidhold, 98 Mich. 517,	479
Jones v. Turnpike Co., 7 Ind. 547,	1452	Kammerling v. Grover, 9 Ind. 628,	2203

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Kanaga v. Taylor, 7 Ohio St. 134,	715	Kelley v. Schupp, 60 Wis. 76,	912
Kanawha, etc., Bank v. Atkinson, 32 W. Va. 203,	1677	Kelley v. Stannberry, 13 Ohio St. 408,	620
Kane v. Bloodgood, 7 Johns. Ch. 90,	1019	Kelley v. Upton, 5 Duer, 336,	869
Kane v. Hood, 13 Pick. 281,	115	Kelner v. Baxter, L. R. 2 C. P. 174,	1309, 1314
Kansas City v. Slangstrom, 53 Kan. 431,	821	Kellogg v. Clark, 23 Hun, 383,	651, 655
Kansas City, etc., R. Co. v. Simpson, 30 Kan. 645,	1962	Kellogg v. Howes, 81 Cal. 170,	2222
Kansas, etc., R. Co. v. Wyandotte Co., 16 Kan. 587,	807	Kellogg v. Kellogg, 21 Colo. 11,	1020
Kansas Pacific Land Co. v. Commissioners, 16 Kan. 587,	460	Kellogg v. Larkin, 3 Pin. (Wis.) 123,	1952, 2026, 2065
Kansas Pacific R. v. Mower, 16 Kan. 573,	2133	Kellogg v. Larkin, 3 Chand. (Wis.) 133,	2030
Kansas Transfer Co. v. Neiswanger, 27 Mo. App. 356,	407	Kellogg v. Richards, 14 Wend. 116,	190
Kaphan v. Ryan, 16 S. Car. 352,	2178	Kellogg Bridge Co. v. Hamilton, 110 U. S. 108,	346
Karnak, The, L. R. 2 P. C. 505,	740	Kelsey v. Hibbs, 13 Ohio St. 340,	616
Karow v. Continental Insurance Co., 57 Wis. 56,	1833, 1839	Kelsey v. National Bank, 69 Pa. St. 426,	1269, 1369
Karstorp's Estate, <i>In re</i> , 158 Pa. St. 30,	1689	Kelly v. Bradford, 33 Vt. 35,	2232
Karwisch v. Atlanta, 44 Ga. 204,	2094	Kelly v. City of Chicago, 62 Ill. 279,	1544
Kaufman v. Bank, 31 Neb. 661,	244	Kelly v. Devlin, 58 How. Pr. (N. Y.) 487,	1985
Kaufman v. Farley Mfg. Co., 78 Iowa, 679,	99	Kelly v. Gould, 141 N. Y. 596,	1876
Kaufman v. United States, etc., Bank, 31 Neb. 661,	237	Kelly v. Roberts, 40 N. Y. 432,	243, 246, 247
Kauffman v. Harstock, 31 Iowa, 472,	595	Kelly v. Solari, 9 M. & W. 54,	799
Kaye v. Wagborne, 1 Taunt. 428,	515, 552	Kelly v. Thuey, 102 Mo. 522,	1063
Kayser v. Maughan, 8 Colo. 232,	681	Kelly v. Town of Bradford, 33 Vt. 35,	139
Kean v. Johnson, 9 N. J. Eq. 401,	1255	Kemble v. Farren, 6 Bing. 141,	756, 761
Keane v. Boycott, 2 H. Bl. 511,	1772, 1795	Kemble v. Kean, 6 Sim. 333,	2073
Kearly v. Duncan, 1 Head (Tenn.), 397,	325, 328	Kemp v. Balls, 28 Eng. Law and Eq. 498,	445
Kearney v. Doyle, 22 Mich. 294,	2211, 2212	Kemp v. Balls, 10 Exch. 607,	543
Kearney v. Taylor, 15 How. 494,	2001	Kemp v. Kemp, 85 N. Car. 491,	1741
Kearney v. Vaughan, 50 Mo. 284,	19	Kemp v. Knickerbocker Ice Co., 69 N. Y. 45,	296, 755
Keaton v. Pearson, 7 Hurl. & N. 386,	939	Kemp v. Wright, L. R. (1894) 2 Ch. 462,	175
Keates v. Lyon, L. R. 4 Ch. App. 218,	1154	Kempshall v. East, 127 Ind. 320,	2216
Keating v. Hyde, 23 Mo. App. 555,	1884	Kempton v. Bray, 99 Mass. 350,	234
Keating v. Nelson, 33 Ill. App. 357,	127	Kendall, <i>Ex parte</i> , 17 Ves. 514,	822
Keator v. St. John, 42 Fed. Rep. 535,	32	Kendall v. Bishop, 76 Mich. 634,	1404
Keck v. Bieber, 148 Pa. St. 645,	754	Kendall v. Frey, 74 Wis. 26,	1099
Keckmann v. Pinkney, 81 N. Y. 211,	2231	Kendall v. Hamilton, L. R. 4 App. Cas. 504,	833
Keefe v. Chafee, 11 Wash. 292,	85	Kendall v. Lawrence, 22 Pick. (Mass.) 540,	1789
Keegan v. Estate of Malone, 62 Iowa, 208,	789	Kendrick, Matter of, 107 N. Y. 104,	196
Keegan v. Kinnaird, 12 Ill. App. 484,	362	Kendrick v. Niesz, 17 Colo. 506,	1775, 1776
Keel v. Larkin, 72 Ala. 493,	772, 778	Kendrick v. O'Neil, 48 Geo. 631,	543
Keeler v. Bartine, 12 Wend. 110,	561	Kenedy v. Schultz, 6 Texas C. App. 461,	1908
Keeler v. Field, 1 Paige, 312,	123	Kennaway v. Treleavan, 5 M. & W. 498,	54, 182
Keeler v. Neal, 2 Watts (Pa.), 424,	517	Kennebec Co. v. Augusta Ins. Co., 6 Gray, 204,	954
Keeler v. Niagara, etc., Ins. Co., 16 Wis. 523,	238	Kennebec R. Co. v. Jarvis, 34 Maine, 360,	155
Keeler v. Taylor, 53 Pa. St. 467, 2045, 2046,	2073	Kennebec R. Co. v. Palmer, 34 Maine, 366,	261
Keen v. Coleman, 39 Pa. St. 239,	1793	Kennebrew v. Southern, etc., Machine Co. (Ala.), 17 So. Rep. 545,	349
Keenan v. Handley, 2 D. J. & S. 283,	210	Kennedy v. Baker, 159 Pa. St. 146,	1779
Keene v. Kent, 4 N. Y. St. R. 431,	2060	Kennedy v. Cochrane, 65 Maine, 594,	1897
Keeney v. Jersey City, 47 N. J. Law, 445,	1508	Kennedy v. California, etc., Bank, 101 Cal. 495,	1261, 1262
Keep v. Goodrich, 12 Johns. 397,	214	Kennedy v. Gies, 25 Mich. 83,	1471
Kehr v. Smith, 20 Wall. (U. S.) 31,	1758	Kennedy v. Green, 3 M. & K. 699,	466
Keifer v. Summers, 137 Ind. 106,	443	Kennedy v. Howell, 20 Conn. 349,	182, 231, 234
Keim v. Lindley (N. J. Eq. 1895), 30 Atl. Rep. 1063,	1170	Kennedy v. Knight, 21 Wis. 340,	730
Kein v. Tupper, 52 N. Y. 550,	146	Kennedy v. Lee, 3 Meriv. 441,	68, 87
Keith v. Fountain, 3 Texas Civ. App. 391,	1887, 2087	Kennedy v. Robinson, 2 Crow. & D. 113,	638
Keith v. Keith, 26 Kan. 26,	2158	Kennedy v. Shaw, 43 Mich. 359,	201
Keith v. Kellogg, 97 Ill. 147,	27	Kennedy v. Siemers, 120 Mo. 73,	75
Keith v. Reynolds, 3 Greenl. 393,	1175	Kennedy v. United States, 24 Ct. Cl. 122,	128
Keitt v. Andrews, 4 Rich. Eq. 349,	1061, 1071	Kenner v. Bitely, 45 Fed. Rep. 133,	1156
Keiwert v. Meyer, 62 Ind. 587,	669	Kenneth v. South Carolina R. Co., 15 Rich. 284,	804
Kellam v. McKinstry, 69 N. Y. 264,	745	Kenney v. Altvater, 77 Pa. St. 34,	1759
Keller v. Boatman, 49 Ind. 104,	443	Kenney v. New York, etc., R. Co., 125 N. Y. 422,	1962
Keller v. Mayer, 55 Ga. 406,	1678	Kent v. Bornstein, 12 Allen (Mass.), 342,	1834
Keller v. Reynolds (Ind. App.), 40 N. E. Rep. 76 and 280,	115	Kent v. Cantrall, 44 Ind. 452,	2171
Kellerman v. Kansas City R. Co. (Mo.), 34 S. W. Rep. 41,	1964, 1966	Kent v. Freehold, etc., Brickmaking Co., 17 Law T. R. (N. S.) 77,	1980
Kelley v. Cosgrove, 83 Iowa, 229,	2104	Kent v. Huskinson, 3 B. & P. 233,	664
Kelley v. Fletcher, 94 Tenn. 1,	1374	Kent v. Kent, 62 N. Y. 560,	647, 653
Kelley v. Jefferis, 13 Mont. 170,	1732	Kent v. Kent, 28 Gratt. (Va.) 840,	2124
Kelley v. Newburyport, etc., Ry. Co., 141 Mass. 496,	1276	Kent v. Miltenberger, 13 Mo. App. 503,	1856, 1923, 1924
Kelley v. Riley, 106 Mass. 339,	278	Kent v. Mining Co., 78 N. Y. 159,	1253
		Kent v. Reynolds, 8 Hun, 559,	562

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Kent, etc., Manufacturing Co. v. Ransom, 46 Mich. 416,	102	Kimball v. Wilson, 3 N. H. 96,	543, 577
Kenton Insurance Co. v. McClellan, 43 Mich. 564,	1746	Kimball Co. v. Mellon, 80 Wis. 133,	162, 164, 168
Kentucky Mutual Ins. Co. v. Jenks, 5 Ind. 96,	76	Kimberley v. Jennings, 6 Sim. 340,	2073
Kenworthy v. Sawyer, 125 Mass. 28,	1745, 1754	Kimberly v. Patchin, 19 N. Y. 330,	660
Kenworthy v. Schofield, 2 B. & C. 945,	674, 677	Kimbro v. Bullitt, 22 How. (U. S.) 256,	1333
Kenworthy v. Stringer, 27 Ind. 498,	1853	Kimmerle v. Hass, 53 Mich. 341,	950
Kenyon v. Nichols, 1 R. I. 411,	867	Kimmons v. Oldham, 27 W. Va. 258,	1179
Kenyon v. People, 26 N. Y. 203,	1802	Kimpton v. Bronson, 45 Barb. 618,	563
Kenyon v. Wilson, 78 Iowa, 405,	32	Kincaid v. Archibald, 73 N. Y. 139,	195
Keokuk Railroad Co. v. Missouri, 152 U. S. 301,	1456	Kincaid v. Dwinelle, 59 N. Y. 545,	1377, 1378
Kepler v. Jessupp, 11 Ind. App. 241,	468	Kincaid v. School District, 11 Maine, 188,	404
Kepler v. Keefer, 6 Watts (Pa.), 231,	2098	King, <i>In re</i> , 46 Fed. Rep. 905,	2094
Kercheval v. King, 44 Mo. 401,	2190	King's Estate, 150 Pa. St. 143,	8
Kerkhof v. Paper Co., 68 Wis. 674,	670	King v. Barnes, 109 N. Y. 267,	442
Korn v. Zeigler, 13 W. Va. 707,	2199, 2200, 2201	King v. Bates, 57 N. H. 446,	162
Kernode v. Hunt, 4 Blackf. (Ind.) 57,	234	King v. Dedham Bank, 15 Mass. 447,	2117
Kerr v. Bell, 44 Mo. 120,	1781	King v. Despard, 5 Wend. 277,	608
Kerr v. Day, 14 Pa. St. 112,	1182	King v. Duluth, etc., R. Co. (Minn.), 63 N. W. Rep. 1105,	199
Kerr v. Hill, 27 W. Va. 576,	637	King v. Faist, 161 Mass. 449,	953, 1044
Kerr v. Lucas, 1 Allen, 279,	210, 1473	King v. Finch, 60 Ind. 420,	381, 402, 405
Kerr v. Lunsford, 31 W. Va. 661,	1031, 1032	King v. Fleming, 72 Ill. 21,	707, 2112
Kerr v. Watts, 6 Wheat. 550,	1214	King v. Gilleland, 60 Texas, 271,	1682
Kerridge v. Hesse, 9 Car. & P. 200,	1309, 1314	King v. Greene, 6 Allen, 139,	1043
Kershaw v. Wright, 115 Mass. 361,	936	King v. Gunnison, 4 Pa. St. 171,	674
Kerstetter v. Raymond, 10 Ind. 199,	2229	King v. Hawkins (Ariz.), 16 Pac. Rep. 434,	2085
Ketchum v. Brennan, 53 Miss. 596,	162	King v. Hoare, 13 M. & W. 494,	29, 816, 832
Ketchum v. Duncan, 96 U. S. 659,	1443	King v. Huston, 19 L. Ann. 288,	2021
Ketchum v. City of Buffalo, 14 N. Y. 356,	1348, 1474, 1564	King v. Jarman, 35 Ark. 190,	296
Ketchum v. Spurlock, 34 W. Va. 597,	857	King v. Kerr, 5 Ohio, 154,	2169
Ketchum v. Stout, 20 Ohio, 453,	110, 425	King v. Lamaille, etc., R. Co., 51 Vt. 369, 2185	369
Ketchum v. Zeilsdorff, 26 Wis. 514,	299	King v. Lucas, L. R. 23 Ch. D. 712,	1653
Kevan v. Crawford, L. R. 6 Ch. Div. 29,	224	King v. Morford, 1 N. J. Eq. 274,	955
Key v. Jennings, 66 Mo. 356,	976	King v. Stevens, 5 East, 244,	768
Key v. Vattier, 1 Ohio, 132,	2005	King v. Upton, 4 Johns. 237,	204
Keyes v. Allen, 65 Vt. 667,	262	King v. Welcome, 5 Gray, 41,	693
Keyes v. Stone, 5 Mass. 391,	146	King v. Whirely, 10 Paige, 465,	236
Keyes v. Westford, 17 Pick. 273,	1491, 1492	King v. Whittash, 7 B. & C. 596,	2095
Keyser v. District No. 8, 35 N. H. 473,	643	King Brick Co. v. Phoenix Insurance Co., 164 Mass. 291,	316
Keystone, etc., Co. v. Dole, 43 Mich. 370,	276	King Iron Bridge, etc., Co. v. St. Louis, 43 Fed. Rep. 768,	754
Kibble v. Gough, 38 L. T. Rep. (N. S.) 204,	665, 666	King Phillip Mills v. Slater, 12 R. I. 82,	150
Kick v. Merry, 23 Mo. 72,	188, 1988	Kinghorn v. Montreal Tel. Co., 18 Upper Canada (Q. B.), 60,	55, 684
Kidder v. Blake, 45 N. H. 530,	212, 214	Kingman County v. Cornell University, 57 Fed. Rep. 149,	1535
Kidder v. Hunt, 1 Pick. 328,	836	Kingsbury v. Burnside, 58 Ill. 310,	15
Kidder v. Kidder, 33 Pa. St. 268,	562	Kingsbury v. Kirwan, 77 N. Y. 612,	1914, 1921
Kidwelly Canal Co. v. Baby, 2 Price, 93,	1328	Kingsbury v. Tharp, 61 Mich. 216,	2252
Kiehne v. Wessell, 53 Mo. App. 667,	1812	Kingsland v. Forrest, 18 Ala. 519,	26
Kiff v. Atchison, etc., R. Co., 32 Kan. 263,	1961	Kingsley v. Holbrook, 45 N. H. 313,	638, 639
Kiichli v. Minnesota, etc., Co., 58 Minn. 418,	1574	Kingsley v. Johnson, 49 Conn. 462,	331
Kilbourn v. Field, 78 Pa. St. 194,	2007	Kingston Bank v. Eltinge, 40 N. Y. 391,	490, 481, 799
Kilbourn v. Latta, 5 Mack (D. C.), 304,	644	Kinner, <i>In re</i> , 14 N. Y. St. Rep. 618,	1659
Kilbourn v. Sunderland, 130 U. S. 505,	2256	Kinnard v. Daniel, 13 B. Mon. 496,	618
Kilcrease v. Johnson, 85 Ga. 600,	730	Kinne v. Town of East Haven, 32 Conn. 210,	2209
Kiley v. Forsee, 57 Mo. 390,	1271	Kinne v. Webb, 54 Fed. Rep. 34,	1712
Kilgore v. Buckley, 14 Conn. 362,	731	Kinnersley v. Mussen, 5 Taunt. 264,	27
Kilgore v. Dempsey, 25 Ohio St. 413,	730	Kinney v. Baltimore, etc., Association, 35 W. Va. 385,	2224
Kilgour v. Miles, 6 Gill & J. 268,	386, 766	Kinney v. McDermot, 55 Iowa, 674,	2104
Killian v. Ashley, 24 Ark. 511,	594	Kinsley v. Charley, 33 Ill. App. 553,	952
Killough v. Payne, 52 Ark. 174,	187	Kinsley v. International, etc., Co., 41 Ill. App. 259,	258
Kilvington v. City of Superior, 83 Wis. 222,	1479	Kinsler v. Pope, 5 Strobbart, 126,	531
Kimball, The, 3 Wall. 37,	452, 1929	Kinsman v. Parkhurst, 18 How. (U. S.) 289,	2032
Kimball v. Atchinson, etc., R. Co., 46 Fed. Rep. 885,	1425	Kirby v. Harrison, 2 Ohio St. 326,	1164
Kimball v. Bangs, 144 Mass. 321,	1875	Kirby v. Johnson, 22 Mo. 354,	660
Kimball v. Brawner, 47 Mo. 395,	930, 940	Kirby v. Miller, 4 Cold. (Tenn.) 3,	1699, 1753
Kimball v. Cochecho Railroad Co., 23 N. H. 579,	280	Kirby v. Taylor, 6 John. Ch. 242,	819
Kimball v. Comstock, 14 Gray, 508,	592	Kirby v. Wash, etc., R. Co., 109 Ill. 412,	869
Kimball v. Corn Exchange Nat. Bank, 1 Brad. (Ill. App.) 209,	805	Kirchner v. New Home Co., 16 N. Y. Supl. 761,	565
Kimball v. Hewitt, 2 N. Y. Supl. 697,	1544	Kirchner v. New Home Co., 135 N. Y. 182,	554, 566
Kimball v. Morton, 5 N. J. Eq. 26,	1209		
Kimball v. News, 17 Wis. 695,	238		
Kimball v. Tooke, 70 Ill. 553,	752		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Kirk, <i>Ex parte</i> , L. R. 5 Ch. D. 800,	567	Knowles v. Toone, 96 N. Y. 534,	867, 868
Kirkham v. Marter, 2 B. & Ald. 613,	594	Knowlton v. Amy, 47 Mich. 204,	990
Kirkland v. Dinsmore, 62 N. Y. 171,	64	Knowlton v. Congress, etc., Spring Co., 57	
Kirkland v. Oates, 25 Ala. 465,	2181	N. Y. 518,	1864, 1940
Kirkman v. Shawcross, 6 T. R. 14,	50	Knowlton v. Oliver, 28 Fed. Rep. 516,	868
Kirkpatrick v. Adams, 20 Fed. Rep. 287,	1925	Knox v. Clifford, 38 Wis. 651,	2113
Kirkpatrick v. Bonsall, 72 Pa. St. 155,	1930, 1946	Knox v. Eden Musee, etc., 148 N. Y. 441,	1344, 1345
Kirk v. Clark, 59 Pa. St. 479,	1655	Knox v. King, 36 Ala. 367,	622, 623
Kirkpatrick v. McElroy, 41 N. J. Eq. 555,	1019	Knox v. Knox, 30 S. Car. 377,	1851
Kirkpatrick v. Puryear, 93 Tenn. 409,	448	Knox v. McFarra, 4 Colo. 440,	631
Kirksey v. Keith, 11 Rich. Eq. 33,	1020	Knox v. Nobel, 77 Hun (N. Y.), 230,	1773
Kirton v. Braithwaite, 1 M. & W. 810,	403	Knox v. Spratt, 23 Fla. 64,	1102, 1104, 1104
Kistner v. Indianapolis, etc., R. Co., 88		Knox v. Webster, 18 Wis. 406,	203
Ind. 460,	2249	Knoxville v. Acuff, 92 Tenn. 26,	545
Kister v. Lebanon, etc., Insurance Co.,		Knoxville, etc., Ins. Co. v. Hird, 4 Texas	
123 Pa. St. 553,	319	Civ. App. 82,	348
Kitchen v. Greenabaum, 61 Mo. 110,	1039	Knox Co. v. Aspinwall, 21 How. (U. S.)	
Kitchen v. Lee, 11 Paige (N. Y.), 107,	1793	539,	1516
Kitchen v. St. Louis, etc., Railroad Co.,		Knox Co. v. Ninth Nat. Bank, 147 U. S. 91,	865, 875
69 Mo. 224,	1295, 1390, 1446,		1174
Kizer v. Lock, 9 Ala. 269,	688	Koch v. Dunkel, 90 Pa. St. 264,	1509
Klauber v. Vigneron (Cal. 1893), 32 Pac.		Koch v. Milwaukee, 89 Wis. 220,	429, 466, 478, 479
Rep. 248,	1714	Koch v. Roth, 150 Ill. 212,	1695, 1752
Kleckka v. Ziegler, 81 Md. 482,	1185	Koehling v. Henkel, 144 Pa. St. 215,	392
Kleeman v. Collins, 9 Bush. 460,	652, 717	Koehler v. Buhl, 94 Mich. 496,	1288
Klein, <i>In re</i> , 1 How. (U. S.) 277,	2118	Koehler v. Dodge, 31 Neb. 328,	
Klein v. Gantner, 135 Ind. 699,	1693	Koehler v. Black River Falls Iron Co., 2	
Klein v. Insurance Co., 104 U. S. 88,	1611	Black, 715,	1231, 1292, 1304, 1307
Kleinsorge v. Rohse, 25 Ore. 521,	1056	Koehler v. Farmers' Bank, 5 N. Y. Supl.	414
Klinck v. Price, 4 W. Va. 4,	721	745,	2192
Kline's Estate, 64 Pa. St. 122,	1713, 1714	Koenig v. Nott, 2 Hilt. (N. Y.) 323,	41, 362
Kline v. Baker, 99 Mass. 253,	1939	Koerper v. Jung, 33 Ill. App. 144,	1115, 1210, 1211
Kline v. Beebe, 6 Conn. 494,	1786	Kofka v. Rosicky, 41 Neb. 328,	2145
Kline v. Kline, 57 Pa. St. 120,	1714	Kohl v. United States, 91 U. S. 367,	
Kline v. L'Amoureux, 2 Paige (N. Y.),		Kohn v. Collison (Del. 1893), 27 Atl. Rep.	1746
419,	1798, 1799	834,	148
Kline v. Vogel, 90 Mo. 239,	414	Kohn v. Fandel, 29 Minn. 470,	2181, 2182
Klinitz v. Surry, 5 Esp. 267,	665	Kolsky v. Enslin, 103 Ala. 97,	777
Knaggs v. Green, 48 Wis. 601,	1787	Konitzky v. Meyer, 49 N. Y. 571,	1100, 1188
Knapp v. Hyde, 60 Barb. (N. Y.) 80,	1828, 1835	Konnerup v. Frandsen, 8 Wash. 551,	190
Knapp v. Knapp, 95 Mich. 474,	1758	Kooker v. Hyde, 6 Wis. 204,	165, 180
Knapp v. Smith, 27 N. Y. 277,	1677, 1689	Koons v. Hendricks, 6 Kulp. (Pa.) 165,	275, 800
Knapp, etc., Co. v. St. Louis Transfer Ry.		Koontz v. Central Nat. Bank, 51 Mo. 275,	1195
Co., 126 Mo. 26,	1581	Kopp v. Reiter, 146 Ill. 437,	1519
Knatchbull v. Hallett, L. R. 13 Ch. Div.		Koppikus v. Commissioners, 16 Cal. 248,	1211
696,	1002	Korminsky v. Korminsky, 21 N. Y. Supl.	1211
Kneass v. Schuylkill Bank, 4 Wash. C.		611,	2158
C. 9,	233	Korn v. Browne, 64 Pa. St. 55,	1013
Kneedler v. Anderson, 43 Ill. App. 317,	953	Kornegay v. Carroway, 2 Dev. Eq. 403,	1036
Kneeland v. Rogers, 2 Hall (N. Y.), 579,	2016	Kornegay v. Kornegay, 109 N. Car. 188,	162, 168
Kneffler v. Commonwealth, 94 Ky. 359,	1914	Kornegay v. White, 10 Ala. 255,	333
Knell v. Eggleston, 140 Mass. 202,	1754	Kortright v. Cady, 21 N. Y. 343,	383, 408, 410, 411
Kneller v. Lang, 63 Hun, 48,	417	Koshkonong v. Burton, 104 U. S. 668,	2158
Knickerbacker v. Colver, 8 Cow. 111,	543, 574	Kountz v. Holthouse, 85 Pa. St. 235,	239, 962
Knickerbocker Ins. Co. v. McGinnis, 87		Kountz v. Kirkpatrick, 72 Pa. St. 376,	2060
Ill. 70,	769	Kountz v. Price, 40 Miss. 341,	2108
Knight v. Abbot, 30 Vt. 577,	390	Kountze v. Helmut, 67 Hun, 343,	422
Knight v. Crawford, 1 Esp. 190,	688	Kraemer v. Adelsberger, 122 N. Y. 467,	171
Knight v. Dunlop, 5 N. Y. 537,	623	Kraft v. City of Keokuk, 17 Iowa, 86,	460
Knight v. Glascock, 51 Ark. 390,	1052	Kramer v. Williamson, 135 Ind. 655,	1036
Knight v. Hunt, 5 Bing. 432,	1637	Kraner v. Chambers (Iowa 1894), 61 N.	
Knight v. Knotts, 8 Rich. L. (S. Car.) 35,	2178	W. Rep. 373,	1045
Knight v. Mann, 118 Mass. 143,	664	Kraushaar v. Hauk, 27 Ore. 92,	1089
Knight v. Mann, 120 Mass. 219,	663	Kreider v. Boyer, 10 Watts. 54,	560
Knights Templar, etc., Co. v. Berry, 50		Kreiger v. Railroad Co., 84 Ky. 66,	1542
Fed. Rep. 511,	119, 733	Kreiss v. Seligman, 8 Barb. (N. Y.) 439,	1902, 1903
Knittel v. Cushing, 55 Tex. 354,	165	Kretschmer v. Hard, 13 Colo. 223,	901
Knoll v. Harvey, 19 Wis. 99,	1197	Kribben v. Haycraft, 26 Mo. 396,	1883, 1988
Knopf v. Morel, 111 Ind. 570,	2203	Kriger v. Leppel, 42 Minn. 6,	149, 592
Knoup v. Piqua Branch Bank, 1 Ohio St.		Krohn v. Heyn, 77 Texas, 319,	2180
603,	2130	Krohn v. Krohn, 5 Texas Civ. App. 125,	2098
Knott v. Burleson, 2 Greene (Iowa), 600,	552	Krohn v. Williamson, 62 Fed. Rep. 869,	1209
Knott v. Raleigh, etc., R. Co., 98 N. C. 73,	1826	Krom v. Schoonmaker, 3 Barb. 647,	1838
Knott v. Tidyman, 86 Wis. 164,	2321	Kromer v. Heim, 75 N. Y. 574,	508, 517, 526, 531, 532, 951
Knowles v. Erwin, 43 Hun, 152,	1730	Krouskop v. Shontz, 51 Wis. 204,	1753, 1755
Knowles v. McCamly, 10 Paige (N. Y.) 342,	636	Kroy v. Railroad Co., 32 Iowa, 357,	1433
Knowles v. Michel, 13 East, 249,	1261		
Knowles v. Sandercock, 107 Cal. 629,			

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Krumb v. Campbell, 102 Cal. 370,	2187	Lake Ontario, etc., R. Co. v. Mason, 16	
Krumbhaar v. Birch, 83 Pa. St. 426,	358	N. Y. 451,	153, 260
Krutz v. Craig, 53 Ind. 561,	463	Lake Shore, etc., R. Co. v. Chicago, etc.,	
Kuecht v. Mutual, etc., Insurance Co., 90		R. Co., 97 Ill. 506,	2145
Pa. St. 113,	308	Lake Shore R. Co. v. City of Chicago, 144	
Kuelkamp v. Hidding, 31 Wis. 503,	1826	Ill. 391,	1546
Kugelmann v. Levy, 24 N. Y. Supl. 559,	936	Lake Shore, etc., R. Co. v. Richards, 152	
Kuhl v. Pierce County, 44 Neb. 584,	2255, 2258	Ill. 591,	2220
Kuhls v. City of Laredo (Texas, 1894), 27		Lake View, City of, v. MacRitchie, 134 Ill.	
S. W. Rep. 791,	1522	203,	897
Kuhn v. Myers, 37 Iowa, 351,	757	Lake View, Town of, v. Rose Hill Cem-	
Kuhns v. Gates, 92 Ind. 66,	2109	etery Co., 70 Ill. 91,	2147
Kunkle v. Mitchell, 56 Pa. St. 100,	102	Lakeside Land Co. v. Dromgoole, 89 Ala.	
Kuser v. Wright (N. J. 1895), 31 Atl. Rep.		505,	628
397,	1338	Lamar v. Micon, 114 U. S. 218,	695
Kuntz v. Tempel, 48 Mo. 71,	385, 767	Lamar Milling Co. v. Craddock, 5 Colo.	
Kunzler v. Kohaus, 5 Hill (N. Y.), 317,	2118	App. 203,	67
Kupfert v. Guttentburg, etc., Association,		Lamar Water Co. v. City of Lamar, 128	
30 Pa. St. 465,	1597, 1680, 1620	Mo. 188,	1562, 1563
Kurtz, <i>In re</i> , 68 Cal. 412,	1478	Lamb v. Crafts, 12 Metc. 353,	41, 653
Kusch v. Kusch, 143 Ill. 353,	2287	Lamb v. Davenport, 18 Wall. 307,	201
Kyle v. Perdue, 95 Ala. 579,	1014	Lamb v. Donovan, 19 Ind. 40,	2210
K. X. v. A. Y., 34 W. N. C. (Pa.) 145,	184	Lamb v. Foss, 21 Maine, 240,	490
		Lamb v. Gregory, 12 Neb. 506,	540
		Lamb v. Henderson, 63 Mich. 302,	935
		Lamb v. Hinman, 46 Mich. 112,	844
		Lamp v. Weed, 27 Ala. 621,	404
		Lambert v. Alcorn, 144 Ill. 313,	565
		Lambert v. Seely, 2 Hilt. 429,	464
		Lambertson v. Hogan, 2 Pa. St. 22,	2121
		Lamborn v. County Commissioners, 97	
		U. S. 181,	440, 458, 459, 806
		Lamme v. Dodson, 4 Mont. 560,	845
		L'Amoreaux v. Crosby, 2 Paige Ch. (N. Y.)	
		422,	1814
		L'Amoureux v. Gould, 7 N. Y. 349,	74
		Lampkin v. Chisom, 10 Ohio St. 450,	835
		Lampleigh v. Braithwait, Hobart, 105,	
			193, 783
		Lampon v. Corke, 5 B. & Ald. 606,	466, 567
		Lampson v. Hobart, 23 Vt. 697,	608
		Lamson Consolidated Co. v. Hartung, 18	
		N. Y. Supl. 143,	334
		Lamson Consolidated Co. v. Hartung, 19	
		N. Y. Supl. 233,	335
		Lanahan v. Pattison, 1 Flip. (U. S.) 410,	1904
		Lancaster v. Dolan, 1 Rawle (Pa.), 231,	1728
		Lancaster v. Elliott, 42 Mo. App. 503,	83
		Lancaster v. Elliott, 28 Mo. App. 86,	66
		Lancaster v. Roberts, 144 Ill. 213,	1160
		Lancaster, etc., Bank v. Moore, 78 Pa. St.	
		407,	1025
		Lance v. Lance, 5 Jones L. 413,	559
		Landa v. Obert, 5 Texas, 620,	1829
		Landa v. Obert, 45 Texas, 539,	1830
		Landauer v. Conklin, 3 S. D. 462,	1641
		Land Co. v. Dromgoole, 89 Ala. 508,	1117
		Landers v. Barlow, 21 Fed. Rep. 836,	683
		Landers v. McIntyre, 8 Wash. 203,	1138
		Landis v. Saxton, 89 Mo. 375,	409
		Landon v. Humphrey, 9 Conn. 209,	797
		Landon v. Hutton, 50 N. J. Eq. 500,	561
		Landwerlen v. Wheeler, 106 Ind. 523,	
			815, 817, 2190
		Lane's Appeal, 82 Pa. St. 289,	1632
		Lane v. Bishop, 65 Vt. 575,	1752, 1753
		Lane v. Doty, 4 Barb. 530,	821
		Lane v. Shackford, 5 N. H. 130,	690, 836
		Lane v. Shears, 1 Wend. 453,	422
		Lane v. Traders' Deposit Bank (Ky. 1892),	
		21 S. W. Rep. 756,	1719, 1722
		Lanes v. Squyres, 45 Texas, 382,	535
		Lanfair v. Lanfair, 18 Pick. 398,	490
		Lang v. Gale, 1 M. & S. 111,	384
		Lang v. Werk, 2 Ohio St. 519,	2026
		Langabier v. Fairbury, etc., R., 64 Ill.	
		243,	2094
		Langbein v. Schneider, 16 N. Y. Supl.	
		943,	1697
		Langan v. Sankey, 55 Iowa, 52,	1935
		Langdon v. Branch, 37 Fed. Rep. 449,	1431
		Langdon v. Castleton, 30 Vt. 285,	1588

L

La Amistad de Rues, 5 Wheat. 385,	506
Labbe v. Corbett, 69 Texas, 503,	2018
Labourchere v. Dawson, L. R. 13 Eq. 322,	2046
LabbvTeaux v. Swigart, 103 Ind. 596,	198
Lacey v. Cent. Nat. Bank, 4 Neb. 179,	248
Lachman v. Block (La. Ann.), 17 So. Rep.	
153,	714
Lackland v. Railroad Co., 31 Mo. 183,	1506
Lacon v. Hooper, 6 T. R. 224,	768
Lacustrine Fertilizer Co. v. Lake Guano,	
etc., Co., 82 N. Y. 476,	466
Lacy v. Getman, 35 Hun, 46,	948
Lacy v. Kynaston, 2 Salk. 575,	569, 574
Lacy v. Pixler, 120 Mo. 383,	1781, 1792, 1794
Lacy v. Wilson, 24 Mich. 479,	392
Ladd v. Cartwright, 7 Ore. 329,	1382
Ladd v. King, 1 R. I. 224,	689
Ladd v. Rogers, 11 Allen, 209,	1476
Ladd v. Southern Cotton Press, etc., Co.,	
53 Texas, 172,	807
Ladies', etc., Institute v. French, 16 Gray,	
196,	256
Ladue v. Seymour, 24 Wend. 60,	780
La Du-King Mfg. Co. v. La Du, 36 Minn.	
473,	592, 652, 693
La Farge, etc., Ins. Co. v. Bell, 22 Barb.	
54,	1288
Lafayette County Monument Co. v. Ma-	
gon, 73 Wis. 627,	258, 445
Laffoon v. Fretwell, 24 Mo. App. 258,	32
Lafollet v. Kyle, 51 Ind. 445,	1195
La France Fire Engine Co. v. Town of	
Mount Vernon, 9 Wash. 142,	1514, 1887
Lagonda Nat. Bank v. Portner, 46 Ohio	
St. 381,	1943
La Grange Butter Tub Co. v. National	
Bank of Commerce, 122 Mo. 154,	1390, 1404
Laidlaw v. Organ, 2 Wheat. 173,	1879
Laidner v. Elliott, 3 B. & C. 738,	797
Laird v. Allen, 82 Ill. 43,	846
Laird v. Campbell, 100 Pa. St. 159,	1632
Laird v. Pim, 7 M. & W. 474,	120, 122, 2213
Lake v. Trustees, 4 Denio, 520,	1558
Lake v. Tyree, 90 Va. 719,	1876
Lake Co. v. Graham, 130 U. S. 674,	
	1526, 1527, 1530, 1539
Lake Co. v. Rollins, 130 U. S. 662,	
	1527, 1539, 1586
Lakeman v. Mountstephen, L. R. 7 H. L.	
17,	598
Lakeman v. Pollard, 43 Maine, 463,	285, 473
Lake Ontario R. Co. v. Curtiss, 80 N. Y.	
219,	242, 258, 259, 260, 1320

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Langdon v. DeGroot, 1 Paine, 203,	—	Lavery v. Pursell, L. R. 39 Ch. Div. 508,	639, 643
Langdon v. Goole, 3 Lev. 21,	95	Lavery v. Turley, 6 H. & N. 239,	526
Langdon v. Mayor, etc., 93 N. Y. 129,	36	Law v. Henry, 39 Ind. 414,	1192
Langdon v. Northfield, 42 Minn. 464,	128	Law v. Liscomb, 31 S. Car. 504,	1683
Langdon v. Richardson, 58 Iowa, 610,	601	Law v. Local Board, L. R. (1892) 1 Q. B.	127,
Lange v. Dammier, 119 Ind. 567,	1817	Lawler v. Murphy, 58 Conn. 294,	758, 760
Lange v. Kaiser, 34 Mich. 317,	784	Law v. People, 87 Ill. 385, 1515, 1519, 1520, 1521	862, 1384
Lange v. Werk, 2 Ohio St. 519,	2047	Lawrence v. American Nat. Bank, 54	
Langelier v. Schaefer, 36 Minn. 361,	71	N. Y. 432,	800
Langford v. Freeman, 60 Ind. 46,	1192	Lawrence v. Bassett, 5 Allen, 140,	706
Langhorne v. Richmond R. Co. (Va. 1895),	—	Lawrence v. Beaubien, 2 Bailey, 623,	1071
22 S. E. Rep. 159,	1458	Lawrence v. Butler, 1 Schoales & L. 13,	1105
Langley v. Mayhew, 107 Ind. 198,	1716	Lawrence v. Carter, 16 Pick. (Mass.) 12,	1949
Langston v. Bates, 84 Ill. 524,	1191, 1194	Lawrence v. Chase, 54 Maine, 196,	694
Langston v. Smyley, 38 S. Car. 121,	1732	Lawrence v. Clark, 36 N. Y. 128,	1640
Langston v. Hughes, 1 Maule & S. 593,	1862	Lawrence v. Cooke, 56 Maine, 187,	654
Langworthy v. Woodworth, 13 Iowa, 530,	552	Lawrence v. Dale, 3 John. Ch. 23,	166, 998
Lanier v. Adams, 72 Ga. 145,	1048	Lawrence v. Fox, 20 N. Y. 268, 236, 242, 243, 607	
Lanier v. Huguley, 91 Ga. 791,	483, 484	Lawrence v. Kidder, 10 Barb. (N. Y.) 641, 2030	
Lanier v. Wallace, 116 Ind. 317,	1397	Lawrence v. McCalmont, 2 How. 426,	9, 233, 871
Lank v. Kinder, 4 Harr. (Del.) 457,	549	Lawrence v. Miller, 86 N. Y. 131,	148
Lanning v. Tompkins, 45 Barb. 303,	434	Lawrence v. Railway Co., 36 Hun, 467,	1101
Lansing v. Dodd, 45 N. J. Law, 525,	1760	Lawrence v. Springer, 49 N. J. Eq. 239,	643
Lanphier v. Phipos, 8 Car. & P. 475,	797	Lawrenson v. Butler, 1 Schoales & L. 13,	1108, 1111
Lantry v. Parks, 8 Cow. 63,	147	Lawson v. Chicago, etc., Railway Co., 64	
Lantz v. Frey and Wife, 19 Pa. 366,	789	Wis. 447,	1960
Lanyon v. Martin, L. R. 13 Ir. Ch. 297,	1183	Lay v. Austin, 25 Fla. 933,	1286
Lanz v. McLaughlin, 14 Minn. 72,	1120	Laycock v. City of Baton Rouge, 35 La.	
Lanzer v. Unterberg, 29 N. Y. Supl. 683,	1907	Ann. 475,	1565, 1566
Lapeyre v. United States, 17 Wall. 191,	761	Layman v. Minneapolis Realty Co., 60	
Laphan v. Barrett, 1 Vt. 247,	634	Minn. 136,	2268
Laphan v. Dreisvoght, 36 Mo. App. 275,	94	Lea v. Hopkins, 7 Pa. St. 492,	2101
Laphan v. Head, 21 Kan. 332,	201	Leach v. Fobes, 11 Gray, 506,	210, 1473
La Point v. Cady, 2 Pin. 515,	2205	Leach v. Francis, 41 Vt. 670,	1663
Lapping v. Duffy, 65 Ind. 229,	48	Leach v. Keach, 7 Iowa, 232,	214
Laramie County v. Albany County, 92 U. S.	—	Leacox v. Griffith, 76 Iowa, 89,	1797
307,	1465	League v. Waring, 85 Pa. St. 244,	455, 456
Large v. Penn, 6 S. & R. 488,	424	Leamans v. Knap, Stout & Co., 89 Wis.	
Larimer v. Kelley, 10 Kan. 298,	646	171,	699
Larimore v. Hornbaker, 21 Ind. 430,	387	Learned v. Ayres, 41 Mich. 677,	829
Larisow v. Hager, 44 Fed. Rep. 49,	833	Learned v. Tritch, 6 Colo. 440,	681
Larkin v. Buck, 11 Ohio St. 561,	148	Lease v. Pennsylvania Co., 10 Ind. App.	
Larkin v. Butterfield, 29 Mich. 254,	815	47,	586
Larkin v. Hardenbrook, 90 N. Y. 333,	562	Leather Cloth Co. v. Lorisont, L. R. 9 Eq.	
Larkin v. Hecksher, 61 N. J. Law, 133,	890	345,	2033, 2039, 2041, 2075
Larmon v. Jordan, 56 Ill. 204,	61	Leatherman v. Oliver, 151 Pa. St. 646,	959
Larned v. City, 86 Iowa, 166,	544	Leatherwood v. Arnold, 66 Texas, 414,	1760
Larrabee v. Sewall, 66 Maine, 376,	578	Leavans v. Ohio Nat. Bank, 50 Ohio St.	
Larsen v. Breene, 12 Colo. 480,	451	591,	1997
Larsen v. Johnson, 78 Wis. 300,	222	Leavenworth, County of, v. Barnes, 94	
Larson v. Altman Co., 86 Wis. 281,	936	U. S. 579,	1428
Lash v. Edgerton, 13 Minn. 210,	475	Leavenworth County Commissioners v.	
Lash v. Lash, 58 Ind. 526,	1768	Chicago R. I. & P. Ry. Co., 134 U. S. 683,	
Lash v. Rendell, 72 Ind. 475,	48, 553	1296, 1446	
Lassence v. Tierney, 1 McN. & G. 551,	618, 1717	Leavitt v. Beirne, 21 Conn. 1,	1695
Lassiter v. Hoes, 31 N. Y. Supl. 850,	1664	Leavitt v. Dodge, 16 N. Y. Supl. 309,	209
Latchford, Succession of, 42 La. Ann. 529,	1618	Leavitt v. Dover (N. H. 1892), 32 Atl. Rep.	
Latham v. Shipley, 86 Iowa, 543,	323, 324	156,	2238
Latham v. Sumner, 89 Ill. 233,	165	Leavitt v. Files, 38 Kan. 26,	1821
Lathrop v. Knapp, 27 Wis. 214,	255	Leavitt v. Morrow, 6 Ohio St. 71,	445, 542
Lathrop v. O'Brien, 57 Minn. 175,	397	Leavitt v. Pratt, 53 Maine, 147,	626
Lathrope v. McBride, 31 Neb. 289,	461	Leavitt v. Windsor, etc., Co., 54 Fed. Rep.	
Latrobe, etc., Ass'n v. Fritz, 152 Pa. St.	—	439,	877
224,	1679, 1688, 1695	Lebanon Bank v. Hollenbeck, 29 Minn.	
Latta v. Miller, 109 Ind. 302,	2203	322,	1082
Lattimore v. Hansen, 14 Johns. 330,	517, 951, 955	Lecomte v. Toudouze, 82 Texas, 208,	1730
Laubenheimer v. Mann, 17 Wis. 542,	2026	Leddel v. Starr, 20 N. J. Eq. 274,	555, 556, 560
Laude v. Seymour, 24 Wend. 60,	785	Ledwich v. McKim, 53 N. Y. 307,	2165
Lauer v. Bandow, 48 Wis. 638,	832	Lee v. Basey, 85 Ind. 543,	831
Laughlin v. President, etc., 6 Ind. 223,	2273	Lee v. Boak, 11 Grat. 182,	559
Laughlin v. Dean, 1 Duv. (Ky.) 20,	2021	Lee v. Briggs, 99 Mich. 487,	506
Laughter's Case, Coke's Rep., pt. 5, 22,	301	Lee v. Dick, 10 Pet. 482,	52, 871
Lauman v. County of Des Moines, 29	—	Lee v. Fletcher, 46 Minn. 49,	15
Iowa, 310,	805	Lee v. Fountaine, 10 Ala. 755,	446, 609
Lauman v. Railroad Co., 30 Pa. St. 42,	1254	Lee v. Gaskell, 1 Q. B. D. 700,	635
Laurel, etc., Assn. v. Sperring, 106 Pa. St.	—	Lee v. Griffin, 1 B. & S. 272,	653, 659, 660
334,	1599	Lee v. Hennick (Ohio 1894), 39 N. E. Rep.	
Lavell v. Frost, 16 Mont. 93,	596	473,	1643
Laver v. Fielder, 9 Jur. (N. S.) 190,	1008		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Lee v. Hill, 87 Va. 497,	652	Leonis v. Lazzavich, 55 Cal. 52,	1187
Lee v. Hills, 66 Ind. 474,	679, 1484,	Leonard v. Leonard, 14 Pick. (Mass.) 280,	1813
Lee v. Horton, 104 N. Y. 538,	1975	Leonard v. Poole, 114 N. Y. 371,	2069, 2072
Lee v. Kirby, 104 Mass. 420,	1131	Leonard v. Vredenburgh, 8 John. 29,	594, 596, 603
Lee v. Kirkpatrick, 14 N. J. Eq. 264,	955	Leonard v. Wiseman, 31 Md. 201,	1587
Lee v. Lancashire R. Co., L. R. 6 Ch. App. 527,	463, 581	Le Page v. McCrea, 1 Wend. 164,	537
Lee v. Mahoney, 8 Iowa, 344,	686	Lerch v. Bard, 153 Pa. St. 573,	2253
Lee v. Muggridge, 5 Taunt. 32,	183	Lerned v. Wannemacher, 9 Allen, 412,	954
Lee v. Nixon, 1 A. & E. 201,	809, 828	Leroux v. Brown, 12 C. B. 801,	592, 718, 719
Lee v. Oppenheimer, 32 Me. 253,	536	Le Roy v. Crownshield, 2 Mason, 151,	716
Lee v. Selleck, 33 N. Y. 615,	728	Le Roy, etc., R. Co. v. Sidell, 66 Fed. Rep. 27,	1282
Lee v. Sellers, 81½ Pa. St. 473,	1640	Leser v. Glaser, 32 Kan. 546,	1857, 1858
Lee v. Supervisors, 58 Mich. 330,	1471	Lesley v. Rosson, 39 Miss. 368,	635
Lee v. West, 47 Ga. 311,	2177	Leslie v. Conway, 59 Cal. 442,	2240
Lee Co. v. Rogers, 7 Wall. 181,	1524	Leslie v. Fitzpatrick, L. R. 3 Q. B. D. 229,	1807
Lee and Company's Bank, In the Matter of, 21 N. Y. 9,	2131	Leslie v. Lorillard, 110 N. Y. 519,	1237, 1248, 1268, 1981, 2029, 2036, 2037, 2065, 2074, 2076
Leeds, Duke of, v. Earl of Amherst, 2 Phil. Ch. 117,	1019	Leslie v. Smith, 32 Mich. 64,	99
Leeds v. Little, 42 Minn. 414,	143, 2230	Lessee of Sylar v. Eckhart, 1 Binney, 378,	850
Leeds v. Metropolitan Gas Light Co., 90 N. Y. 26,	365	Lessley v. Phipps, 49 Miss. 790,	871, 891, 2157
Leedy v. Nash, 67 Ind. 311,	1076	Lesson v. Mass. Ass'n., 23 N. Y. Supl. 294,	544, 578
Leeming v. Snaith, 16 Q. B. 275,	111	Les Successeurs D'Arles v. Freedman, 53 N. Y. Superior, 518,	161
Leeson v. Anderson, 99 Mich. 247,	520	Lester v. Bowman, 39 Iowa, 611,	597
Leete v. State Bank, 115 Mo. 184,	1707	Lester v. Connelly, 46 La. 340,	1742
Le Fevre v. Le Fevre, 4 Serg. & Rawle, 241,	635	Lester v. Foxcroft, 1 White & Tudor's Lead. Cas. Eq. 1038,	1103
Lefever v. Lefever, 30 N. Y. 27,	1334	Lester v. Foxcroft, 1 Lead. Cas. Eq. 1027,	834, 837
Leftwich v. Berkeley, 1 H. & M. 61,	830	Lester v. Garland, 15 Ves. 248,	761, 764
Legal Tender Cases, 12 Wall. 457,	392, 2118	Lester v. Georgia, etc., R. Co., 90 Ga. 802,	1435
Legard v. Hodges, 1 Ves. Jur. 477,	1631	Lester v. Jewett, 11 N. Y. 453,	115, 2182
Leggatt v. Sands Brewing Co., 60 Ill. 158,	348	Lester v. Jewett, 12 Barb. 502,	214
Leggate v. Clark, 111 Mass. 308,	1812	Lester v. Mayor, 29 Md. 415,	440, 804
Leggatt v. Leggatt, 14 Mont. 104,	1031	Lester v. Palmer, 4 Allen, 145,	233
Legge v. Harlock, 12 Q. B. 1015,	758	Lester v. Union Manufacturing Co. 1 Hun, 238,	554
Leggett v. Banking Co., 1 Saxton Ch. —, 23 Am. Dec. 746, note,	1231	Lester v. Webb, 1 Allen (Mass.), 34,	1351, 1358
Le Grand v. Eufaula Nat. Bank, 81 Ala. 123,	1749	Letcher v. Bank, 1 Dana (Ky.), 82,	537
Lehigh, etc., Iron Co. v. Bamford, 150 U. S. 665,	989	Leuckhart v. Cooper, 3 Bing. N. Car. 99,	922
Lehigh Valley R. Co. v. McFarlan, 31 N. J. Eq. 706,	2117	Levan v. Milholland, 114 Pa. St. 49,	1779
Lehigh Valley, etc., Co. v. Miller, 59 Fed. Rep. 483,	545, 558	Levan v. Sternfeld, 55 N. J. Law, 41,	384, 414
Lehigh Water Co.'s Appeal, 102 Pa. St. 515,	1577	Levene v. Rabitte, 2 N. Y. Supl. 389,	145
Lehigh Water Co. v. Easton, 121 U. S. 388,	2116	Levering v. Shockey, 100 Ind. 558,	43
Lehman v. Collins, 69 Ala. 127,	415	Lvey v. New York Cent., etc., Co., 24 N. Y. Supl. 124,	1270
Lehman v. Marshall, 47 Ala. 362,	922	Levi v. Booth, 58 Md. 305,	1706
Lehman v. Schmidt, 87 Cal. 15,	781	Levi v. Karrick, 13 Iowa, 344,	532
Lehnlof v. Cope, 122 Ill. 317,	430	Levi v. Lynn, etc., R. Co., 11 Allen, 300,	274
Leicester v. Rose, 4 East, 372,	1637, 1638	Levi v. Welsh, 45 N. J. Eq. 867,	1661
Leichtweiss v. Treskow, 21 Hun (N. Y.), 487,	1807	Levick v. Brotherline, 74 Pa. St. 149,	997
Leigh v. Patterson, 8 Taunt. 540,	498, 2221	Leviston v. Junction R. Co., 7 Ind. 597,	550
Leigh v. Mobile R. Co., 58 Ala. 165,	170	Levy v. Brush, 45 N. Y. 589,	645
Leighton v. Sargent, 27 N. Y. 460,	796, 797	Levy v. Green, 8 E. & B. 575,	304
Leiper's Appeal, 108 Pa. St. 377,	1755	Levy v. Spencer, 18 Colo. 532,	1976
Lemmon v. Hanley, 23 Texas, 219,	965	Levy v. Walker, L. R. 10 Ch. Div. 436,	2046
Lemon v. Graham, 131 Pa. St. 447,	180	Levy v. Yates, 8 A. & E. 129,	1912
Lemon v. Groskopf, 22 Wis. 447,	1931	Lewystein v. Whitman, 55 Ala. 345,	477
Lemonius v. Mayer, 71 Miss. 514,	1927	Le Warne v. Meyer, 38 Fed. 191,	1246
Lempriere v. Lange, L. R. 12 Ch. D. 675,	1805	Lewis, <i>In re</i> , Appeal of, 55 Mich. 340,	1764, 1769
Le Neve v. Le Neve, 2 White & T. Lead. (Cas. Eq., pt. 1, p. 109,	—	Lewis, Succession of, 45 La. Ann. 833,	1692
Lengle v. Smith, 48 Mo. 276,	2252	Lewis v. Alexander, 51 Texas, 578,	1895
Lenhart v. Ream, 74 Pa. St. 59,	1786	Lewis v. Burr, 2 Car. Cas. 195,	767
Lenoir v. Moore, 61 Miss. 400,	400, 832	Lewis v. Cocks, 23 Wall. (U. S.) 466,	2256
Lent v. Padelford, 10 Mass. 230,	2210	Lewis v. Davison, 29 Gratt. 216,	452
Leonard v. Baudry, 68 Mich. 312,	506	Lewis v. Great Western R. Co., 5 Hurl. & N. 867,	1967
Leonard v. Burlington, etc., Loan Assn., 55 Iowa, 594,	1314	Lewis v. Greider, 49 Barb. 606,	338
Leonard v. Canton, 35 Miss. 189,	460	Lewis v. Grimes, 7 J. J. Mash. 336,	680
Leonard v. Carter, 36 Wis. 607,	95	Lewis v. Hadley, 36 Ill. 433,	695
Leonard v. City of Canton, 35 Miss. 189,	1499	Lewis v. Headley, 36 Ill. 433,	710
Leonard v. Crane, 147 Ill. 52,	1427	Lewis v. Kerr, 17 Iowa, 73,	444
Leonard v. Kessler, 50 Ohio St. 444,	16		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Lewis v. Latham, 74 N. Car. 283,	1902	Lindsay v. Cusimano, 10 Fed. Rep. 302,	
Lewis v. Lewis, 5 Ore. 169,	1085	Lindsay v. Glass, 119 Ind. 301,	972
Lewis v. Lewis, 5 Rich. Law, 12,	367	Lindsay v. McCormack, 2 A. K. Marsh.	
Lewis v. Lewis, 3 Strobb. 530,	186	(Ky.) 229,	1524
Lewis v. Lewis Lumber Co., 156 Pa. St.		Lindsay v. Pettigrew, 5 S. D. 500,	2206
217,	595, 602	Lindsay v. Warnock, 93 Ga. 619,	1112
Lewis v. McCabe, 49 Conn. 141,	170	Lindsay Petroleum Co. v. Hurd, L. R. 5	
Lewis v. McElvain, 16 Ohio, 347,	2120	C. F. 221,	1009, 1020
Lewis v. McReavy, 7 Wash. 294,	266	Lindsey v. City of Philadelphia, 2 Phila.	
Lewis v. Overby, 28 Gratt. 627,	20	212,	1984
Lewis v. Pima County, 155 U. S. 54,	1541	Lindsey v. Rutherford, 17 B. Mon. (Ky.)	
Lewis v. Prendergast, 39 Minn. 302,	1126, 1144	245,	1891
Lewis v. Reichy, 27 N. J. Eq. 240,	1175	Lindsey v. Stone, 123 Mass. 332,	709
Lewis v. Rountree, 78 N. Car. 323,	345	Lindsey v. Van Cortlandt, 67 Hun, 145,	1664
Lewis v. Tilton, 64 Iowa, 220,	1385	Lindsley v. Chicago, etc., Ry. Co., 36	
Lewis v. Trickey, 20 Barb. 337,	775	Minn. 539,	1958
Lewis v. Yale, 4 Fla. 415,	1167	Lingenfelder v. Wainwright Brewing Co.,	
Lewisville Natural Gas Co. v. State, 135		103 Mo. 578,	187, 199
Ind. 49,	1483, 1573	Link v. Clemmens, 7 Blkf. (Ind.) 479,	2098
Lewy v. Crawford, 5 Texas Civil App.		Link v. Germantown Building Associa-	
293,	1940	tion, 89 Pa. St. 15,	1608, 1620
Lexington, City of, v. Butler, 14 Wall. 282,	1342, 1524	Link v. Page, 72 Texas, 592,	1006
Lexington, City of, v. McQuillan's Heirs,		Linkauf v. Lombard, 137 N. Y. 417,	1248, 1264
9 Dana, 513,	1542	Linn v. Bruce, 2 H. Bl. 317,	526
Lexington R. Co. v. Chandler, 13 Metc.		Linn v. Lindertho, 40 Ill. App. 320,	785
311,	155	Linn v. Sigsbee, 67 Ill. 75,	2031, 2039
Libbey v. Elsworth, 97 Cal. 316,	1468	Linney v. Wood, 66 Texas, 22,	901, 1925
Libby v. Hopkins, 104 U. S. 303,	438	Lins v. Lendhardt, 127 Mo. 271,	2286
Lidderdale v. Duke of Montrose, 4 T. R.		Linscott v. Buck, 33 Maine, 530,	1157
248,	2084	Linton v. Crosby, 54 Iowa, 478,	1735
Lide v. Hadley, 36 Ala. 627,	1122	Linton v. Porter, 31 Ill. 107,	354, 358
Liebes v. Steffy (Ariz.), 32 Pac. Rep. 261,	1683, 1690	Linton v. Williams, 25 Ga. 391,	688
Liening v. Gould, 13 Cal. 598,	189	Linvile v. State, 130 Ind. 210,	2248
Liesemer v. Burg (Mich.), 63 N. W. Rep.		Lion v. McGlory, 106 Cal. 623,	1005
999,	468	Lippincott v. Shaw Carriage Co., 25 Fed.	
Life and Fire Ins. Co. v. Mechanic Fire		Rep. 577,	1366
Ins. Co., 7 Wend. (N. Y.) 31,	1343, 1344	Liscomb v. Nichols, 6 Colo. 290,	681
Life Association v. Goode, 71 Texas, 90,	970	List v. Wheeling, 7 W. Va. 501,	1621
Life Ins. Co. v. Terry, 15 Wall. 580,	119	Lister v. Hodgson, L. R. 4 Eq. 30,	253
Ligare v. City of Chicago, 139 Ill. 46,	1557	Lister, etc., Works v. Pender, 74 Md. 15,	544
Liggett v. Shira, 159 Pa. St. 350,	1084	Lillie v. Dunbar, 62 Wis. 198,	638
Liggins v. Inge, 7 Bing. 682,	641	Litchfield v. Ballou, 114 U. S. 190,	
Lightfoot v. Bass, 8 Lea (Tenn.), 350,	1698		361, 1516, 1539
Lightfoot v. Tenant, 1 Bos. & P. 551,	1862	Litchfield v. Hutchinson, 117 Mass. 195,	990
Lightly v. Clouston, 1 Taunt. 112,	781	Littell v. Nichols, Hardin, 66,	381, 405
Ligonier, Town of, v. Ackerman, 46 Ind.		Little v. Banks, 77 Hun, 511,	860
552,	804	Little v. Bowers, 134 U. S. 547,	463
Lilly v. Hays, 5 A. & E. 548,	237, 240	Little v. Paddleford, 13 N. H. 167,	421
Lilly v. Person, 168 Pa. St. 219,	142	Little v. Phenix Bank, 2 Hill (N. Y.), 425,	451
Lime Works v. Dismukes, 87 Ala. 344,	1402	Little v. Thurston, 58 Maine, 86,	1146
Linch v. Paris Lumber Co., 80 Tex. 23,		Little Rock v. National Bank, 98 U. S.	
	127, 136, 144, 372	308,	2121
Lincoln v. Field, 54 Ark. 471,	872	Little Rock, etc., R. Co. v. Miles, 13 Am.	
Lincoln v. Iron Co., 103 U. S. 412,	1499	& Eng. R. Cas. 10,	1432
Lincoln v. Little Rock Granite Co., 56		Little Rock, etc., R. Co. v. Perry, 37 Ark.	
Ark. 405,	2189	164,	1316
Lincoln v. Quynn, 68 Md. 299,	165	Littleton v. Smith, 119 Ind. 230,	1780
Lincoln v. Wilder, 29 Maine, 169,	884	Litton v. Baldwin, 8 Humph. (Tenn.) 210,	1699, 1750
Lincoln v. Wright, 4 De Gex & J.	681	Litz v. Goosling (Ky.), 19 S. W. Rep. 527,	1108
Lincoln, etc., Associations v. Graham, 7		Lively, The, 1 Gall. 315,	506
Neb. 173,	1612	Liverpool v. Wright, 28 Law J. Ch. 868,	2084
Line v. Nelson, 33 N. J. Law, 358,	519, 541	Liverpool Borough Bank v. Eccles, 4 H. &	
Linehan v. City of Cambridge, 109 Mass.		N. 138,	688
212,	1473	Liverpool, etc., Insurance Co. v. Hunt, 11	
Liness v. Hessing, 44 Ill. 113,	2081	La. Ann. 623,	1326
Linde v. Budd, 2 Paige (N. Y.), 191,	1779	Liverpool Ins. Co. v. Massachusetts, 10	
Lindenmuller v. People, 33 Barb. (N. Y.)		Wall. (U. S.) 566,	2058
548,	2094	Liverpool Steam Co. v. Phenix Ins. Co.,	
Linder v. Carpenter, 62 Ill. 309,	2083	129 U. S. 397,	696, 713, 740, 1958
Linderman v. Farquharson, 101 N. Y.		Liverpool, etc., Steam Co. v. Suiter, 17	
434,	1653	Fed. Rep. 695,	938
Linderman v. Pomeroy, 142 Pa. St. 168,	194	Livesey v. Omaha Hotel Co., 5 Neb. 50,	1322
Lindersmith v. South Missouri Land Co.,		Live Stock Assn. v. Levy, 54 N. Y. Super.	
31 Mo. App. 258,	779	Ct. 32,	2076
Lindley v. Groff, 37 Minn. 338,	893	Livingstone v. Ackeston, 5 Cow. 531,	268
Lindley v. Kelley, 42 Ind. 294,	637	Livingston v. Anderson, 30 Fla. 117,	2215
Lindley v. Lacey, 17 C. B. (N. S.) 578,	46	Livingston v. Bishop, 1 John. 290,	574, 575
Lindley v. O'Reilly, 50 N. J. Law, 636,	720	Livingston Co. v. First National Bank,	
Lindo v. Lindo, 1 Beav. 496,	566	128 U. S. 102,	1461
Lindon v. Hooper, Cowp. 414,	781		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Livingston v. Livingston, 2 Johns. Ch. 237,	1207, 1653	Long v. Thayer, 150 U. S. 520,	444
Livingston v. Lynch, 4 Johns. 573,	1254	Long v. Towl, 42 Mo. 545,	2035
Livingston v. Rogers, 1 Caines, 583,	214	Long v. Walker, 105 N. Car. 90,	2152
Livingston v. Stickles, 7 Hill, 255,	869	Long v. White, 42 Ohio St. 59,	643
Livingston v. Story, 11 Pet. 351,	867	Long v. Williams, 74 Ind. 115,	1817
Livingston v. Tompkins, 4 Johns. Ch. 415,	433	Longfellow v. McGregor (Minn. 1895), 63	
Llano Improvement Co. v. Cross, 5 Texas		N. W. Rep. 1032,	570
Civ. App. 175,	1762	Longnecker v. Shields, 1 Colo. App. 264,	461
Lloyd v. Conover, 25 N. J. Law, 47,	621	Longridge v. Dorville, 5 B. & Al. 117,	213
Lloyd v. Fulton, 91 U. S. 479,	618	Longstreet v. Rea, 52 Ala. 195,	835
Lloyd v. Guibert, L. R. 1 Q. B. 115,	695, 739	Longworth v. Higham, 89 Ind. 352,	475
Lloyd v. Gurdon, 2 Swanst. 180,	1872	Longworth v. Taylor, 1 McLean, 395,	1151
Lloyds v. Harler, L. R. 16 Ch. 290,	2184	Lonsdale v. Brown, 4 Wash. C. C. 148,	204
Lloyd v. Hollenback, 98 Mich. 203,	848	Looby v. West Troy, 24 Hun, 78,	522
Lloyd v. Lynch, 28 Pa. St. 419,	467	Loomis v. Bragg, 50 Conn. 228,	165
Lloyd v. Preston, 146 U. S. 630,	1916	Loomis v. Newhall, 15 Pick. 159,	
Loach v. Farnum, 90 Ill. 367,	951	183, 192, 193, 221, 262	
Loaiza v. Superior Court, 85 Cal. 11,	2	Loomis v. Ruck, 56 N. Y. 462,	1653
Loan, etc., Bank v. Miller, 39 S. Car. 175,	518	Loper v. United States, 13 Ct. of Cl. 269,	868
Loan Association v. Topeka, 21 Wall.		Lorah v. Nissley, 156 Pa. St. 329,	19
(U. S.) 655,	2143	Loranger v. Jardine, 56 Mich. 518,	1896
Lobdell v. Hopkins, 5 Cowen, 516,	500, 2198	Lord v. Parker, 3 Allen (Mass.), 127,	1754
Lobdell v. Lobdell, 36 N. Y. 327,	232, 627	Lord v. Underdunk, 1 Sandf. Ch. 46,	845
Lobdell v. Merchants', etc., Bank, 33		Lord v. Wheeler, 1 Gray, 282,	
Mich. 408,	2233	294, 489, 2226, 2227	
Lock v. Etherington, 1 Sid. 265,	550	Lord Say and Sele's Case, 10 Mod. 40,	95, 892
Lock v. Furze, 19 C. B. (N. S.) 96,	369	Lord Walpole v. Lord Orford, 3 Ves. Jr.	
Locke v. Sioux City & P. R., 46 Iowa, 109,	855	402,	1197
Locke v. Towler, 41 Ill. App. 66,	1927	Loredo v. Loury (Texas App.), 20 S. W.	
Lockett v. Usry, 28 Ga. 345,	2152	Rep. 89,	461
Lockwood v. Barnes, 3 Hill, 128,	648	Lorents v. Lorentz, 14 W. Va. 637,	1179
Lockwood v. Doane, 107 Ill. 235,	2252	Lorie v. Adams, 51 Kan. 698,	1859
Lockwood v. Robbins, 125 Ind. 398,	785	Lorillard v. Clyde, 122 N. Y. 498,	
Lockwood v. Wabash R. Co., 122 Mo. 86,	1506, 1507, 1581	236, 240, 270, 271, 872, 946, 948	
Lockwood v. White, 65 Vt. 466,	1089	Lorillard v. Silver, 36 N. Y. 578,	170
Lodge v. Lee, 6 Cranch, 237,	1174	Loring v. Alden, 3 Metc. (Mass.) 576,	954
Loeb v. McCullough, 78 Ala. 533,	1744	Loring v. Blake, 106 Mass. 592,	557
Lofgren v. Peterson, 54 Minn. 343,	1005	Loring v. Boston, 7 Metc. 409,	61, 1329
Loffin v. Crossland, 94 N. Car. 137,	1741	Loring v. Cooke, 3 Pick. 48,	399
Loftus v. Fischer, 106 Cal. 616,	1053	Loring v. Halling, 15 Johns. 120,	765
Logan v. Austin, 1 Stew. (Ala.) 476,	517	Los Angeles Association v. Phillips, 56	
Logan v. Berkshire Apartment Co., 20		Cal. 539,	2216
N. Y. Supl. 368,	374	Losey v. Bond, 94 Ind. 67,	1779
Logan v. Berkshire Assn., 19 N. Y. Supl.		Loth v. Friedrich, 95 Mich. 598,	565
164,	132	Loth v. Mothner, 53 Ark. 116,	457
Logan v. Pyne, 43 Iowa, 524,	1504	Loucheim v. First Nat. Bank, 98 Ala. 521,	1003
Logan v. Simmons, 3 Ired. Eq. (N. Car.)		Loud v. Citizens', etc., Insurance Co., 2	
487,	1727	Gray, 221,	317
Logan v. Wallis, 76 N. Car. 416,	781	Loud v. Loud, 4 Bush (Ky.), 453,	2010
Logan v. Wienholt, 1 Cl. & Fin. 611,	618	Loud v. Pomona, etc., Co., 153 U. S. 564,	
Logansport, City of, v. Dykeman, 116 Ind.		1148, 1166	
15,	1513	Lough v. Michael, 37 W. Va. 679,	1062
Loker v. Brookline, 13 Pick. 343,	1498	Loughborough v. McNevin, 74 Cal. 250,	411
Lomax v. Smyth, 50 Iowa, 223,	206	Loughbridge v. Iowa Life Ins Co., 84 Iowa,	
Lombard v. Ruggles, 9 Maine, 62,	635	141,	381
Lomerson v. Johnson, 13 Atl. Rep. 8,	1830	Louisiana v. Jumel, 107 U. S. 711,	2092
Lomerson v. Johnston, 47 N. J. Eq. 312,	1830	Louisiana v. Mayor, 109 U. S. 285,	774
London Gas Co. v. Chelsea, 8 C. B. (N. S.)		Louisiana v. New Orleans, 102 U. S. 203,	2153
215,	117	Louisiana v. Wood, 102 U. S. 294,	361, 732, 1539
London Gas Co. v. Nichols, 2 C. & P. 365,	810	Louisville, City of, v. Hennig, 1 Bush, 381,	460
Loneragan v. Buford, 143 U. S. 581,	22-3	Louisville, City of, v. Muldoon, 94 Ky.	
Loneragan v. Stewart, 46 Ill. 233,	913	462,	2193
Loney v. Bailey, 43 Md. 10,	519, 524	Louisville, City of, v. Murphy, 86 Ky. 53,	1470
Long's Appeal, 77 Pa. St. 151,	621	Louisville v. Portsmouth Sav. Bank, 104	
Long v. City of Duluth, 49 Minn. 280,	1504	U. S. 469,	762
Long v. Crosson, 119 Ind. 3,	1724	Louisville, City of, v. President, etc., of	
Long v. Hartwell, 34 N. J. Law, 116,	691	University of Louisville, 15 B. Mon.	
Long v. Hickingbottom, 28 Miss. 772,	354, 357, 358	(Ky.) 642,	2142
Long v. Long, 142 N. Y. 545,	1781	Louisville, City of, v. Zanone, 1 Metc.	
Long v. Long, 118 Ill. 638,	1191	(Ky.) 151,	799, 808
Long v. Long, 57 Iowa, 497,	543, 571	Louisville Asphalt, etc., Co. v. Lorick, 29	
Long v. Miller, 93 N. Car. 233,	478	S. C. 533,	684
Long v. Millar, L. R. 4 C. P. Div. 450, 684,	691	Louisville Gas Co. v. Clay, 65 Ky. 363,	1756
Long v. New York, etc., R. Co., 50 N. Y.		Louisville R. Co. v. Alexander (Ky. 1894),	
76,	64	27 S. W. Rep. 981,	1724, 1748, 1753
Long v. Pennsylvania R. Co., 147 Pa. St.		Louisville, etc., R. Co. v. Barkhouse, 100	
243,	275, 276	Ala. 543,	921
Long v. Ramsay, 1 Serg. & R. 72,	17	Louisville, etc., R. Co. v. Bodenschatz,	
Long v. Straus, 124 Ind. 84,	482	etc., Stone Co., 141 Ind. 251,	1115, 2272
		Louisville, etc., R. Co. v. Boney, 117 Ind.	1455
		501,	

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Louisville & N. R. Co. v. Boykin, 76 Ala. 560,	1117	Lowry v. Dillman, 59 Wis. 197,	1869, 1930
Louisville, New Albany & Chicago Ry. Co. v. Buck, 116 Ind. 566,	1976	Lowry v. Russell, 8 Pick. 360,	933
Louisville R. Co. v. Carson, 151 Ill. 444,	1276	Lowry v. Tew, 3 Barb. Ch. 407,	844
Louisville, etc., R. Co. v. Commonwealth (Ky. 1895), 31 S. W. Rep. 476,	1431, 1432	Loyd v. Lee, 1 Strange, 94,	214
Louisville, etc., R. Co. v. Donnegan, 111 Ind. 179,	2249	Loyd v. Malone, 23 Ill. 43,	1034
Louisville, etc., R. Co. v. Faylor, 126 Ind. 126,	1962	Lucas v. Allen, 80 Ky. 681,	2004, 2079
Louisville N. A. & C. R. Co. v. Herr, 135 Ind. 591,	1816	Lucas v. Chamberlain, 8 B. Mon. 276,	615
Louisville & N. R. Co. v. Hopkins Co., 87 Ky. 605,	986	Lucas v. Commerford, 3 Brown Ch. 166,	1101, 1203
Louisville, etc., Ry. Co. v. McVay, 98 Ind. 391,	1281	Lucas v. Godwin, 3 Bing. (N. Car.) 737,	139
Louisville, etc., R. Co. v. Ohio, etc., Con- tract Co., 57 Fed. Rep. 42,	2257	Lucas v. Smith, 42 Ind. 103,	2244
Louisville, etc., R. Co. v. Ohio, etc., Imp. Co., 69 Fed. Rep. 431,	1429	Luce v. Foster, 42 Neb. 818,	1861
Louisville, etc., R. Co. v. Palmes, 109 U. S. 244,	2140	Lucisco Oil Co. v. Brewer, 66 Pa. St. 351,	150, 887
Louisville, etc., R. Co. v. Power, 119 Ind. 260,	900	Luckett v. Williamson, 37 Mo. 388,	658
Louisville, etc., R. Co. v. Schmidt, 106 Ind. 73,	2166	Ludden v. Hazen, 31 Barb. 650,	170
Louisville, etc., R. Co. v. Steele, 6 Ind. App. 183,	1968	Luders v. Anstrey, 4 Ves. 501,	226
Louisville, etc., R. Co. v. Weaver, 9 Lea, 88,	737	Luddington v. Bell, 77 N. Y. 138,	192, 543
Louisville, etc., R. Co. v. Widman, 9 Ind. App. 190,	1967	Luddington v. Miller, 38 N. Y. Super. Ct. 478,	554
Louisville Water Co. v. Clark, 143 U. S. 1,	2132, 2136	Luddington v. North, 141 Pa. St. 184,	523
Lovatt v. Hamilton, 5 M. & W. 639,	125	Ludlow v. Bowne, 1 Johns. (N. Y.) 1,	2021
Love v. Harvey, 114 Mass. 80,	1914	Ludlow v. McCrea, 1 Wend. 228,	815, 818
Love v. Mabury, 59 Cal. 484,	2213	Ludlow v. O'Neil, 29 Ohio St. 181,	417
Love v. Mayor, 40 N. J. Law, 456,	2126	Luebe v. Thorpe, 54 N. W. Rep. 41,	1709
Love v. Miller, 104 N. C. 582,	345	Luey v. Bundy, 9 N. H. 298,	2257
Love v. Mining Co., 32 Cal. 639,	1058	Lugar v. Swayze, 21 N. Y. Supl. 1101,	1658, 1705
Love v. Palmer, 7 Johns. (N. Y.) 159,	1975	Lukens' Appeal, 143 Pa. St. 386,	209
Love v. Sortwell, 124 Mass. 446,	1119	Lukens v. Freund, 27 Kan. 664,	347
Love v. Welch, 97 N. C. 254,	630	Lum v. McEwen, 56 Minn. 278,	1973
Love v. Wells, 25 Ind. 503,	2108	Lumley v. Wagner, 1 DeG., M. & G. 604,	2073, 2265
Lowejoy v. Murray, 3 Wall. 1,	543	Lumley v. Wagner, 5 DeGex & S. 485,	2072
Lowejoy v. Whipple, 18 Vt. 379,	2096, 2112	Lundahl v. Hansen, 147 Ill. 504,	996
Lowell v. St. Louis Ins. Co., 111 U. S. 264,	487	Lundberg v. Northwestern Elevator Co., 42 Minn. 37,	201
Lovelock v. Franklyn, 8 Q. B. 371,	486, 488	Lunday v. Pierson, 67 Texas, 233,	431
Lovett v. Adams, 3 Wend. 380,	171	Lungerhausen v. Crittenden (Mich.), 61 N. W. Rep. 270,	101
Lovett v. Steam Saw Mill Association, 6 Paige, 54,	1229	Lungstrass v. German Ins. Co., 48 Mo. 201,	66, 76
Low v. Anderson, 61 Iowa, 476,	1723	Lupin v. Marie, 6 Wend. 77,	166
Low v. Connecticut, etc., Railroad, 45 N. H. 370,	782, 1315	Lupton v. Freeman, 82 Mich. 638,	446
Low v. Foss, 121 Mass. 531,	8	Lurch v. Holder (N. J. Eq. 1893), 27 Atl. Rep. 81,	973, 992
Low v. Railroad Co., 52 Cal. 53,	1227	Luse v. Deitz, 46 Iowa, 205,	1190
Lowber v. Bangs, 2 Wall. 728,	956	Luse v. Ismuths Railway Co., 6 Ore. 125,	1368
Lowber v. Connit, 36 Wis. 176,	92	Lush v. Foster, 44 N. J. Law, 378,	1549
Lowe v. Brown, 22 Ohio St. 463,	1094	Lusted v. Chicago, etc., Railroad, 71 Wis. 391,	588
Lowe v. Harris, 112 N. Car. 472,	2121	Luthy v. Waterbury, 140 Ill. 664,	354
Lowe v. Harwood, 139 Mass. 133,	487, 488, 492	Luttrell v. Martin, 112 N. C. 503,	1283
Lowe v. Lehman, 15 Ohio St. 179,	48, 926, 928	Lutz v. City of Crawfordsville, 109 Ind. 463,	1585
Lowe v. Peers, 4 Burr. 2225,	179	Luzander v. Richmond, 128 Ind. 344,	1114
Lowe v. Trundle, 78 Va. 65,	1876	Lyde v. Railroad Co., 36 Beav. 10,	1254
Lowe v. Waller, Doug. (Eng.) 736,	1944	Lydick v. Holland, 83 Mo. 703,	842
Lowell v. Gage, 38 Maine, 35,	40	Lydick v. Railroad Co., 17 W. Va. 427,	1179
Lowell v. Lewis, 1 Mason, 182,	233	Lyle, The Tom, 48 Fed. Rep. 690,	470
Lowell Five Cents Savings Bank v. Win- chester, 3 Allen (Mass.), 109, 1358, 1491,	1515	Lyle v. Jackson County, 23 Ark. 63,	98
Lower v. United States, 91 U. S. 536,	34	Lyles v. Lescher, 108 Ind. 882,	877
Lower v. Winters, 7 Cow. 263,	635	Lyle v. Shinnebarger, 17 Mo. App. 66,	639, 802
Lowey v. Granite State Assn., 28 N. Y. Supl. 560,	1894	Lyman v. Babcock, 40 Wis. 503,	754
Lowman v. Sheets, 124 Ind. 416,	592, 655	Lyman v. City of Lincoln, 33 Neb. 794,	1493
Lowndes v. Chisholm, 2 McCord Eq. 455,	1071	Lyman v. Clarke, 9 Mass. 235,	566
Lowrance v. Robertson, 10 S. Car. 8,	366	Lyman v. Gedney, 114 Ill. 388,	120, 397, 499, 1163
Lowrey v. Murrell, 2 Port. (Ala.) 280,	446	Lyman v. Insurance Co., 2 Johns. Ch. 630,	1080
Lowrey v. Robertson, 141 Pa. St. 189,	194	Lyman v. Lauderbaugh, 75 Iowa, 481,	461
Lowry v. Bourdieu, Doug. 467,	800, 1870	Lyman v. Rasmussen, 27 Minn. 384,	438
Lowry v. Buffington, 6 W. Va. 249,	846	Lyman v. Robinson, 14 Allen, 242,	55
		Lynch v. Bogy, 19 Mo. 170,	186
		Lynch v. Henry, 75 Wis. 631,	12
		Lynch v. Jennings, 43 Ind. 276,	120, 378
		Lynch v. Onondaga Salt Co., 64 Barb. 558,	779
		Lynch v. Rosenthal (Ind. 1896), 42 N. E. Rep. 1103,	1955
		Lynch v. Postlethwaite, 7 Martin (La.), 69,	695

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Lynchburgh Insurance Co. v. West, 76 Va. 575,	311, 313	McCandless v. Richmond, etc., R. Co., 38 S. Car. 103,	2133
Lynchburg & D. R. Co. v. Board, etc., 109 N. Car. 159,	1516	McCandlish v. Keen, 13 Gratt. 615,	430, 479
Lynde v. Budd, 2 Paige Ch. (N. Y.) 191,	1793	McCann v. McLonnan, 3 Neb. 25,	1861
Lynde v. Winnebago Co., 16 Wall. 6,	1524	McCann v. Pennie, 100 Cal. 547,	2177, 2216
Lyndon Mill Co. v. Lyndon Literary and Biblical Inst., 63 Vt. 581,	1349, 1350	McCann v. Preston, 79 Md. 223,	1006, 1007
Lynn v. Baltimore, etc., R. Co., 60 Md. 404,	134	McCants v. Bee, 1 McCord Eq. (S. Car.) 383,	2284
Lynn v. Bruce, 2 H. Bl. 317,	508, 525	McCarger v. Rood, 47 Cal. 138,	844
Lynn v. Smith, 35 Hun. 275,	789	McCarn v. Wilcox (Mich. 1895), 63 N. W. Rep. 978,	1035
Lyon v. Culbertson, 83 Ill. 33,	913, 1914	McCarren v. McNulty, 7 Gray, 139,	131, 160
Lyon v. George, 44 Md. 295,	909	McCartee v. Orphan, etc., Society, 9 Cow. (N. Y.) 437,	1672
Lyon v. Hersey, 103 N. Y. 261,	170	McCartee v. Teller, 2 Paige (N. Y.), 511,	1715
Lyon v. Hussey, 82 Hun (N. Y.), 15,	1999	McCarthy v. Henderson, 138 Mass. 310,	1797
Lyon v. King, 11 Mete. (Mass.) 411,	649, 654	McCarthy v. Lavasche, 89 Ill. 270,	1434
Lyon v. Mitchell, 36 N. Y. 235,	1852, 1993	McCarthy v. Mayor, 96 N. Y. 1,	268
Lyon v. Rood, 12 Vt. 233,	1663	McCarthy v. Metropolitan Life Ins. Co., 162 Mass. 254,	1241
Lyon v. Strong, 6 Vt. 219,	2094, 2097	McCartney v. Glassford, 1 Wash. St. 579,	229
Lions v. Hodgen & Miller, 90 Ky. 280,	1915	McCarthy, Estate of, 53 Cal. 333,	2235
Lions-Thomas Hardware Co. v. Perry Stove Mfg. Co., 86 Texas, 143,	1390	McCarthy v. Beach, 10 Cal. 461,	2183
Lysaght v. Phillips, 5 Duer. 106,	569	McCarthy v. Hamilton, etc., Association, 61 Iowa, 287,	199
Lytch v. Ault, 7 Exch. 669,	537	McCarthy v. Roots, 21 How. (U. S.) 432,	828
Lytch v. Whichey, 21 La. Ann. 182,	2022	McCaughrin v. Williams, 15 S. Car. 505,	1151
Lytton v. Railway Co., 2 Kay & J. 394,	1122	McCaull v. Braham, 16 Fed. Rep. 37,	2072
Mc		McCelvy v. Noble, 13 Rich. (S. Car.) 330,	504
		McChesney v. Syracuse (Sup. 1883), 32 N. Y. Supl. 307,	1555
McAfee v. Covington, 71 Ga. 272,	2122, 2149	McClain v. Davis, 77 Ind. 419,	1816
McAfee v. Fisher, 64 Cal. 246,	438	McClanahan v. Williams, 136 Ind. 30,	1787
McAfee v. Glen, etc., Coke Co., 97 Ala. 709,	2182	McClary v. Lowell, 14 Vt. 116,	2099
McAleer v. Horsey, 35 Md. 439,	1007	McClatchie v. Haslam, 63 Law T. R. (N.S.) 376,	1832
McAlister v. Haden, 2 Camp. 438,	1944	McClave v. Paine, 49 N. Y. 561,	8
McAlister v. Sprague, 34 Me. 296,	544, 573, 574	McClave v. Thompson, 36 Hun. 365,	1388
McAllister v. Dennin, 27 Mo. 40,	542	McClay v. Hedge, 18 Iowa. 96,	135, 147, 148
McAllister v. Hoffman, 16 S. & R. (Pa.) 147,	1942, 1948	McClellan v. Sanford, 26 Wis. 595,	238, 655
McAllister v. Howell, 42 Ind. 15,	2044	McClellan v. Scott, 21 Wis. 81,	1879
McAllister v. Smith, 17 Ill. 328,	730	McClintock's Appeal, 71 Pa. St. 365,	640
McAlpin v. Woodruff, 11 Ohio St. 120,	369	McClintock v. Emick, 87 Ky. 160,	322, 328, 333
McAnally v. O'Neal, 56 Ala. 299,	1685	McCloskey v. City of Albany, 7 Hun. 472,	782
McAninch v. Laughlin, 13 Pa. St. 370,	995	McCloskey v. McCormick, 37 Ill. 66,	466
McAnnulty v. McAnnulty, 120 Ill. 26,	619, 958, 1712, 1716	McCluer v. Railroad Co., 13 Gray, 124,	1249
McArdle v. Irish Iodine and Marine Salts Mfg. Co., 15 Ir. C. L. 146,	2184	McCluney v. Jackson, 6 Gratt. 96,	452
McArthur v. Times Printing Co., 48 Minn. 319,	1310, 1312, 1313, 1316	McClure v. Briggs, 53 Vt. 82,	131, 134
McAuley v. Billenger, 20 Johns. 89,	255	McClure v. Jeffrey, 8 Ind. 79,	233
McBlain v. Cross, 25 Law T. R. (N. S.) 804,	684	McClure v. Maitland, 24 W. Va. 561,	978
McBlair v. Gibbes, 17 Howe, 232,	1306, 1554, 1904	McClure v. Missouri River, etc., R. Co., 9 Kan. 373,	1978
McBride v. Grand Rapids, 56 Mich. 95,	1508	McClure v. Otrich, 113 Ill. 320,	489, 694
McBride v. Bangs, 65 Texas, 174,	1681	McClure v. People's, etc., R. Co., 90 Pa. St. 209,	153, 260
McBride v. Grand Rapids, 47 Mich. 236,	1505	McClure v. Raben, 125 Ind. 139,	235
McBride v. Grand Rapids, 49 Mich. 239,	1505	McClure v. Secrist, 5 Ind. 31,	2229
McBratney v. Chandler, 22 Kan. 692,	1852, 1994	McClure v. Township of Osgood, 94 U. S. 429,	1526
McBryde v. Sayre, 86 Ala. 453,	1123	McClure v. Tp. of Oxford, 94 U. S. 429,	1516, 1529
McCabe v. Caner, 68 Mich. 182,	201	McClure v. Watertown Ins. Co., 90 Pa. St. 277,	896
McCabe v. Matthews, 155 U. S. 550,	1133	McClurg's Appeal, 58 Pa. St. 51,	2039, 2261, 2264
McCabe v. Shaver, 60 Mich. 25,	440	McClurg v. Kingsland, 1 How. 202,	1135
McCarg v. Heacock, 31 Ill. 476,	1033	McCollum v. Mutual, etc., Insurance Co., 55 Hun. 103,	813
McCall v. American Land Mortg. Co., 99 Ala. 427,	1654, 1740	McComb v. Donald, 82 Va. 903,	163
McCall v. Bushnell, 41 Minn. 37,	1007	McComb v. Kittredge, 14 Ohio, 343,	207
McCall v. Lenox, 9 S. & R. 302,	197	McComb v. Wright, 4 John. Ch. 659,	674
McCalley v. Otey, 90 Ala. 302,	383, 396, 415, 457	McCombs v. McGratten, 3 Houst. 35,	796
McCammon v. Cunningham, 108 Ind. 545,	1810	McConahey v. Grifley, 82 Iowa, 564,	654
McCampbell v. McCampbell, 2 Lea (Tenn.), 661,	1680	McCone v. Williams, 37 Ill. App. 591,	126, 127
McCandless v. Alleghany Bessemer Steel Co., 152 Pa. St. 139,	1953, 2090	McConihe v. New York R. Co., 20 N. Y. 495,	295
		McConnel v. Murphy, L. R. 5 Priv. C. App. 203,	111, 853
		McConnell's Appeal, 97 Pa. St. 31,	1685
		McConnell v. Brayner, 63 Mo. 461,	110, 631
		McConnell v. Jones, 19 Ind. 328,	840

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

McConnell v. Murphy, 20 Weekly Rep. 603,	306	McCullough v. Eagle Ins. Co., 1 Pick. 278,	76
McConnell v. New Orleans, 35 La. Ann. 273,	853	McCullough v. Moss, 5 Denio (N. Y.), 567,	1343
McConnell v. Street, 17 Ill. 253,	1033	McCullough v. State, 4 Wheat. 316,	392
McConnell v. Norfolk, etc., R. Co., 86 Va. 248,	738	McCully v. Pittsburgh R. Co., 32 Pa. St. 25,	261
McCoughey v. Jackson, 101 Cal. 265,	1477	McCune v. Belt, 45 Mo. 174,	828
McCord v. Blackwell, 31 S. Car. 125,	1683	McCurdy v. Breathitt, 5 B. Mon. (Ky.) 234,	1074
McCord v. Durant, 134 Pa. St. 184,	457	McCurdy v. Canning, 64 Pa. St. 39,	1767
McCorkell v. Karhoff, 90 Iowa, 545,	332	McCurdy v. Middleton, 82 Ala. 131,	478
McCormic v. Leggett, 8 Jones L. (N. Car.) 425,	1778	McDaniel v. Chicago, etc., R., 24 Iowa, 412,	734
McCormick's Appeal, 98 Am. Dec. 197,	644	McDaniel v. Springfield, etc., Co., 45 Mo. App. 273,	407
McCormick v. Basal, 46 Iowa, 235,	496	McDaniels v. Bank, 29 Vt. 230,	438
McCormick v. Blum, 4 Texas Civ. App. 9, 1741	1695	McDaniels v. Lapham, 21 Vt. 222,	522
McCormick v. Bottorf, 155 Pa. St. 334, 1679,	1695	McDaniels v. Whitney, 38 Iowa, 60,	890
McCormick v. Brown, 36 Cal. 434,	196	McDermott's Appeal, 108 Pa. St. 358,	1669
McCormick v. Cheevers, 124 Mass. 262,	635	McDermott v. French, 15 N. J. Eq. 78,	1766
McCormick v. Connolly, 2 Bay. (S. Car.) 401,	2181	McDermott v. Lycoming, etc., Ins. Co., 12 J. & S. 221,	117
McCormick v. Elston, 16 Ill. 204,	1948	McDermott v. Miners', etc., Bank, 100 Pa. St. 285,	1769
McCormick v. Hartley, 107 Ind. 248,	1048	McDill v. Gunn, 43 Ind. 315,	1183
McCormick v. McCormick, 1 Ind. App. 594,	792	McDill's Lessee v. McDill, 1 Dall. 63,	19
McCormick v. Mitchell, 57 Ind. 248,	475	McDole v. Purdy, 23 Iowa, 277,	120
McCormick v. Rusch, 15 Iowa, 127,	2154	McDonald v. Chisholm, 131 Ill. 273,	1354
McCormick Co. v. Martin, 32 Neb. 723,	343	McDonald v. Gray, 11 Iowa, 508,	2198
McCormick, etc., Co. v. Wilson, 39 Minn. 467,	897	McDonald v. Kellogg, 30 Kan. 170,	1066
McCormick, etc., Machine Co. v. Ches- rown, 33 Minn. 32,	132, 133	McDonald v. Liggett, 146 Pa. St. 460,	501
McCormick, etc., Machine Co. v. Richard- son, 89 Iowa, 525,	687	McDonald v. Matney, 21 Hun (N. Y.), 210,	2252
McCormick Harvesting Co. v. Brower, 88 Iowa, 607,	330	McDonald v. Mayor, etc., 68 N. Y. 23, 1508,	2242
McCormick Harvesting Machine Co. v. Russell, 86 Iowa, 556,	330	McDonald v. Mezes, 107 Cal. 492,	1468
McCormick Machine Co. v. Watson (S. Dak.), 54 N. W. Rep. 945,	353	McDonald v. McDonald, 5 Jones Eq. (N. C.) 211,	1185
McCoun v. Delaney, 3 Bibb, 46,	110	McDonald v. Minnick, 147 Ill. 651,	1105, 1140
McCoun v. New York, etc., R. Co., 50 N. Y. 176,	773, 774	McDonald v. Ortmann, 98 Mich. 40,	2173
McCoy v. Able, 131 Ind. 417,	2248	McDonald v. Unaka Timber Co., 88 Tenn. 38,	900
McCoy v. Archer, 3 Barb. 323,	355, 356	McDonough v. Hennepin, etc., Associa- tion (Minn. 1895), 64 N. W. Rep. 106,	1600
McCoy v. Barnes, 136 Ind. 378,	1720	McDonough v. Jolly, 165 Pa. St. 542,	2247
McCoy v. Cassidy, 96 Mo. 429,	182	McDougald v. Bellamy, 33 Ga. 411,	1435
McCoy v. Erie & Western Trans. Co., 42 Md. 498,	870	McDougall v. Provident, etc., Co., 64 Hun, 515,	118
McCracken v. City of San Francisco, 16 Cal. 591,	1508	McDowell v. Delap, 2 A. K. Marsh. 33,	680
McCracken v. Hayward, 2 How. (U. S.) 608,	2116, 2154	McDowell v. Lev, 35 Wis. 171,	237, 238
McCracken v. Pool, 10 La. Ann. 288,	2021	McDowell v. Lucas, 98 Ill. 459,	846, 1192
McCracken v. San Francisco, 16 Cal. 591,	783	McDuffee v. Sinnott, 119 Ill. 449,	1032
McCrae v. Purmort, 16 Wend. 460,	335	McElfresh v. Kirkendall, 36 Iowa, 224,	563
McCraith v. National, etc., Bank, 104 N. Y. 414,	596	McElhanny's Appeal, 61 Pa. St. 188,	1980
McCrary v. Ruddick, 33 Iowa, 521,	787	McElroy v. Hiner, 133 Ill. 156,	1023
McCray Refrig. Co. v. Woods, 59 Mich. 269,	336, 340	McElroy v. Ludlum, 32 N. J. Eq. 823,	652, 838
McCrea v. Marsh, 12 Gray, 211,	642	McElwain v. Willis, 9 Wend. 549,	27
McCrea v. Purmort, 16 Wend. 460,	196	McEvoy v. Loyd, 31 Wis. 142,	424
McCreary v. Davis (S. Car.), 22 S. E. Rep. 178,	227, 704	McEwen v. Shannon, 64 Vt. 583,	1128
McCreary v. Day, 119 N. Y. 1, 516, 532, 951,	952	McFadden v. Compagnie Generale Trans- atlantique (1837), — Fed. Rep. —,	297
McCreary v. Garvin, 39 S. Car. 375,	1272	McFadden v. Fritz, 90 Ind. 590,	1859
McCreary v. Green, 38 Mich. 172,	299	McFadden v. Missouri Pac. Ry. Co., 92 Mo. 343,	1958, 1966
McCraikart v. Pittsburgh, 88 Pa. St. 133,	460	McFadden v. Wilson, 96 Ind. 253,	1817
McCrillis v. Copp, 31 Fla. 100,	1104	McFarland v. Farmer, 42 N. H. 386,	699
McCrillis v. Hawes, 33 Maine, 566,	541	McFarland v. Pico, 8 Cal. 626,	385
McCrimmin v. Cooper, 27 Texas, 113,	1327	McFarlan v. Township, 93 Mich. 558,	461
McCroy v. Grandy, 92 Ga. 319,	1726	McFarlan v. Garber, 30 Ind. 151,	1634
McCroskey v. Ladd (Cal.), 28 Pac. Rep. 216,	418	McFarland v. Missouri, etc., R. Co., 125 Mo. 253,	580
McCroskey v. Ladd, 96 Cal. 455,	1143	McFarson's Appeal, 11 Pa. St. 503,	687
McCallis v. Thurston, 27 Vt. 596,	810	McGahey v. Virginia, 135 U. S. 662,	32, 2152, 2158, 2159
McCullough v. Ashbridge, 155 Pa. St. 166,	928	McGarry v. Roods, 73 Iowa, 363,	775, 793
McCullough v. Barr, 145 Pa. St. 459,	201	McGaughey v. Richardson, 145 Mass. 608,	193
		McGavock v. Puryear, 6 Coldw. (Tenn.) 34,	1933
		McGee v. McGee (Mich. 1895), 63 N. W. Rep. 763,	1021
		McGee v. McManus, 70 Cal. 553,	1129
		McGeehe v. Jones, 10 Geo. 127,	383
		McGeehe v. Lindsay, 6 Ala. 16,	1898

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

McGeorge v. Improvement Co., 57 Fed. Rep. 262,	1447	McKinney v. Hotel Co., 12 Heisk. 104,	1221
McGeragle v. Broemel, 53 N. J. Law, 59,	898	McKinney v. McCloskey, 8 Daly (N. Y.), 368,	652
McGhee v. Mathis, 4 Wall. (U. S.) 143,	2123	McKinney v. Springer, 3 Ind. 59,	898
McGiffin v. Baird, 62 N. Y. 329,	360	McKinstor v. Hitchcock, 19 Neb. 100,	514
McGill v. Hall (Texas 1894), 26 S.W. Rep. 132,	2233	McKinnon v. Gates, 102 Mich. 618,	2173
McGilvery v. Capen, 7 Gray, 523,	192	McKinnon v. McIntosh, 98 N. Car. 323,	345
McGinness v. Barton, 21 Iowa, 644,	266	McKinnon v. McKinnon, 5 C. C. A. 530; 56 Fed. Rep. 409,	1211
McGinniss v. Curry, 13 W. Va. 29,	1677	McKittrick v. Arkansas Central R. Co., 152 U. S. 473,	1538
McGirr v. Sell, 60 Ind. 249,	162	McKone v. Williams, 37 Ill. App. 591,	128
McGivern v. Fleming, 12 Daly, 289,	638	McLane v. His Creditors, 47 La. Ann. —; 16 So. Rep. 764,	701
McGlyn v. Brooklyn, etc., R. Co., 93 N. Y. 655,	554	McLane v. Johnson, 43 Vt. 43,	1663
McGoon v. Shirk, 54 Ill. 408,	394	McLane v. Paschal, 47 Texas, 365,	431
McGourkey v. Toledo, etc., Ry. Co., 146 U. S. 536,	1979	McLaren v. Hall, 26 Iowa, 297,	452
McGovern v. Board of Public Works (N. J. 1895), 31 Atl. Rep. 613,	1547	McLaughlin v. Austin (Mich. 1895), 62 N. W. Rep. 719,	596
McGowan v. Brooks (Miss. 1895), 16 So. Rep. 1136,	1029	McLaughlin v. Citizens', etc., Assn., 62 Ind. 264,	1600
McGowan v. Remington, 12 Pa. St. 56,	966	McLaughlin v. Hess, 164 Pa. St. 570,	889
McGrath v. Barnes, 13 S. Car. 323,	2178	McLaughlin v. Horton, 1 Hill (S. Car.), 383,	343
McGrath v. Gogner, 77 Md. 331,	394	McLaughlin v. Wheeler, 1 S. Dak. 497,	621
McGrath v. Hamilton, etc., Association, 44 Pa. St. 383,	1599	McLaurin v. Cronly, 90 N. Car. 50,	2173
McGrath v. Kennedy, 15 R. I. 209,	1949	McLaurine v. Monroe, 30 Mo. 462,	540
McGraw v. Solomon, 83 Mich. 449,	1063	McLean v. Clapp, 141 U. S. 429,	1037
McGregor v. Donnelly, 67 Cal. 149,	1887	McLellan v. Cumberland Bank, 24 Maine, 566,	573, 854
McGregor v. Brown, 10 N. Y. 114,	638	McLellan v. Detroit File Works, 56 Mich. 579,	1257, 1357
McGregor v. Estate of Ross, 96 Mich. 103,	496	McLelland v. Cook, 94 Mich. 528,	381
McGregor v. McGregor, L. R. 21 Q. B. Div. 424,	653, 654	McLennan v. Ohmen, 75 Cal. 558,	323, 328
McGregor v. Penn, 9 Yerger, 74,	327, 353	McLennan v. Hopkins (Kan. Oct. 1895), 41 Pac. Rep. 1061,	1335, 1337
McGregor v. Ross, 96 Mich. 103,	840	McLennan v. McDermid, 50 Mich. 379,	2173
McGuinness v. Shannon, 154 Mass. 86,	957	McLeod v. Burroughs, 9 Ga. 213,	2121
McGuire v. Adams, 8 Pa. St. 286,	560	McLeod v. Free, 96 Mich. 57,	1057
McGuire v. Gadsby, 3 Cal. 334,	452	McLeod v. Genins, 31 Neb. 1,	296, 950
McGuire v. Lawrence Manufacturing Co., 156 Mass. 324,	521	McLeod v. Tarrant, 39 S. Car. 271,	1763
McGuirk v. Marchand, 45 La. Ann. 732,	1743	McLughan v. Bovard, 4 Watts, 308,	456
McGuirk v. Huggett, 56 Mich. 187,	828	McLure v. Lancaster, 24 S. Car. 273,	1677
McHenry R. Co. v. Philadelphia R. Co., 4 Harr. (Del.) 448,	276	McMahan v. McMahan, 13 Pa. St. 376,	628
McIlhenny v. Blum, 68 Texas, 197,	573	McMahan v. Morrison, 16 Ind. 172,	1457
McIlvaine v. Legare, 36 La. Ann. 359,	701	McMahan v. Stewart, 23 Ind. 590,	48
McInerney v. Lindsay, 97 Mich. 238,	380	McMahon v. Jacoway (Ala. 1895), 17 So. Rep. 39,	630
McIniffe v. Wheelock, 1 Gray, 600,	402	McMahon v. Smith, 47 Conn. 221,	1832, 1853, 2011
McIntire v. Cagley, 37 Iowa, 678,	760	McManus v. Bark, L. R. 5 Ex. 65,	527, 532
McIntosh v. Hambleton, 35 Ga. 94,	484	McManus v. Cooke, L. R. 35 Ch. Div. 681,	838
McIntosh v. Lee, 89 Iowa, 488,	1692	McMaster v. Ins. Co. of North America, 55 N. Y. 222,	897
McIntosh v. Smith, 2 La. Ann. 756,	1742	McMaster v. Smith, 3 N. Y. St. Rep. 481,	322
McIntyre v. Kennedy, 29 Pa. St. 448,	455	McMaster v. State, 108 N. Y. 542,	372
McIntyre v. Parks, 3 Mete. (Mass.) 207,	698	McMerty v. Morrison, 62 Mo. 140,	717
McKamey v. Thorp, 61 Texas, 648,	1681	McMichael v. Kilmer, 76 N. Y. 36,	554
McKay v. Darling, 65 Vt. 639,	2185	McMillen v. Pratt, 89 Wis. 612,	874
McKay v. Williams, 67 Mich. 547,	2276, 2277	McMillan v. Richards, 9 Cal. 365,	807
McKee v. Cheney, 52 How. Pr. (N. Y.) 144,	1852, 1993	McMorris v. Herndon, 2 Bailey L. (S. C.) 56,	684
McKee v. Manice, 11 Cush. (Mass.) 357,	1949	McMullan v. Deckinson Co. (Minn.), 65 N. W. Rep. 661,	92
McKee v. Reynolds, 26 Iowa, 578,	1735	McMillan v. Maysville R. Co., 15 B. Monroe, 218,	155
McKeefrey v. Connellsville Coke Co., 56 Fed. Rep. 212,	922, 932	McMullen v. Carson, 48 Kan. 263,	334
McKeen v. Morse, 1 U. S. App. 7,	518	McMullen v. MacKenzie, 2 G. Greene (Iowa), 368,	2252
McKeen v. Read, Littell's Select Cases, 395,	526	McMillen v. Pratt, 89 Wis. 612,	615
McKellip v. McIlhenny, 4 Watts (Pa.), 317,	641	McMurchey v. Robinson, 10 Ohio, 496,	384
McKelvain v. Allen, 58 Texas, 383,	431	McMurray v. Taylor, 80 Mo. 263,	447
McKenney v. Diamond Loan Assn., 8 Houst. (Del.) 557,	1615	McNally v. Gradwell, 16 Ir. Ch. 512,	2266
McKenzie v. Farrell, 4 Bosw. 192,	1132	McNally v. Weld, 30 Minn. 209,	1671
McKenzie v. Culbreth, 66 N. Car. 534,	524	McNamara v. Babcock, 50 Hun, 602,	545
McKenzie v. Durant, 9 Rich. L. 61,	385	McNamara v. McEntee, 4 N. Y. Supl. 620,	544
McKenzie v. McKenzie, 52 Vt. 271,	1187	McNamee v. Tenny, 41 Barb. 495,	194
McKenzie v. Ohio River Railroad Co., 27 W. Va. 306,	1667	McNaught v. McLaughry, 42 N. Y. 22,	591
McKibben v. Brown, 14 N. J. Eq. 13,	1212	McNeal v. Blackburn, 7 Dana (Ky.), 170,	573
McKillop v. McKillop, 8 Barb. 552,	430	McNeal v. Braun, 53 N. J. Law, 617,	124
McKinney v. Andrews, 41 Texas, 363,	2018	McNeer v. McNeer, 142 Ill. 388,	2122
McKinney v. Demby, 44 Ark. 74,	2110		
McKinney v. Hamilton, 51 Pa. St. 63,	1704		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

McNeill v. Boston Chamber of Commerce, 154 Mass. 277,	1351	Madeira's Heirs v. Hopkins, 12 B. Mon. 595,	1113
McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 1034,	1346	Madigan v. McCarthy, 108 Mass. 376, 186	
McNish v. Coon, 13 Wend. 26, 488		Madison v. Harbor Board, 76 Md. 395, 1544, 1547	
McNulty v. Prentice, 25 Barb. 204, 2		Madison v. Zabriskie, 11 La. 247, 12	
McNutt v. Loney, 153 Pa. St. 281, 560		Madison Avenue Baptist Church v. Baptist Church, 73 N. Y. 82,	1895
McNutt v. McEwen, 1 W. N. Cas. (Pa.) 552,	2039	Madison, etc., Plank-Road Co. v. Water- town Co., 7 Wis. 59,	1257
McNutt v. McNutt, 116 Ind. 545, 1713		Madison Tp., Overseer of Poor of, v. Over- seer of Poor of Monroe Tp., 42 N. J. Law, 493,	1549
McParland v. Larkin, 155 Ill. 84, 2285,	2286	Magarity v. Shipman, 82 Va. 784, 1712	
McPherson v. Cox, 86 N. Y. 472, 2012		Magee v. Blenkinship, 95 N. C. 563, 592	
McPherson v. Cox, 96 U. S. 404, 646		Magee v. Lavell, L. R. 9 C. P. 107, 760, 886	
McPherson v. Walker, 40 Ill. 371, 496, 2220, 2221		Magee v. Magee, 67 Barb. (N. Y.) 487, 1758	
McQuaid v. Ross, 77 Wis. 470, 41, 334, 335, 336		Magee v. Pacific Imp. Co., 98 Cal. 678, 1264	
McQuaid v. Ross, 85 Wis. 492, 352		Maggart v. Chester, 4 Ind. 124, 1176	
McQueen v. Bank, 2 Ind. 413, 1818		Magnay v. Edwards, 13 C. B. 479, 814	
McQueen v. Gamble, 33 Mich. 344, 145		Magniac v. Thompson, 1 Baldwin, 344, 224	
McQueen v. Wilson, 51 Mo. App. 138, 776, 785		Magniac v. Thompson, 7 Pet. (U. S.) 348, 1665	
McRae v. Battle, 69 N. Car. 98, 1017		Magniac v. Thompson, 7 Peters, 367, 224	
McRee v. Means, 34 Ala. 349, 1524		Magniac v. Thompson, 15 How. 281, 1539	
McReynolds v. Gentry, 14 Mo. 495, 1712		Magnin v. Dinsmore, 56 N. Y. 168, 64, 1963	
McRoberts v. Copeland, 85 Tenn. 211, 1763		Magnusson v. Williams, 111 Ill. 450, 379	
McSorley v. Faulkner, 18 N. Y. Supl. 460, 776		Maguire v. Heraty, 163 Pa. St. 381, 1193	
McSpedon v. Mayor of New York, 7 Bosw. (N. Y.) 601,	783	Maguire v. Maguire, 7 Dana (Ky.), 181, 2122	
McTucker v. Taggart, 29 Iowa, 478, 1065		Maguire v. Smock, 42 Ind. 1, 1987	
McWhinnie v. Martin, 77 Wis. 182, 1183		Mahaffey v. Ferguson, 156 Pa. St. 156, 352	
McWilliams v. Bryan, 21 La. Ann. 211, 2021		Mahan, <i>in re</i> , 20 Hun, 301, 1552	
McWilliams v. Phillips, 51 Miss. 196, 1887		Mahan v. Smitherman, 71 Ala. 563, 477	
		Mahana v. Blunt, 20 Iowa, 142, 846	
		Maher v. Davis Lumber Co., 86 Wis. 530, 142	
		Mahoney v. Bland, 14 Ind. 176, 1690	
		Mahoney v. Rector, etc., of St. Paul's Church, 47 La. Ann. —; 17 So. Rep. 484, 751	
		Mahood v. Tealza, 26 La. Ann. 108, 1902	
		Maiden v. Webster, 30 Ind. 847, 811	
		Main v. Casserly, 67 Cal. 127, 1275	
		Main v. Johnson, 7 Wash. 321, 2112	
		Maine v. Gilman, 11 Fed. Rep. 214, 762	
		Maine, etc., Institute v. Haskell, 73 Maine, 140,	218
		Mains v. Haight, 14 Barb. 76, 466	
		Mains v. Mintle, 86 Iowa, 742, 518	
		Maize v. Bowman, 14 Ky. L. Rep. 121, 31	
		Major v. Holmes, 121 Mass. 108, 1753	
		Major v. Major, 1 Drewry, 165, 556	
		Makepeace v. Harvard College, 10 Pick. 298,	867
		Makin v. Watkinson, L. R. 6 Ex. 31, 270	
		Malbon v. Southard, 36 Maine, 147, 40	
		Male v. Roberts, 3 Esp. 163, 87	
		Mallack v. Galton, 3 P. Wms. 352, 1780	
		Mallalieu v. Hodgson, 16 Q. B. 689, 1631, 1638	
		Mallan v. May, 11 M. & W. 653, 801, 1360, 2026, 2030, 2043, 2044	2044
		Mallan v. May, 13 M. & W. 511, 869	
		Mallet v. Bateman, L. R. 1 C. P. 163, 605	
		Mallett v. Lewis, 61 Miss. 105, 649	
		Mallett v. Page, 8 Ind. 364, 15, 557	
		Malli v. Willett, 57 Iowa, 705, 2011	
		Mallins v. Brown, 4 N. Y. 403, 843	
		Malone v. Gates, 87 Mich. 332, 840, 841	
		Malone v. Harris, 6 Mo. 451, 2198	
		Malone v. Keener, 44 Pa. St. 107, 597	
		Malone v. Philadelphia, 147 Pa. St. 416, 758	
		Malone v. Philadelphia R. Co., 157 Pa. St. 430,	953
		Malone v. Plato, 22 Cal. 103, 633	
		Mallory v. Gillett, 21 N. Y. 412, 596, 599, 603, 615	
		Mallory v. Hanaur Oil Works, 86 Tenn. 598,	2053
		Mallory v. Mallory, 92 Ky. 316, 223, 619	
		Mallory v. Mallory Wheeler Co., 61 Conn. 131,	1292, 1350, 1979
		Mallory v. Travellers' Ins. Co., 47 N. Y. 52, 119	
		Mallory v. Vanderheyden, 3 Barb. Ch. (N. Y.) 9,	1703
		Mallory v. Willis, 4 N. Y. 76, 502	

M

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Malpas v. Lowenstine, 46 Ark. 552,	456	Marietta, Town of, v. Fearing, 4 Ohio,	2142
Malpica v. McKown, 1 La. 248,	710	427,	
Mamlock v. Fairbanks, 46 Wis. 415,	1005	Marine Bank v. Fulton Bank, 2 Wall. 252,	941
Manby v. Cremonini, 6 Ex. 808,	120	Marine Bank v. Ogden, 29 Ill. 248,	2053
Manchester v. Sahler, 47 Barb. 155,	1746	Marine Bank v. Rushmore, 28 Ill. 463,	941
Manchester v. Van Brunt, 19 N. Y. Supl.	202	Mariner v. Collins, 5 Harr. 290,	784, 790
685,		Marion v. Farnan, 68 Hun. 383,	794
Manchester Co. v. Concord R. Co., 66		Marion School Township v. Carpenter, 12	
N. H. 100,	1895, 2062	Ind. App. 191,	104
Manchester Assur. Co. v. Koerner (Ind.),		Marion Savings Bank v. Dunkin, 54 Ala.	1263
40 N. E. Rep. 1110,	121	471,	
Mandlebaum v. Gregovich, 17 Nev. 87,	1891	Marion Tp., etc., Drainage Co. v. Norris,	1382
Mandeville v. Harman, 42 N. J. Eq. 185,	2015	37 Ind. 424,	
Maness v. Henry, 98 Ala. 451,	550, 588	Mariposa Co. v. Bowman, Deady (U. S.	
Mangam v. Peck, 111 N. Y. 401,	1736	C. C.), 228,	440, 1829
Manhattan Ins. Co. v. Broughton, 109		Markel v. Spittler, 28 Ind. 488, 48, 198, 468, 475	
U. S. 121,	119	Markham v. Jaudon, 41 N. Y. 135,	203
Manhattan Life Ins. Co. v. Forty-second		Markley v. Stevens, 89 Pa. St. 279,	800
St., etc., R. Co., 19 N. Y. Supl. 90,	1351	Marksbury v. Taylor, 10 Bush (Ky.), 519,	2016
Manhattan Life Ins. Co. v. Forty-second		Marlett v. Jackman, 3 Allen (Mass.), 287,	1329
& G. St. Ferry Co., 139 N. Y. 146,	1305, 1344, 1346	Marley v. Noblett, 42 Ind. 85,	646
Manhattan Sav. Inst. R. Co., 82 N. Y. 142,	1553	Marlin v. Kosmyroski (Texas 1894), 27	
Manhattan Trust Co. v. City of Dayton,		S. W. Rep. 1042,	1761, 1773
59 Fed. Rep. 327,	1487	Marlow v. Barlew, 53 Cal. 456,	1719
Manhattan Trust Co. v. Dayton Natural		Marmet Co. v. Archibald, 37 W. Va. 778,	1236
Gas Co., 55 Fed. Rep. 1-1,	1488, 1530	Marmon v. Harwood, 124 Ill. 101,	1664
Manhattan Trust Co. v. Sioux City Rail-		Marquette Co. v. Jeffery, 49 Mich. 283,	162
road Co., 68 Fed. Rep. 72,	1418	Marqueze v. Caldwell, 48 Miss. 23,	688, 1112
Mankel v. Belscamper, 84 Wis. 218,	384	Marquis v. Lauretson, 76 Iowa, 23,	374, 698
Mann v. Bowen, 85 Ga. 616,	2202	Marquis of Bute v. Thimpson, 13 M. & W.	
Mann v. Cooke, 20 Conn. 178,	1325	487,	301
Mann v. Evertson, 32 Ind. 355,	348	Marr v. Bank, 4 Lea. 578,	1375
Mann v. Pearson, 2 John. 37,	424	Marrett v. Babb, 91 Ky. 88,	543
Mann v. Richardson, 66 Ill. 481,	1189	Marriam v. United States, 14 Ct. Cl. 289,	307
Mann v. Stephens, 15 Sim. 377,	1154	Marriot v. Hampton, 3 Smith's Leading	
Mann v. Thompson, 86 Ga. 347,	168	Cases (9th Am. ed.), 1636,	480, 798
Manning v. Albee, 11 Allen (Mass.), 520,	1834	Marriott v. Brune, 9 Howe. 619,	807
Manning v. Beck, 129 N. Y. 1,	1664	Marsden v. Moore, 4 H. & N. 500,	120
Manning v. Riley, 52 N. J. Eq. 39,	1710, 1716	Marsh v. Austin, 1 Allen, 235,	490
Manning v. Sprague, 148 Mass. 18,	2006	Marsh v. Bellaw, 45 Wis. 36,	689
Manny v. Glendinning, 15 Wis. 50,	132	Marsh v. Davis, 33 Kan. 326,	644
Mansell v. Burdedge, 7 T. R. 348,	809	Marsh v. Dodge, 66 N. Y. 533,	867
Mansfield, <i>Ex parte</i> , 19 L. J. Ch. 258,	260	Marsh v. Fairbury, etc., R. Co., 64 Ill. 414,	1976, 1977
Mansfield v. Hodgdon, 147 Mass. 304,	521	Marsh v. Falker, 40 N. Y. 562,	989
Mansfield v. New York Cent. R. Co., 102		Marsh v. Fulton County, 10 Wall. (U. S.)	
N. Y. 205,	137, 1271	676,	1430, 1529
Mansfield, etc., Co. v. Veeder, 17 Ohio,		Marsh v. Hyde, 3 Gray, 331,	662
385,	870	Marsh v. Low, 55 Ind. 271,	366
Manter v. Churchill, 127 Mass. 31,	204, 206	Marsh v. McNair, 99 N. Y. 171,	41, 2179
Manton v. Ray, 18 R. I. 672,	1208	Marsh v. Rouse, 44 N. Y. 643,	663
Manufacturers', etc., Co. v. Conover, 5		Marsh v. Russell, 66 N. Y. 288,	2000, 2019, 2056, 2063
Phila. 18,	1603	Marsh v. Tunis' Estate, 39 Mich. 100,	2173
Manufacturing Co. v. Goddard, 14 How-		Marsh v. Ward, Peake (N. P.) Cas. 177,	810
ard, 446,	646	Marsh v. Webber, 16 Minn. 418,	333
Manwaring v. Powell, 40 Mich. 371,	1764	Marsh v. Whitmore, 21 Wall. 178,	1292, 1307
Maples v. Wightman, 4 Conn. 376,	1772	Marshall's Estate, 138 Pa. St. 285,	194
Mapleson v. Del Puente, 13 Abb. N. Car.		Marshall v. Baltimore, etc., R. Co., 16	
(N. Y.) 144,	2073	How. (U. S.) 314,	1852, 1992, 1998, 2001
Marble v. Marble, 5 N. H. 374,	620	Marshall v. Broadhurst, 1 Tyr. 348,	283, 288
Marble Co. v. Harvey, 92 Tenn. 115,	1258, 1259, 1264, 1266, 1430	Marsh v. Burroughs, 1 Woods, 463,	260
Marble Co. v. Ripley, 10 Wall. 339,	1103, 1120, 1121, 2271, 2272	Marshall v. Farmers', etc., Bank, 85 Va.	2244
Marbury v. Kentucky Land Co., 62 Fed.		676,	637
Rep. 335,	1226, 1258, 1766	Marshall v. Ferguson, 23 Cal. 65,	
March, <i>In re</i> , 27 Ch. Div. 166,	759	Marshall v. Green, L. R. 1 C. P. Div. 35,	636, 639, 668
March v. Allabough, 103 Pa. St. 335,	1254	Marshall v. Jamieson, 42 Up. Can. Q. B. 115,	83
March v. Railroad Co., 43 N. H. 515,	251	Marshall v. Jaquith, 134 Mass. 138,	1639
Marcy v. Amazeen, 61 N. H. 131,	617, 1300	Marshall v. Lynn, 6 M. & W. 109,	690
Marcy v. Crawford, 16 Conn. 549,	591, 651, 655	Marshall v. Niles, 8 Conn. 369,	884
Marcy v. Marcy, 9 Allen, 8,	1525	Marshall v. Vicksburg, 15 Wall. 146,	433
Marcy v. O-wego, 92 U. S. 637,	1524	Marshall Foundry Co. v. Killian, 99 N. Car.	1323
Marcy v. Township of O-wego, 92 U. S.		501,	1769
637,	1106, 1127	Marsteller v. Marsteller, 93 Pa. St. 350,	1574
Marden v. Portsmouth, 59 N. H. 18,	1799	Marston v. Driesen, 76 Wis. 418,	
Margraf v. Muir, 57 N. Y. 153,	1388	Marston v. Singapore Rattan Co., 163	2288
Margrett, <i>Ex parte</i> , L. R. (1891) 1 Q. B.		Mass. 236,	63
413,	1828	Marston v. Sweet, 66 N. Y. 206,	1132
Marian v. Devlin, 132 Mass. 87,	10, 74, 2000	Martenson v. Railroad Co., 60 Iowa, 705,	1636, 1639
Marielo v. Brooks, 5 N. Y. Supl. 210,		Martin v. Adams, 51 Hun, 9,	
Marie v. Garrison, 83 N. Y. 14,			

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Martin v. Baltimore, etc., Railroad Co., 41 Fed. Rep. 125,	584, 586	Mass. General Hospital v. Fairbanks, 129 Mass. 78,	779
Martin v. Bartow Iron Works, 35 Ga. 320,	2021	Massey v. Belisle, 2 Ired. L. 170,	878
Martin v. Baugh, 1 Ind. App. 20,	832	Massey v. Citizens', etc., Building Assn., 22 Kan. 624,	1336, 1601
Martin v. Black's Executors, 20 Ala. 809,	594	Massey v. Johnson, 1 Exch. 241,	516, 526
Martin v. Blanchett, 77 Ala. 288,	694	Massey v. Womble, 69 Miss. 347,	1012
Martin v. Clarke, 8 R. I. 389,	1855	Massey v. Yancey, 90 W. Va. 626,	1757
Martin v. Cole, 104 U. S. 30,	334	Massie v. Watts, 6 Cranch 148,	1173
Martin v. Dwelly, 6 Wend. (N. Y.) 9,	1731	Masson v. Bovee, 1 Denio 69,	975
Martin v. Ellerbe's Admr., 70 Ala. 326,	777	Mast v. Pearce, 54 Iowa 579,	334, 657
Martin v. Fewell, 79 Mo. 401,	1311	Master v. Hansard, L. R. 4 Ch. Div. 718,	1154
Martin v. Funk, 75 N. Y. 134,	250, 253	Mastin v. Halley, 61 Mo. 196,	10-2
Martin v. Hunt, 1 Allen 418,	548	Mastin v. Marlow, 65 N. C. 695,	1185
Martin v. Johnson, 84 Ga. 481,	1627	Matchette v. Colburn, 165 Pa. St. 265,	881
Martin v. Martin (Com. Pl. 1892), 20 N. Y. Supl. 685,	2186	Materne v. Horwitz, 101 N. Y. 469,	2024
Martin v. Martin, 1 Heisk. (Tenn.) 644,	1824	Matheny v. Golden, 5 Ohio St. 361,	32
Martin v. Mathiot, 14 S. & R. 214,	162	Matheny v. Mason, 73 Mo. 677,	359
Martin v. Morgan, 1 Brod. & B. 289,	480	Mathes v. Dobschuetz, 72 Ill. 438,	1798
Martin v. Murphy, 129 Ind. 464, 95, 2039,	2045	Matheson v. Kelly, 24 Up. Can. C. P. 598,	389
Martin v. Niagara Falls Paper Co., 122 N. Y. 165,	1279	Mathews v. City of Philadelphia, 93 Pa. St. 147,	1486
Martin v. Northwestern Fuel Co., 22 Fed. Rep. 596,	83	Mathews v. Danahy, 26 Mo. App. 660,	876
Martin v. Quinn, 37 Cal. 55,	445	Mathews v. Davis, 102 Cal. 202,	1187
Martin v. Righter, 10 N. J. Eq. 510,	955	Mathews v. Inhabitants of Westborough, 131 Mass. 521; 134 Mass. 555,	1473
Martin v. Schichtl, 60 Ark. 595,	432	Mathews v. Phelps, 61 Mich. 327,	853, 873
Martin v. State, 23 Neb. 371,	2128	Mathews v. St. Louis, etc., R. Co., 121 Mo. 298,	2133
Martin v. Santa Cruz Co. (Ariz. 1894), 36 Pac. Rep. 36,	1299	Mathews v. Sharp, 99 Pa. St. 560,	761
Martin v. Webb, 110 U. S. 7,	1269, 1271, 1281, 1287	Mathis v. Thomas, 101 Ind. 119,	2171
Martin v. White, 40 Ill. App. 281,	544	Mathison v. Hanks, 2 Hill (S. Car.), 625,	1880
Martin-Brown Co. v. Siebe, 6 Texas Civ. App. 232,	1642	Mathison v. Wilson, 87 Ill. 51,	1186
Martindale v. Waas, 8 Fed. Rep. 854,	752	Matlock v. Glover, 63 Texas 231,	1681
Martine v. Christenson (Minn. 1895), 62 N. W. Rep. 1127,	1065	Matson v. Blossom, 2 N. Y. Supl. 551,	1935, 1936
Martineau v. Kitching, L. R. 7 Q. B. 436,	906	Matson v. Melchor, 42 Mich. 477,	2280
Martineau v. May, 18 Wis. 54,	1201	Matson v. Wharam, 2 T. R. 80,	601
Martini v. Christensen, 60 Minn. 491,	2268	Matter of Accounting of Waite, 99 N. Y. 433,	726
Martinsburgh, etc., R. Co. v. March, 114 U. S. 549,	121, 159, 1131	Matter of Anderson, 109 N. Y. 554,	1484
Marvin v. Bennett, 8 Paige 312,	110	Matter of Beckwith, 3 Hun (N. Y.), 443,	1822
Marvin v. Brewster Mining Co., 55 N. Y. 538,	52	Matter of Conklin, 8 Paige (N. Y.), 450,	1815
Marvin v. Marvin, 75 N. Y. 240,	762	Matter of Davis, 7 Daly (N. Y.), 1,	674
Marvin v. Prentice, 49 How. Pr. 385,	1157	Matter of Dunkell, 5 Dem. (N. Y.) 188,	465
Marvin v. Wallis, 6 E. & B. 726,	668	Matter of Howe, 1 Paige 125,	434
Marx v. Bell, 48 Ala. 497,	606	Matter of Jones, 10 St. Rep. (N. Y.) 176,	465
Marx v. Gross (Super. N. Y.), 22 N. Y. Supl. 393,	2234	Matter of Kendrick, 107 N. Y. 104,	196
Maryland v. Railroad Co., 22 Wall. 105,	392	Matter of New York, etc., R. Co., 49 N. Y. 414,	873
Maryland Fertilizing, etc., Co. v. Lorenz, 44 Md. 218,	890	Matter of Pruyn, 141 N. Y. 544,	564
Maryon v. Carter, 4 Car. & P. 295,	2237	Matter of Richardson, In the, 2 Story C. C. 571,	762
Maryatts v. White, 2 Stark. 91,	469, 473	Matter of Swoford, 6 M. & S. 226,	384
Maryott v. Renton, 21 N. J. Eq. 381,	954	Matter of Van Duzer's Estate, 51 How. Pr. 410,	472
Marysville Electric, etc., Co. v. Johnson, 109 Cal. 192,	1320	Matter of Welman, 20 Vt. 653,	762
Marysville, etc., Power Co. v. Johnson, 93 Cal. 538,	1320	Matter of Wing, 83 Hun 284,	1845
Marzetti v. Williams, 1 Barn. & Adol. 415, 22, 772	572, 818	Matter of Cavin v. Gleason, 105 N. Y. 256, 333,	1002
Maslin v. Hiatt, 37 W. Va. 15,	572, 818	Matteson v. Scofield, 27 Wis. 671,	73
Mason v. Chappell, 15 Gratt. 572,	326, 356	Mathews v. Associated Press, 136 N. Y. 333,	2036, 2050, 2076
Mason v. Clough, 155 Mass. 389,	1634	Mathews v. Chicopee, etc., Co., 3 Robt. 712,	543, 576
Mason v. Decker, 72 N. Y. 595,	335, 388	Mathews v. Murchison, 15 Fed. Rep. 691,	1447
Mason v. Eldred, 6 Wall. 231,	825, 830, 832	Mathews v. Smith, 67 N. C. 374,	803
Mason v. Haile, 12 Wheat. (U. S.) 370,	2153	Mathews v. Westborough, 131 Mass. 521,	210
Mason v. Mining Co., 133 U. S. 50,	1255	Matthiessen, etc., Co. v. McMahon, 38 N. J. Law 536,	672
Mason v. Moulden, 58 Ind. 1,	1079	Matthiessen, etc., Co. v. McMahon's Ad- ministrators, 38 N. J. Law 541,	663
Mason v. Railway Co., 27 Kan. 83,	1433	Mattison v. Childs, 5 Colo. 78,	821
Mason v. Smith, 130 N. Y. 474,	504	Mattison v. State, 55 Ala. 224,	46
Mason v. Waite, 17 Mass. 560,	1950	Mauger, In re, 23 Hun 658,	1163
Mason v. White, 17 Mass. 560,	1818	Maule v. Bucknell, 50 Pa. St. 39,	604, 609
Mason v. Wilson, 84 N. C. 51,	609	Mauran v. Bullus, 16 Pet. 528,	52, 853
Masonic, etc., Association v. Beck, 77 Ind. 203,	138, 144, 148	Maxcy v. Williamson Company, 72 Ill. 207,	1526
Masonic Association v. Channell, 43 Minn. 353,	154		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Maxim, etc., Co. v. Nordenfelt, L. R. (1893) 1 Ch. 630,	2030, 2033, 2041	Meade v. Clarke, 159 Pa. St. 159,	1655
Maxon v. Scott, 55 N. Y. 247,	1704	Meador v. White, 66 Maine, 90,	2106
Maxton v. Gheen, 75 Pa. St. 166,	1946	Meageley v. Hoyt, 125 N. Y. 771,	365
Maxwell v. Brown, 39 Maine, 98,	662, 669	Meager v. Reed, 14 Colo. 335,	681
Maxwell v. Grace, 85 Ala. 577,	1744	Meageley v. Hoyt, 88 Hun, 323,	341
Maxwell v. Hanshaw, 24 W. Va. 405,	1677	Meakin v. Morris (1884), L. R. 12 Q. B. D. 352,	1807
Maxwell v. Lee, 34 Minn. 511,	351	Means v. Hapgood, 19 Pick. 105,	723
May v. Adams, 58 Vt. 74,	1076	Means v. Williamson, 37 Maine, 556,	668
May v. LeClaire, 18 Fed. Rep. 164,	153	Mease v. Wagner, 1 McCord (S. C.), 395,	598
May v. May, 7 Fla. 207,	1713	Measurall v. Pearce (N. J. Eq.), 3 Atl. Rep. 92,	955
May v. May, 9 Neb. 16,	1680	Mechanics', etc., Assn. v. Meriden Agency Co., 24 Conn. 159,	1249, 1259
May v. Wannemacher, 111 Mass. 202,	1644	Mechanics' Bldg. and Loan Assn. v. Conover, 14 N. J. Eq. 219,	1629
May v. Williams, 61 Miss. 125,	614	Mechanics', etc., Association v. Dorsey, 15 S. Car. 462,	1623
May v. Sloan, 101 U. S. 231,	694	Mechanics', etc., Building Assn. v. Wilcox, 24 Conn. 147,	1620, 1621
Maybee v. Moore, 90 Mo. 340,	694	Mechanics' Bank v. Seton, 1 Pet. 209,	1214, 1215
Mayer v. Isaac, 6 M. & W. 605,	883	Mechanics' etc., Bank v. Smith, 19 Johns. 115,	1270
Mayer v. Mayor, etc., 63 N. Y. 455,	480, 500	Mechanics' etc., Savings Bank v. Allen, 28 Conn. 97,	2120, 2125
Mayer v. McCreery, 119 N. Y. 434,	98	Mechanics' Nat. Bank v. H. C. Burnet Manfg. Co., 32 N. J. Eq. 236,	1338
Mayer v. Swift, 73 Texas, 367,	965	Mechanics' & Traders' Bank v. Deboldt, 1 Ohio St. 591,	2130
Mayfield v. Wadsley, 3 B. & C. 357,	636	Mechanics', etc., Insurance Co. v. Thompson, 57 Ark. 279,	310
Mayhew v. Thayer, 8 Gray (Mass.), 172,	1660	Mecklem v. Blake, 19 Wis. 397,	1176
Maynard v. Brown, 41 Mich. 298,	1110	Meconroy v. Stanley, 8 Cush. 85,	204, 206
Maynard v. Hill, 125 U. S. 190,	704, 1840, 2123	Medbury v. Watrous, 7 Hill (N. Y.), 110,	1785
Maynard v. Maynard, 10 Mass. 456,	15, 90	Medbury v. Watrous, 6 Metc. (Mass.) 246,	365, 981
Maynard v. Tidball, 2 Wis. 34,	780	Medford v. Learned, 16 Mass. 215,	2120
Maynard v. Valentine, 2 Wash. T. 3,	1840	Medina v. Stoughton, 1 Ld. Raymond, 593,	322
Maynes v. Moore, 16 Ind. 116,	1496	Medlin v. Steel, 75 N. Car. 154,	621
Mayo v. Farrar, 112 N. Car. 66,	1741	Medloch v. Cogburn, 1 Rich. Eq. (S. Car.) 477,	1814
Mayo v. Knowlton, 134 N. Y. 250,	412	Medway, Inhabitants of, v. Inhabitants of Milford, 21 Pick. 349,	1473
Mayor v. Feig, 114 Ind. 577,	1859	Meech v. City of Buffalo, 29 N. Y. 198,	200
Mayor v. Gill, 31 Md. 375,	1516	Meech v. Lee, 82 Mich. 274,	1099, 1832
Mayor v. Huff, 60 Ga. 221,	2030	Meech v. Smith, 7 Wend. 317,	608
Mayor v. N. Y. Refrigerating Construction Co. (N. Y.), 8 Misc. 61,	875	Meehan v. Sharp, 171 Mass. 564,	661
Mayor, etc., v. Furze, 16 Hill, 612,	374	Meehan v. Valentine, 29 Fed. Rep. 276,	2252
Mayor, etc., v. Keyser, 72 Md. 106,	1545	Meeker v. Dalton, 75 Cal. 154,	158
Mayor, etc., v. Lefferman, 4 Gill (Md.), 425,	802	Meeker v. Wright, 76 N. Y. 262,	1766
Mayor, etc., v. Patton, 4 Cranch, 317,	477, 478	Meguire v. Corwine, 101 U. S. 108,	1552, 1853, 1884, 1986, 2081
Mayor, etc., v. Second Ave. R. Co., 32 N. Y. 261,	1481	Mehan v. Thompson, 71 Mo. 492,	536
Mayor of Baltimore v. Gill, 31 Md. 375,	563	Mehlberg v. Tisher, 24 Wis. 607,	446
Mayor of Berwick v. Oswald, 1 E. & B. 295,	515	Mehlhop v. Rae, 90 Iowa, 30,	1796
Mayor of Berwick-on-Tweed v. Oswald, 3 E. & B. 653,	273	Meikel v. German, etc., Fund Soc., 16 Ind. 89,	1336
Mayor of Hoboken v. Gear, 27 N. J. Law, 265,	2127	Meincke v. Falk, 55 Wis. 427,	659
Mayor of Jersey City v. O'Callahan, 41 N. J. Law, 349,	459	Meinhardt v. Mode, 22 Fla. 279,	854
Mayor of Jersey City v. Riker, 38 N. J. Law, 225,	458	Meisenbach v. Southern Cooperage Co., 45 Mo. App. 232,	788
Mayor of Macon v. Huff, 60 Ga. 221,	1506	Meka v. Brown, 84 Iowa, 711,	587
Mayor of Nashville v. Ray, 19 Wall. 463,	782	Melan v. De Fitz Fames, 1 Bos. & P. 138,	715
Mayor of Nashville v. Toney, 10 Lea, 643,	782	Melchert v. American Union Tel. Co., 11 Fed. Rep. 193,	1923
Mayor of New Orleans v. Ripley, 5 La. 121,	810	Melchert v. American Union Telegraph Co., 3 McCrary (U. S.), 521,	1914
Mayor of New Orleans v. United States, 49 Fed. Rep. 40,	30	Melchoir v. McCarty, 31 Wis. 343,	2100, 2110
Mayor of New York v. Huntington, 114 N. Y. 631,	2245	Melhado v. Porto Algir, etc., R. Co., L. R. 9 C. P. 503,	1309, 1314
Mayor of New York v. Second Ave. R. Co., 31 Hun, 241,	1584	Melhop v. Tathwell, 74 Iowa, 571,	1633
Mayor of Niles v. Muzzy, 33 Mich. 61,	1506	Melick v. Pidcock, 44 N. J. Eq. 525,	853
Mayor of Richmond v. Judah, 5 Leigh (Va.), 305,	460	Melick v. Varney, 41 Neb. 105,	1666, 1745
Mayor of Worcester v. Norwich & W. R. Co., 109 Mass. 103,	1439	Mell v. Moony, 30 Ga. 413,	2039
Mayrant v. Dickerson, Rich. Eq. Cas. 199,	1018	Melledge v. Boston Iron Co., 5 Cush. 158,	1277, 1317
Mays v. Cincinnati, 1 Ohio St. 268,	803, 805	Mellen v. Whipple, 1 Gray, 317,	237, 239
Mazet v. City of Pittsburgh, 137 Pa. St. 548,	1544, 1552	Mellick v. Mellick, 47 N. J. Eq. 86,	221
Meacham v. Dow, 32 Vt. 721,	1853, 1883, 2011	Mellich v. Rawdon, 9 Bing. 416,	746
Mead v. Altgeld, 33 Ill. App. 373,	416, 417	Mellon v. Webster, 5 Mo. App. 449,	554
Mead v. Bunn, 32 N. Y. 275,	1037, 1602		
Mead v. Case, 33 Barb. 202,	660		
Mead v. Parker, 115 Mass. 413,	691, 1117, 1118, 1176		
Mead v. Stevens, 22 Ill. App. 298,	416		
Mead v. Watson, 57 Vt. 426,	594		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Melman, Matter of, 20 Vt. 653,	762	Meridian, etc., Co. v. Schulberr (Miss. 1892), 17 So. Rep. 167,	2255
Melton v. Camroux, 2 Exch. 487,	1842	Meritt v. Millard, 4 Keyes (N. Y.), 208,	1870
Melton v. Smith, 65 Mo. 315,	975, 976	Meriweather v. Garrett, 102 U. S. 472,	1501, 2145
Melville v. De Wolf, 4 E. & B. 844,	280	Meriweather v. Lowndes County, 89 Ala. 362,	289
Melvin v. Lamar Co., 80 Ill. 446,	157	Meriweather v. Morrison, 78 Ky. 572,	556
Melvin v. Proprietors of the Locks, etc., 5 Metc. 15,	894	Meriweather v. Smith, 44 Ga. 541,	2102
Memphis Gayoso Gas Co. v. Williamson, 9 Heisk. 314,	1222	Meroney v. Atlanta Loan Assn. (N. C. 1895), 21 S. E. Rep. 924,	714
Memphis, etc., R. Co. v. Commissioners, 112 U. S. 609,	1441	Meroney v. Atlanta, etc., Loan Association, 116 N. Car. 882,	714, 1594, 1597, 1622, 1627
Memphis, etc., R. Co. v. Grayson, 88 Ala. 572,	1410	Merriam, Re, 84 N. Y. 596,	1553
Memphis, etc., R. Co. v. Railroad Commissioners, 112 U. S. 609,	2131	Merriam v. Brown, 128 Mass. 391,	186
Memphis R. Co. v. Sullivan, 57 Geo. 240,	154	Merriam v. Field, 24 Wis. 640,	336, 338, 352
Memphis, etc., Ry. Co. v. Thompson, 24 Kan. 170,	747	Merriam v. Stearns, 10 Cush. (Mass.) 257,	2101
Memphis, etc., R. Co. v. Woods, 88 Ala. 630,	1410, 1906	Merriam v. United States, 107 U. S. 437,	873, 874, 875
Menasha v. Hazard, 102 U. S. 81,	1461	Merrick v. Peru Coal Co., 61 Ill. 472,	1290, 1307, 2070
Mendell v. Delano, 7 Metc. 176,	26	Merrick v. Giddings, 1 Mackey (D. C.), 394,	194
Menees v. Johnson, 12 Lea (Tenn.), 561,	1698, 1699	Merrick v. Road Co., 11 Iowa, 74,	1231
Menne v. Menne (Ky. 1894), 25 S. W. Rep. 592,	1012	Merrick v. Trustees, 8 Gill (Md.), 59,	2016
Merced Mining Co. v. Fremont, 7 Cal. 130,	2268	Merrill v. American Express Co., 62 N. H. 514,	1968
Mercantile Ins. Co. v. Jayns, 87 Ill. 199,	873	Merrill v. Beckwith, 163 Mass. 503,	1172
Mercantile Nat. Bank v. Parsons, 54 Minn. 56,	1289	Merrill v. Englesby, 28 Vt. 150,	608
Mercantile Trust Co. v. Atlantic, etc., R. Co., 63 Fed. Rep. 910,	2052	Merrill v. Gore, 29 Maine, 346,	863
Mercer v. Kelso, 4 Gratt. 106,	1031	Merrill v. Hurley (S. Dak. 1895), 62 S. W. Rep. 958,	1230, 1286
Mercer's Lessee v. Selden, 1 How. (U. S.) 37,	1789	Merrill v. Melchior, 30 Miss. 516,	871
Merchants' Bank v. Bliss, 64 N. Y. 173,	1388	Merrill v. Montgomery, 25 Mich. 73,	1229
Merchant's Bank v. Curtiss, 37 Barb. 317,	540	Merrill v. Monticello, 138 U. S. 673,	1532
Merchants' Bank v. Livingston, 74 N. Y. 223,	1369	Merrill v. Nightingale, 39 Wis. 247,	364
Merchants' Bank v. Spicer, 6 Wend. 443,	451	Merrill v. Packer, 50 Iowa, 542,	1935
Merchants' Bank v. State Bank, 10 Wall. 604,	1341, 1343, 1355	Merrill v. Pease, 51 Vt. 556,	623
Merchants' Bank v. Stevenson, 10 Gray, 232,	1388	Merrill v. Peaslee, 146 Mass. 460,	2008
Merchant Banking Co. v. Phoenix, etc., Steel Co., L. R. 5 Ch. Div. 205,	888	Merrill v. President, etc., of Kalamazoo, 35 Mich. 211,	1361
Merchants', etc., Bank v. Bangs, 102 Mass. 295,	96	Merrills v. Swift, 18 Conn. 257,	90, 91
Merchants', etc., Bank v. Frazee, 9 Ind. App. 161,	331	Merrimack River Savings Bank v. City of Lowell, 152 Mass. 556,	1575
Merchants', etc., Bank v. Northup, 22 N. J. Eq. 58,	1661	Merriman v. Barker, 121 Ind. 74,	833
Merchants' Nat. Bank v. Citizens Gas Light Co., 159 Mass. 505,	1351, 1358	Merritt v. Brown, 19 N. J. Eq. 286,	1172
Merchants' Nat. Bank v. Lovitt, 114 Mo. 513,	1288	Merritt v. Earle, 29 N. Y. 115,	274, 276, 2098, 2105
Merchants' Nat. Bank v. National Eagle Bank, 101 Mass. 281,	799	Merritt v. Gumaer, 2 Cow. (N. Y.) 552,	1822
Merchants' Nat. Bank v. Newton Cotton Mills, 115 N. Car. 507,	1399	Merritt v. Johnson, 7 Johns. 473,	502
Merchants' Nat. Bank v. Raymond, 27 Wis. 567,	1754	Merritt v. Seaman, 6 N. Y. 168,	2246
Merchants' Ins. Co. v. Edmond, 17 Gratt. (Va.) 138,	895	Merritt v. Todd, 23 N. Y. 28,	9
Merchants' Ins. Co. v. Morrison, 62 Ill. 242,	854	Meriweather v. Taylor, 15 Ala. 735,	2181
Merchants' Ins. Co. v. Prince, 52 N. W. Rep. 131,	923	Merryweather v. Jones, 4 Giff. 509,	2007
Merchants' and Planters' Line v. Wagered, 71 Ala. 581,	1452	Morsereau v. Lewis, 25 Wens. 243,	597
Meredith v. Meigh, 2 E. & B. 364,	667	Mersey, etc., Iron Co. v. Naylor, 9 Q. B. Div. 648,	2221
Meredith v. Short, 1 Salk. 25,	610	Mersey Steel Company v. Naylor, L. R. 9 App. Cas. 434,	150, 497, 2222
Meriam v. Harsen, 2 Barb. Ch. (N. Y.) 232,	1673	Mershon v. Moore, 76 Wis. 502,	168
Meriam v. Harsen, 4 Edw. Ch. (N. Y.) 70,	1672	Merson v. Merson, 101 Mich. 55,	625
Meriam v. Piner City Lumber Co., 23 Minn. 314,	855	Mertz v. Detweiler, 8 W. & S. 376,	797
Meriden, etc., Bank v. Gallaudet, 120 N. Y. 298,	2252	Merwin v. Ballard, 66 N. Car. 398,	2120
Meriden Britannia Co. v. Zingsen, 48 N. Y. 247,	867	Mescall v. Tully, 61 Ind. 96,	2166
		Metcalf v. Clark, 8 La. Ann. 286,	1675
		Metcalf v. Taylor, 36 Maine, 28,	864
		Metcalf v. Weld, 1 Gray, 210,	924
		Metcalfe v. Rycroft, 6 M. & S. 75,	548
		Methudy v. Ross, 10 Mo. App. 101,	6
		Metropolitan Bank v. Van Dyck, 27 N. Y. 400,	2118
		Metropolitan Bldg. Assn. v. Van Pelt, 36 Neb. 3,	1362
		Metropolitan Board of Excise v. Barrie, 34 N. Y. 657,	2128, 2147
		Metropolitan Exhibition Co. v. Ewing, 42 Fed. Rep. 198,	871, 2073
		Metropolitan Exhibition Co. v. Ward, 24 Abb. N. Cas. (N. Y.) 393,	2073

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Metropolitan Gaslight Co., <i>Re</i> , 85 N. Y. 526,	1553	Millard v. Baldwin, 3 Gray, 116,	239
Metropolitan Ins. Co. v. Anderson, 79 Md. 375,	22	Miles v. New Zealand Co., L. R. 32 Ch. Div. 266,	210, 655, 1473
Metropolitan Life Ins. Co. v. Drach, 101 Pa. St. 278,	896	Miles v. Williams, 1 P. Wms. 249,	548
Metropolitan Life Ins. Co. v. Meeker, 85 N. Y. 614,	2012	Miles Planting, etc., Co. v. Carlisle (D. C. App. Cas.) 23 Washington Law Rep. 33,	2129
Metropolitan National Bank v. Loyd, 90 N. Y. 530,	2281	Milford, Borough of, v. Milford Water Co., 124 Pa. St. 610,	1578
Metropolitan, etc., Tel. Co. v. Domestic, etc., Tel. Co., 44 N. J. Eq. 568,	1206,	Milford, etc., Co. v. Brush, 10 Ohio, 111,	259
Mette v. Feltgen, 148 Ill. 357,	1786	Milford. Inhabitants of, v. Commonwealth, 144 Mass. 64,	773
Metz v. Soule, 40 Iowa, 236,	543	Millani v. Tognini, 19 Nov. 135,	236
Meux v. Bell, 1 Hare, 73,	427	Mill v. Blackall, 11 Q. B. 358,	182
Mexia v. Oliver, 148 U. S. 664,	1710, 1729	Millan v. Page, 71 Wis. 655,	775
Mexican, etc., Banking Co. v. Lichtenstein, 10 Utah, 338,	1903	Millar v. Babcock, 29 Mich. 526,	1794
Meyer v. Brandt, 53 Minn. 59,	897	Millard v. Harvey, 34 Beav. 237,	845
Meyer v. Blair, 109 N. Y. 600,		Mill Dam Foundry v. Hovey, 21 Pick. (Mass.) 417,	281
Meyer v. City of Muscatine, 1 Wall. 384,	156, 157, 1636, 1638	Miller v. American Mut. Acc. Ins. Co. (1892), 92 Tenn. 167,	1263
Meyer v. Estes, 164 Mass. 457,	2074	Miller v. Ammon, 145 U. S. 421, 1897, 1898,	2071
Meyer v. Hartman, 72 Ill. 442,	597, 601	Miller v. Auburn, etc., Ry. Co., 6 Hill, 61,	643
Meyer v. Houck, 85 Iowa, 219,	265	Miller v. Baker, 160 Pa. 172,	1687
Meyer v. Meyer, 40 Ill. App. 94,	30	Miller v. Ball, 64 N. Y. 286,	844, 2274
Meyer v. Mitchell, 75 Ala. 475,	1117	Miller v. Bealer, 100 Pa. St. 583,	2253
Meyer v. Richards, 46 Fed. Rep. 727,	361	Miller v. Benjamin, 142 N. Y. 613,	140
Meyer v. Roberts, 46 Ark. 80,	652	Miller v. Billingsly, 41 Ind. 489,	246
Meyer v. Stitz, 9 N. Y. Supl. 805,	527	Miller v. Brenham, 63 N. Y. 83,	716
Meyers v. Lebanon Insurance Co., 156 Pa. St. 240,	319	Miller v. Campbell, 140 N. Y. 457,	1758
Meyers v. Pacific Construction Co., 20 Ore. 603,	2192, 2224	Miller v. Campbell, 52 Ind. 125,	1177
Meyers v. Schemp, 67 Ill. 469,	1151	Miller v. Chitwood, 2 N. J. Eq. 199,	955
Meylert v. Gas, etc., Co., 14 N. Y. Supl. 148,	956	Miller v. Church, 112 N. Car. 628,	1732
Meylette v. Brennan, 20 Colo. 242,	1216	Miller v. Coates, 66 N. Y. 610,	190, 465
Moynell v. Surtees, 25 L. J. C. 257,	61	Miller v. Collyer, 36 Barb. 250,	674
Mhoon v. Wilkerson, 47 Miss. 633,	1013	Miller v. Cook, 23 N. Y. 455,	684, 1132
Michael v. Bacon, 49 Mo. 474,	1902	Miller v. Craig, 36 Beav. 433,	566
Michael v. St. Louis, etc., Insurance Co., 17 Mo. App. 23,	877	Miller v. Craig, 36 Ill. 109,	1031
Michaelis v. Wolf, 136 Ill. 68,	126, 127, 128	Miller v. Dundlap, 22 Mo. App. 27,	877, 902
Michaels v. New York Cent. R. Co., 30 N. Y. 564,	276	Miller v. Eldridge, 126 Ind. 461,	190, 198
Michel v. Colegrove, 19 N. Y. Supl. 715,	2222	Miller v. Elliott, 1 Ind. 484,	2039
Michel v. Tinsley, 69 Mo. 442,	1058	Miller v. Fenton, 11 Paige, 18,	568, 569, 827
Michener v. Springfield, etc., T. Co., 142 Ind. 130,	2256	Miller v. Florer, 15 Ohio St. 148,	244, 248
Michaud v. McGregor, 63 N. W. Rep. 479,	200	Miller v. Gilleland, 19 Pa. St. 119,	1656
Michigan, etc., Ins. Co. v. Naugle, 130 Ind. 79,	119	Miller v. Hannibal, etc., R. Co., 90 N. Y. 430,	872, 885
Michigan Ins. Co. v. Bowes, 42 Mich. 19,	118	Miller v. Hanover R. Co., 87 Pa. St. 95,	157
Michigan Ins. Co. v. Leavenworth, 30 Vt. 11,	444	Miller v. Holbrook, 1 Wend. 318,	202
Michigan, etc., Iron Co. v. Thoney, 89 Mich. 226,	2277	Miller v. Holden, 18 Vt. 337,	509
Michigan R. Co. v. Bacon, 33 Mich. 466,	158	Miller v. Hughes, 33 S. C. 530,	1045
Michigan State Bank v. Hastings, 1 Doug. (Mich.) 225,	2130	Miller v. Ins. Co., 12 W. Va. 116,	895
Mickey v. Burlington, etc., Ins. Co., 35 Iowa, 174,	317	Miller v. Lorenz, 39 W. Va. 160,	1093, 1178, 1179, 1180
Micon v. Ashurst, 55 Ala. 607,	217	Miller v. Lullman, 81 Mo. 311,	13
Middleton v. Arnolds, 13 Gratt. (Va.) 489,	1891	Miller v. Mackle, 21 Ill. 152,	1023
Middleton v. Selby, 19 W. Va. 167,	1179	Miller v. Mackle, 27 Ill. 402,	1061
Middleton v. Stone, 111 Pa. St. 589,	906	Miller v. McCarty, 47 Minn. 321,	453
Middlesex v. Thomas, 5 C. E. Green, 39,	452	Miller v. McKenzey, 95 N. Y. 575,	10
Middlesex Turnpike Co. v. Locke, 8 Mass. 268,	293	Miller v. Miller, 78 Iowa, 177,	2006, 2008
Midkiff v. Lusher, 27 W. Va. 439,	831	Miller v. Minor Lumber Co., 38 Mich. 163,	1834
Midland, etc., Co. v. Johnson, 6 H. L. C. 795,	858	Miller v. Nugent, 12 Ind. App. 348,	83
Midland, Township of, v. County Board of, 37 Neb. 582,	1543	Miller v. Preston, 4 N. M. 311,	258
Mignano v. McAndrews, 56 Fed. Rep. 300,	411	Miller v. Proctor, 20 Ohio St. 442,	646
Milan v. Malloy, 10 Neb. 228,	146, 148	Miller v. Purchase, 5 Dak. 232,	1654
Milburn v. Thirty, etc., Boxes Oranges and Lemons, 57 Fed. Rep. 236,	988	Miller v. Roberts, 18 Texas, 16,	650
Milburn Wagon Co. v. Nisewarner (Va.), 19 S. E. Rep. 846,	325	Miller v. Sims, 2 Hill (S. Car.), 479,	1797
		Miller v. Smith, 26 Minn. 218,	1784
		Miller v. South Carolina R. Co., 9 Lawyers' Rep. Ann. 833,	733
		Miller v. State, 15 Wall. (U. S.) 478,	2132
		Miller v. Steam Navigation Co., 10 N. Y. 431,	124, 275
		Miller v. Stepper, 32 Mich. 194,	2256
		Miller v. Tiffany, 1 Wall. 298,	712, 730, 731
		Miller v. Union Switch Co., 132 N. Y. 502,	944
		Miller v. Washington, etc., R. Co., 11 Wash. 414,	1273
		Miller v. Wild Cat Co., 52 Ind. 51,	261
		Miller v. Winchell, 50 N. Y. 437,	242
		Miller v. Zwiener, 111 N. Y. 441,	1825
		Millett v. People, 117 Ill. 294,	1478
		Milthiser v. Erdman, 98 N. C. 298,	22

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Milligan v. Phipps, 153 Pa. St. 208,	1679, 1688, 1752	Minturn v. Larue, 23 How. 435,	1499, 1504
Milliken v. Pratt, 125 Mass. 374,	696, 700	Minturn v. Seymour, 4 Johns. Ch. 497,	1132
Milliken v. Tufts, 31 Maine, 497,	473	Misner v. Knapp, 13 Ore. 135,	1945
Milliman v. Huntington, 63 Hun, 258,	98	Missisquoi Bank v. Sabin, 43 Vt. 239,	214
Millner v. Patton, 49 Ala. 423,	1902	Mississippi, etc., Steamship Co. v. Swift,	5
Mills v. Brown, 11 Iowa, 314,	614, 616	Missouri Lead Mining and Smelting Co.	
Mills v. Catlin, 22 Vt. 98,	881	v. Reinhard, 114 Mo. 218,	1297
Mills v. Central Railroad Co., 41 N. J. Eq.	1415	Missouri, etc., R. Co. v. Brickley, 21 Kan.	749
1,	1099	275,	
Mills v. City of Brooklyn, 32 N. Y. 489,	1099	Missouri, etc., Ry. Co. v. Fagan, 72 Texas,	920, 1969
Mills v. Dunham, L. R. (1891) 1 Ch. 576,	872, 2045	127,	
Mills v. East London Union, L. R. 8 C. P.	281	Missouri, etc., R. Co. v. Harris, 67 Texas,	1959, 1968
79,	472	166,	
Mills v. Fowkes, 77 Scott, 444,	472	Missouri Pacific R. Co. v. Levi (Texas),	296
Mills v. Fowkes, 5 Bing. (N. C.) 455,	468, 471	14 S. W. Rep. 1082,	
Mills v. Fox, L. R. 37 Ch. Div. 153,	223	Missouri Pac. R. Co. v. Sidell, 67 Fed. Rep.	1283
Mills v. Gleason, 11 Wis. 470,	1509	464,	
Mills v. Gore, 20 Pick. 28,	16	Missouri Pacific Ry. Co. v. Twiss, 35 Neb.	736
Mills v. Hunt, 20 Wend. 431,	355	267,	
Mills v. Hyde, 19 Vt. 59,	826	Missouri Pac. R. Co. v. Tygard, 84 Mo. 263,	157
Mills v. Joiner, 20 Fla. 479,	24	Missouri Steamship Co., <i>In re</i> , L. R., 42	
Mills v. Kuykendall, 2 Blackf. 47,	994	Ch. Div. 321,	700, 741
Mills v. Mills, 40 N. Y. 543,	1852, 1985, 1993, 2082	Mitchel v. Reynolds, 1 P. Wms. 181,	
	1992	180, 2033, 2039, 2040, 2042, 2043, 2066, 2075, 2078	
Mills v. Norfolk & N. R. Co., 90 Va. 523,	2248	Mitchell v. Allen, 69 Texas, 70,	419, 543, 577
Mills v. Parkhurst, 126 N. Y. 89,	2275	Mitchell v. Brewster, 23 Ill. 163,	832
Mills v. St. Clair Co., 8 How. (U. S.) 569,	2146	Mitchell v. Burnham, 41 Maine, 286,	626
Mills v. Salisbury, etc., Association, 75		Mitchell v. Capital City Ins. Co. (Ala.	
N. Car. 292,	1614, 1620, 1622	1895), 17 So. Rep. 678,	1068
Mills v. Todd, 83 Ind. 25,	2240	Mitchell v. Clark, 110 U. S. 633,	2118, 2158
Mills v. United States Bank, 11 Wheat.	941	Mitchell v. Colby (Lowa 1895), 63 N. W.	
431,	941	Rep. 769,	632
Mills v. Wyman, 3 Pick. 207, 183, 192, 193, 784		Mitchell v. Griffin, 58 Ind. 559,	604
Millspaps v. City of Terrell, 60 Fed. Rep.	1533	Mitchell v. Hawley, 4 Denio, 414,	517, 527
192,		Mitchell v. Hockett, 25 Cal. 538,	447
Milltown, Earl of, v. Stewart, 3 Mylne &	1873	Mitchell v. Knight, 7 Ohio Ct. Ct. 204,	518
C. 18; 18 Sim. 371,		Mitchell v. Mitchell, 84 Texas, 303,	1083
Millville Traction Co. v. Goodwin (N. J.	1433	Mitchell v. Mitchell, 80 Texas, 101,	1680, 1683
Eq. 1895), 32 Atl. Rep. 263,	278	Mitchell v. Parker, 25 Mo. 31,	19
Millward v. Littlewood, 5 Ex. 775,	278	Mitchell v. Roberts, 17 Fed. Rep. 776,	383, 411
Milne v. Davidson, 5 Mart. (La.) (N. S.)	1478	Mitchell v. Rome R. Co., 17 Ga. 574,	155
410,	1902	Mitchell v. Sawyer, 71 N. Car. 70,	519, 524
Milne v. Huber, 3 McLean (U. S.), 212,	721	Mitchell v. Schoonover, 16 Ore. 211,	761
Milne v. Moreton, 6 Binn. 353,	1906	Mitchell v. Scott, 41 Mich. 108,	144, 2211
Milner v. Patton, 49 Ala. 423,	798, 799	Mitchell v. Seitz, 1 McArthur, 480,	1685
Milnes v. Duncan, 6 B. & C. 671,	335, 349	Mitchell v. Smith, 1 Bin. (Pa.) 110,	1883
Milwaukee Boiler Co. v. Duncan, 87 Wis.	155, 156	Mitchell v. Vance, T. B. Mon. 528,	188
120,	842	Mitchinson v. Hewson, 7 Term R. 344,	1651
Milwaukee Invest. Co. v. Johnson, 35		Mitford v. Mitford, 9 Ves. 87,	1644
Neb. 554,	932	Mitts v. McMorran, 64 Mich. 664,	612
Milwaukee R. Co. v. Field, 12 Wis. 340,	155, 156	Mix v. Baldwin, 156 Ill. 313,	1186
120,	842	Mix v. Beach, 46 Ill. 311,	1163
Mims v. Chandler, 21 S. Car. 480,	1349	Mixer v. Howarth, 21 Pick. 205,	659
Miner v. Belle Isle Ice Co. (Mich.) 53 N.	1766	Mixer v. Supervisors, 26 Mich. 422,	1471
W. Rep. 222,		Mizell v. Burnett, 4 Jones Law (N. Car.)	
Miner v. Brown, 133 N. Y. 308,	1349	249,	639, 688
Mineral Point R. Co. v. Barron, 83 Ill.	716	Mobile, etc., R. Co. v. Copeland, 63 Ala.	
365,		219,	737
Miner's Ditch Co. v. Zellerbach, 37 Cal.	543,	Mobile & O. R. Co. v. People, 132 Ill. 559,	1976
1231, 1264, 1514,	1536	Mobile, etc., R. Co. v. Jay, 61 Ala. 247,	907
Minick v. Huff, 41 Neb. 516,	616	Mobile, etc., Assn. v. Robertson, 65 Ala.	
Mining Co. v. Anglo, etc., Bank, 104 U. S.	192,	382,	1620
1271, 1287, 1339, 1351, 1602		Mobile, etc., Ry. Co. v. Steiner, 61 Ala.	
Minor v. Mechanics' Bank, 1 Pet. 46,	830, 831, 1384	559,	803
253		Mobile R. Co. v. Yandal, 5 Sneed, 294,	259
Minor v. Rogers, 40 Con. 512,		Mobley v. Lettis, 61 Ind. 11,	1859
Minneapolis, etc., Co. v. Davis, 40 Minn.	1101,	Modisett v. Johnson, 2 Blackf. (Ind.) 431,	2270
1101,	153		
Minneapolis, etc., Ry. Co. v. Beckwith,	2147	Moeller v. American Fire Ins. Co., 52	
129 U. S. 626,		Minn. 336,	1105
Minneapolis, etc., R. Co. v. Chisholm, 55		Moenich v. Fenestre, 2 The Reports, 102,	2041, 2045
Minn. 374,	1007, 1126, 1144		
Minneapolis Threshing Machine Co. v.	260	Moffat v. Parsons, 5 Taunt. 307,	403
Crevier, 39 Minn. 417,		Moffat v. Strong, 10 Johns. 11,	275
Minnesota Linsed Oil Co. v. Collier		Moffatt v. Bulson, 96 Cal. 106,	1866
White Lead Co., 4 Dill. 431,	62, 83, 103	Mogul Steamship Co. v. McGregor, L. R.	
Minnesota Thresher Co. v. Hanson, 3 N.	330	15 Q. B. Div. 476,	2060
Dak. 81,		Mohawk Bridge Co. v. Utica, etc., R. Co.,	
Mintier v. Mintier, 28 Ohio St. 307,	1713	6 Paige (N. Y.), 554,	2135
		Mohney v. Reed, 40 Mo. App. 99,	2236

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Mokelumne, etc., Mining Co. v. Woodbury, 14 Cal. 424,	1335	Moore v. Darton, 7 Eng. Law & Eq. Rep. 134,	557
Mollyneux v. Wittenberg, 39 Neb. 547,	2243	Moore v. Detroit Locomotive Works, 14 Mich. 266,	199
Molyneux v. Collier, 13 Geo. 406,	532	Moore v. Eastman, 1 Hun. 578,	1801
Monadnock Ry. Co. v. Felt, 52 N. H. 379,	157, 902	Moore v. Eddowes, 2 Ad. & E. 133,	798
Monaghan v. Agricultural Fire Ins. Co., 53 Mich. 238,	829	Moore v. Estes, 79 Ky. 282,	831
Monahan v. Moore, 9 Mich. 8,	415	Moore v. Evans, 14 Barb. (N. Y.) 524,	1963
Monmouth Park Assn. v. Wallis Iron Works, 55 N. J. Law, 132,	757, 758, 863	Moore v. Flynn, 135 Ill. 74,	15
Monocacy Co. v. American, etc., Co., 83 Pa. St. 517,	370	Moore v. Fox, 10 Johns. (N. Y.) 244,	653
Monongahela Navigation Co. v. Fenlon, 4 Watts & S. 205,	881	Moore v. Garwood, 4 Exch. 681,	904
Monopolies, Case of the, 11 Coke 84,	2052	Moore v. Gaus Mfg. Co., 113 Mo. 98,	1287
Monroe v. Hoff, 5 Den. 360,	456	Moore v. Giesecke, 76 Texas, 543,	116
Monroe v. Perkins, 9 Pick. 298,	199	Moore v. Goodwin, 43 Hun. 534,	131
Monroe v. Skelton, 36 Ind. 302,	1076	Moore v. Gordon, 44 Ark. 334,	843
Monroe v. Smelly, 25 Texas, 586,	2018	Moore v. Granby Mining & Smelting Co., 80 Mo. 86,	2184
Monroe v. Williams, 37 S. C. 81,	165	Moore v. Griffen, 22 Maine, 350,	872
Monroe, Bank of, v. Gifford, 79 Iowa, 300,	452	Moore v. Hanover R. Co., 94 Pa. St. 324,	156, 157
Monson v. Drakeley, 40 Conn. 552,	811	Moore v. Hays, 12 Ind. App. 476,	670
Monson, Inhabitants of, v. Williams, 6 Gray (Mass.), 416,	1660	Moore v. Hibbee, 45 Ind. 437,	629, 854, 1193
Montacute v. Maxwell, 1 P. Wms. 618,	227, 618, 619, 843, 1717	Moore v. Hollaman, 25 Texas. Supl. 81,	375
Montague v. Flockton, L. R. 16 Eq. Cas. 189,	2072	Moore v. Joyce, 161 Pa. St. 138,	1678
Montague v. Smith, 13 Mass. 396,	2184	Moore v. Kennedy, 81 Texas, 144,	942
Montague v. Weil, 30 La. Ann. 50,	4	Moore v. Kerr, 46 Ind. 468,	621
Montclair, Inhabitants of Township of, v. New York & G. L. R. Co., 45 N. J. Eq. 436,	439	Moore v. King, 134 N. Y. 596,	327
Montefiori v. Montefiori, 1 W. Bl. 363,	223	Moore v. Norman, 52 Minn. 83,	400
Monterey County v. Seegleken (Cal. 1894), 36 Pac. Rep. 515,	1066	Moore v. Ligon, 22 W. Va. 292,	445
Monterey, etc., R. Co. v. Hildreth, 53 Cal. 123,	1320	Moore v. Magrath, Cowp. 9,	862, 892
Montgomery v. Edwards, 46 Vt. 151,	592	Moore v. Mahaska County, 61 Iowa, 177,	2088
Montgomery v. Gibbs, 40 Iowa, 652,	264	Moore v. Biglow, 153 Mass. 60,	1056
Montgomery v. Phillips (N. J.), 31 Atl. Rep. 622,	1364, 1366	Moore v. Marks, 116 N. Car. 785,	478
Montgomery v. Pickering, 116 Mass. 227,	2289	Moore v. Mayor, etc., of New York, 73 N. Y. 238,	783
Montgomery, City Council of, v. Montgomery Water Works Co., 77 Ala. 248,	772	Moore v. McIntosh, 6 Kan. 39,	201
Montgomery Mutual Building Assn. v. Robinson, 60 Ala. 413,	1620	Moore v. McKenney, 83 Me. 80,	40
Montgomery, etc., R. Co. v. Boring, 51 Ga. 582,	1458	Moore v. Metropolitan Nat. Bank, 55 N. Y. 41,	1034
Montpelier Academy v. George, 14 La. 395,	2142	Moore v. Moore, 127 Mass. 22,	239
Montpelier R. Co. v. Langdon, 46 Vt. 284,	157	Moore v. Moore, 3 Abb. Dec. (N. Y.) 303,	186
Montville, Inhabitants of the Town of, v. Haughton, 7 Conn. 543,	1057	Moore v. Mourgue, Cowp. 479,	797
Monumental National Bank v. Globe Works, 101 Mass. 58,	1230, 1248, 1285, 1358	Moore v. Murdock, 26 Cal. 514,	2098, 2102
Monyhan v. Moore, 9 Mich. 9,	403	Moore v. New Orleans, 32 La. Ann. 726,	2142
Moody v. Mahurin, 4 N. H. 296,	393	Moore v. Norman, 43 Minn. 428,	408
Moody v. Moody, 14 Maine, 307,	2210	Moore v. Norman, 52 Minn. 83,	400, 468
Moog v. Hannon, 93 Ala. 503,	1888, 1898	Moore v. Nowell, 94 N. Car. 265,	2150
Moon v. Crowder, 72 Ala. 79,	1102	Moore v. Page, 111 U. S. 117,	1733
Moon v. Harder, 38 Mich. 566,	145	Moore v. Phillips, 7 M. & W. 536,	2121
Moon v. Martin, 122 Ind. 211,	211, 213	Moore v. Phoenix Ins. Co., 62 N. H. 240,	895
Mooney v. Howard Insurance Co., 138 Mass. 375,	915	Moore v. Pierson, 6 Iowa, 275,	57
Mooney v. Miller, 102 Mass. 217,	989, 1878	Moore v. Powell, 6 Texas C. App. 43, 1198,	1199
Moore v. Appleton, 26 Ala. 633,	827	Moore v. Redding, 69 Miss. 811,	205
Moore v. Burler, 90 Va. 683,	1711, 1712	Moore v. Shields, 121 Ind. 267,	1518
Moore v. Campbell, 10 Exch. 323,	109, 306, 685, 952	Moore v. Small, 19 Pa. St. 461,	844
Moore v. Carter, 146 Pa. St. 492,	138, 149, 370	Moore v. Smith, 19 Ala. 774,	99
Moore v. Chenault (Ky. App. 1895), 29 S. W. Rep. 140,	690	Moore v. Tate, 102 Ala. 320,	1086
Moore v. City of Indianapolis, 120 Ind. 433,	2128	Moore v. Taylor, 81 Md. 644,	682
Moore v. City of Waco, 85 Texas, 206,	1851	Moore v. Taylor, 42 Hun. 45,	2193
Moore v. Colt, 127 Pa. St. 289,	2262	Moore v. Williams, 115 N. Y. 586,	420, 1159
Moore v. Copewell, etc., Nail Co., 76 Mich. 606,	2211	Moore v. Williamson, 44 N. J. Eq. 496,	1662
Moore v. Copley, 165 Pa. St. 294,	1656	Moore Hardware Co. v. Towers Hardware Co., 87 Ala. 206,	2042, 2047
Moore v. Cross, 87 Texas, 557,	965, 1627	Moorehouse v. Colvin, 15 Beav. 341,	618
		Moorehouse v. Crangle, 36 Ohio St. 130,	608
		Moore v. Citizens Nat. Bank, 111 U. S. 156,	1305, 1351
		Moran v. Commissioners, 2 Black, 722,	1524, 1527
		Moran v. Moran (Mich. 1895), 63 N. W. Rep. 889,	2276
		Morange v. Morris, 3 Keyes, 48,	410
		Moran v. Prather, 23 Wall. 492,	869, 892
		Mordecai v. Jacobi, 12 Rich. 547,	917
		Mordocai v. Pearl, 63 Hun (N. Y.), 553,	1796
		More v. Bennett, 140 Ill. 69,	2037, 2061
		More v. Bonnet, 40 Cal. 251, 152, 887, 1866,	2029
		More v. Freeman, Bumb. 215,	1207, 1653
		Moreau v. Saffarans, 3 Sneed, 596,	646
		Morehouse v. Comstock, 42 Wis. 626,	193
		Moreland Township v. Davidson Township, 71 Pa. St. 371,	785

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Morey v. Town of Newfane, 8 Barb. 645,	213	Morse v. Crawford, 17 Vt. 499,	1838
Morford v. White, 53 Ind. 547,	781	Morse v. Good, 11 N. Y. 281,	2152, 2157
Morgan v. Bain, L. R. 10 C. P. 15,		Morse v. Moore, 83 Maine, 473,	2230
	152, 492, 2235	Morse v. Rathburn, 42 Mo. 594,	755, 757
Morgan v. Beaumont, 121 Mass. 7,	1949	Morse v. St. Paul, etc., Insurance Co., 21	
Morgan v. Bell, 3 Wash. St. 554,	1100	Minn. 407,	995
Morgan v. East, 126 Ind. 42,	123	Morse v. Siebold, 147 Ill. 318,	1180
Morgan v. Fencher, 1 Blackf. 10,	356	Morse v. Toppan, 3 Gray (Mass.), 411,	2150
Morgan v. Griffith, L. R. 6 Exch. 70,	263	Morse v. Westport, 110 Mo. 502,	1554
Morgan v. Louisiana, 93 U. S. 217,	2139	Morse v. Wheeler, 4 Allen (Mass.), 570,	1778
Morgan v. Malleson, L. R. 10 Eq. Cas. 475,	557	Morse v. Wilcoxson (Ky. 1895), 30 S. W.	
Morgan v. McKee, 77 Pa. St. 228,	150	Rep. 612,	962
Morgan v. Perhamus, 36 Ohio St. 517,	2044	Morse v. Woodworth, 155 Mass. 233,	1884
Morgan v. Powers, 66 Barb. 35,	322	Morse Twist, etc., Co. v. Morse, 103 Mass.	
Morgan v. Railroad Co., 96 U. S. 716,	1833	73, 2041, 2047, 2043, 2049, 2051,	2074
Morgan v. Smith, 70 N. Y. 537,	819	Morss v. Elmendorf, 11 Paige, 277,	1158
Morgan v. Struthers, 313 U. S. 246,	157	Morten v. Frick, 87 Ga. 230,	108
Morgan v. Yarborough, 5 La. Ann. 316,	617	Mortlock v. Buller, 10 Ves. 292,	234
Morgan, County of, v. Allen, 103 U. S. 515,		Mortlock v. Williams, 76 Mich. 568,	514
	558, 1400	Morton v. Burn, 7 Ad. & El. 19, 74, 182, 192, 220	
Moritz v. Hoffman, 35 Ill. 553,	1664	Morton v. Dean, 13 Metc. 385,	674
Morley v. Attenborough, 3 Ex. 500,	362	Morton v. Lamb, 7 T. R. 121,	149, 378
Morley v. Boothby, 3 Bing. 107,	179, 683	Morton v. Nelson, 145 Ill. 586,	645
Morley v. Lake Shore Ry. Co., 146 U. S.		Morton v. Rainey, 82 Ill. 215,	19
162,	2150, 2151	Morton v. Stewart, 5 Bradw. (Ill.) 533,	1772
Morphett v. Jones, 1 Swans. 172,	841	Morton v. Tibbett, 15 Q. B. 428,	
Morrell v. Fisher, 4 Exch. 591,	862		663, 665, 669, 671
Morrell v. Frith, 3 M. & W. 402,	903, 904	Morville v. American Tract Soc., 123 Mass.	
Merriam v. Field, 24 Wis. 640,	41	129,	1577
Morrill v. Aden, 19 Vt. 505,	1802	Moseley v. Mastin, 37 Ala. 216,	925
Morrill v. Boston, etc., R. Co., 55 N. H.		Moser v. Claes, 23 Mo. App. 420,	1644
531,	1425	Moser v. Cochran, 107 Mass. 400,	1141
Morrill v. Everson, 77 Cal. 114,	234, 245	Moses v. Boston & M. R. Co., 32 N. H. 23,	124
Morrill v. Morrill, 26 Cal. 288,	551	Moses v. Hatfield, 27 S. Car. 324,	900
Morrill v. Nightingale, 93 Cal. 452, 2, 1828,	2012	Moses v. Macferlan, 2 Burr. 1005,	30
Morrill v. Tehama, etc., Mining Co., 10		Moses v. Ocoee Bank, 1 Lea, 398,	1375
Nev. 135,	6	Moses v. Trice, 21 Gratt. 556,	399, 457
Morris v. Cleasby, 1 M. & Sel. 576,	612	Mosher v. Griffin, 51 Ill. 184,	1946
Morris v. Gaines, 82 Texas, 255,	1198	Mosher v. Kittle, 101 Mich. 345,	1694
Morris v. Hoyt, 11 Mich. 8,	1126	Mosher v. Post, 89 Wis. 602,	1022
Morris v. Kasing, 79 Texas, 141,	1774	Moshier v. Meek, 80 Ill. 79,	429
Morris v. Keil, 20 Minn. 531,	1228	Moss v. Averell, 10 N. Y. 449,	1225
Morris v. Lagerfelt, 103 Ala. 608,	218	Moss v. Cohen, 11 N. Y. Misc. 184,	1975
Morris v. Levison, L. R. I. C. P. D. 155,		Moss v. Culver, 64 Pa. St. 414,	621, 632, 846
	95, 108, 111	Moss v. Jerome, 10 Bosw. 220,	834
Morris v. Moss, 25 L. J. Eq. 194,	2044	Moss v. Smith, 9 C. B. 94,	269
Morris v. Peckham, 51 Conn. 128,	651	Moss v. Sweet, 16 Q. B. 493,	506
Morris v. Rexford, 18 N. Y. 552,	123	Moss v. Wilson, 40 Cal. 159,	517
Morris v. Simpson, Executor, 3 Houst.		Mossop v. Mason, 16 Grant's Ch. (Can.)	
568,	789	302,	2044
Morris v. Summerl, 2 Wash. (C. C. U. S.)		Mosteller's Appeal, 30 Pa. St. 473,	792
203,	2206	Motley v. Head, 43 Vt. 633,	1843
Morris v. Tuscaloosa Manufacturing Co.,		Mott v. Mott, 49 N. J. Eq. 192, 1813, 1818,	1824
83 Ala. 565,	2077	Mott v. Mott, 11 Barb. (N. Y.) 127,	2039
Morris v. Woodward, 25 N. J. Eq. 32,	2000	Motts v. Hicks, 1 Cow. (N. Y.) 513,	1360
Morris Canal Co. v. Emmett, 9 Paige, 168, 110		Mound City, City of, v. Snoddy, 53 Kan.	
Morris Run Coal Co. v. Barclay Coal Co.,		126,	1512
68 Pa. St. 173,	1425, 1426, 1427, 1983,	Moulou v. American, etc., Insurance Co.,	
	2037, 2054, 2057, 2060, 2061, 2062	111 U. S. 335,	307, 313
Morris v. Harveys, 75 Va. 726,	448	Moulton v. Faught, 41 Maine, 298,	641
Morrison v. Berry, 42 Mich. 393,	1709	Moulton v. Kershaw, 59 Wis. 316,	55
Morrison v. Collier, 79 Ind. 417,	670	Moulton v. McOwen, 103 Mass. 587,	139
Morrison v. Darling, 47 Vt. 67,	2002	Moultrie, County of, v. Rockingham Ten	
Morrison v. Gold, etc., Mining Co., 52 Cal.		Cent Savings Bank, 92 U. S. 631,	1524
306,	1314	Mounsey v. Drake, 10 John. 27,	280
Morrison v. Insurance Co., 69 Texas, 353, 2214		Mount v. White, 7 Johns. (N. Y.) 434,	1946
Morrison v. Phillips, etc., Construction		Mountain v. Fisher, 22 Wis. 93,	793
Co., 44 Wis. 405,	1960, 1961, 1962	Mountjoy v. Metzger, 9 Phila. 10,	2222
Morrison v. Poyntz, 7 Dana, 307,	7827	Mountjoy v. Metzger, 12 Am. Law Reg.	
Morrison v. Terrell, 27 Kan. 326,	1145	442,	496
Morrison v. Wells, 48 Kan. 494,	744	Mount Hope Cemetery v. City of Boston,	
Morrissey v. Broomal, 37 Neb. 766,	1919, 1920	158 Mass. 509,	2142
Morrow v. Des Moines Co., 84 Iowa, 256,	118	Mount Pleasant v. Beckwith, 100 U. S.	
Morrow v. Goudchaux, 41 La. Ann. 711,		514,	1456
	1743, 1835	Mount Sterling, etc., Turnpike Co. v.	
Morrow v. Iron and Steel Co., 87 Tenn.		Looney, 1 Metc. (Ky.) 550,	1341
262,	155	Bush, 428,	259, 260
Morrow v. Jones, 41 Neb. 867,	219	Mowatt v. Wright, 1 Wend. 355,	795, 802
Morrow v. Morrow, 12 Hun. 386,	194, 195	Mowrey v. Davis, 12 Ind. App. 681,	637
Morrow v. Norton (Cal. 1894), 38 Pac. Rep.		Mowrey v. Vandling, 9 Mich. 39,	629
953,	2177, 2183	Mowry v. Kirk, 19 Ohio St. 375,	496, 499
Morse v. Bellows, 7 N. H. 549,	577		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Moxon v. Payne, L. R. 8 Ch. 881,	2239	Murphy v. Thompson, 23 U. C. C. P. 233,	684
Moynehan v. Moore, 9 Mich. 9,	380, 398, 411	Murphy v. Welch, 123 Mass. 489,	1228
Muckenberg v. Holler, 29 Ind. 139,	2007	Murphy v. Whitney, 69 Hun. 573,	839
Mudskill Min. Co. v. Watrous, 61 Fed. Rep.		Murray v. Bogart, 14 Johns. 518,	826
163,	982, 993, 999, 1010	Murray v. Coster, 20 Johns. 576,	194
Mueller v. State, 76 Ind. 310,	2096, 2100, 2102	Murray v. Ellis, 112 Pa. St. 455,	417
Mugler v. Kansas, 123 U. S. 623,	2147	Murray v. Gouverneur, 2 Johns. Cas. 438,	447
Muhlenbrinck v. Commissioners, 42 N. J.		Murray v. Harway, 56 N. Y. 337,	417
Law, 361,	2128	Murray v. Judah, 6 Cow. 454,	451
Muir v. City of Glasgow Bank, 4 L. R. 4		Murray v. Lylburn, 2 Johns. Ch. (N. Y.)	
App. Cas. 337,	872	441,	1644
Muirheid v. Smith, 35 N. J. Eq. 303,	1661	Murray v. McShane, 52 Md. 217,	275
Mulcrone v. American Lumber Co., 55		Murray v. Nelson Lumber Co., 143 Mass.	
Mich. 622,	609, 611	230,	1350
Muldon v. Whitlock, 1 Cow. 290,	447	Murray Pillsbury, 59 Minn. 85,	886
Muldoon v. Lynch, 66 Cal. 536,	758	Murray v. Reeves, 8 Barn. & C. 425,	1882
Mulford v. Caesar, 53 Mo. App. 263,	1924	Murray v. Roberts, 150 Mass. 353,	1634
Mulhall v. Berg (Iowa), 63 N. W. Rep.		Murray v. Scott, L. R. 9 App. Cas. 526,	1604
573,	483	Murray v. Snow, 37 Iowa, 410,	—
Mulhall v. Quinn, 1 Gray, 105,	2086	Murray v. Vanderbilt, 39 Barb. (N. Y.) 140,	2080
Mulholland v. Mayor, etc., of New York,			
113 N. Y. 631,	1559, 2175	Murrell v. Goodyear, 1 De Gex, F. & J.	
Mullanphy Savings Bank v. Schott, 135		432,	1148
Ill. 635,	1362	Murtha v. Curley, 90 N. Y. 372,	1064
Mullen v. Morris, 43 Neb. 596,	171	Muscataine v. Keokuk, etc., Co., 45 Iowa,	
Mullen v. Old Colony R. Co., 127 Mass. 86,	577	185,	460, 803, 807
Muller v. Balke, 154 Ill. 110,	2291	Muscataine Water-works Co. v. Muscatine	
Muller v. Dows, 94 U. S. 444,	1453	Lumber Co., 55 Iowa, 112,	1231
Muller v. Eno, 14 N. Y. 597,	365, 412	Muschamp v. Lancaster, etc., Ry. Co., 8	
Mulligan v. Illinois Central R. Co., 107		M. & W. 421,	736
U. S. 102,	737	Musgrave v. Morrison, 54 Md. 161,	154
Mullins v. Smith, 1 Drew & S. 204,	1523	Musick v. Dodson, 76 Mo. 624,	184, 1697
Mulloy v. Ingalls, 4 Neb. 115,	1518	Musselman v. Cravens, 47 Ind. 1,	
Mulock v. Mulock, 31 N. J. Eq. 594,	1018		1816, 1817, 1850, 2241
Mulvey v. King, 39 Ohio St. 491,	960	Musser v. Johnson, 42 Mo. 74,	1228
Mumford v. Brown, 6 Cowen, 475,	186	Musser v. Meears, 8 Utah, 367,	2201
Mumford v. Gething, 7 C. B. (N. S.) 305,	2015	Mussey v. Bates, 65 Vt. 449,	625
Mumford v. Hawkins, 5 Denio, 355,	1318	Mussey v. Eagle Bank, 9 Metc. (Mass.)	
Mumford v. McPherson, 1 Johns. 363,	851	306,	1343
Mumford v. Murray, 6 Johns. Ch. 452,	566	Mussey v. Ravner, 22 Pick. 223,	52
Mumford v. Whitney, 15 Wend. 380,	635, 611	Mustard v. Wohlford, 15 Gratt. 329,	215, 1772
Munchus v. Harris, 69 Ala. 86,	1003	Mutual Benefit Life Ins. Co. v. Robison,	
Muncy Traction Engine Co. v. De La		54 Fed. Rep. 580,	733
Green (Pa.), 13 Atl. Rep. 747,	259	Mutual Life Ins. Co. v. Arhelger (Ariz.),	
Muncy Engine Co. v. De La Green, 143 Pa.		36 Pac. Rep. 895,	313
St. 269,	1329	Mutual Life Ins. Co. v. Leubrie, 71 Fed.	
Munds v. Cassiday, 98 N. Car. 558,	22	Rep. 843,	118, 119
Mundy v. Whittimore, 15 Neb. 647,	1831	Mutual Life Ins. Co. v. Smith, 23 Hun,	
Munger v. Munger, 33 N. H. 551,	792	535,	204
Munhall v. Pennsylvania R. Co., 92 Pa. St.		Mutual Life Ins. Co. v. Watson, 30 Fed.	
150,	1420	Rep. 653,	1923
Munk v. Weidner (Texas App. 1895), 29		Mutual National Bank v. Rotge, 28 La.	
S. W. Rep. 409,	680	Ann. 933,	451
Munro v. Butt, 8 E. & B. 738,	187	Myer v. Fruin (Texas 1894),	2225
Munro v. Long, 35 S. Car. 360,	1061, 1071	Myer v. Hart, 40 Mich. 517,	755
Munsell v. Baldwin, 56 Conn. 522,	140	Myers v. Croft, 13 Wall. 291,	201
Munson v. Syracuse, etc., R. Co., 103 N. Y.		Myers v. Dean, 132 N. Y. 65,	7
58,	1205, 1291, 1311, 1314	Myers v. Dean, 11 Misc. R. 368,	268
Munson v. Washband, 31 Conn. 303,	1800	Myers v. De Mier, 52 N. Y. 647,	753
Munson v. Wray, 7 Blackf. 403,	48	Myers v. Forbes, 24 Md. 598,	95
Munt v. Stokes, 4 T. R. 561,	1870	Myers v. Kingston Coal Co., 126 Pa. St.	
Muolov v. American, etc., Insurance Co.,		582,	1775
111 U. S. 335,	318	Myers v. Knabe, 51 Kan. 720,	1821
Murchie v. Cornell, 155 Mass. 60,	347	Myers v. Meinrath, 101 Mass. 366,	1889, 2103
Murchie v. McIntire, 40 Minn. 331,	1633	Myers v. Munson, 65 Iowa, 423,	686
Murdeldt v. New York, etc., R. Co., 102		Myers v. O'Neal, 130 Ind. 370,	29, 30
N. Y. 703,	2271	Myers v. Ross, 3 Head, 59,	427
Murdock v. Clarke, 90 Cal. 427,	422	Myers v. Smith, 48 Barb. 615,	81, 83
Murdock v. Gilchrist, 52 N. Y. 242,	52	Myers v. Turner, 17 Ill. 179,	234
Murdock v. Lewis, 26 Mo. App. 234,	201	Mygalt v. Tarbell, 78 Wis. 351,	201, 203
Murdy v. McCutcheon, 95 Pa. St. 435,	831	Myles v. Myles, 6 Bush, 237,	611
Murley v. Ennis, 2 Colo. 300,	635	Mynard v. Syracuse, etc., R. Co., 71 N. Y.	
Murphy v. First Nat. Bank (Iowa 1895),		180,	1963
63 N. W. Rep. 702,	1065	Myrick v. Battle, 5 Fla. 345,	2124
Murphy v. Hanrahan, 50 Wis. 4485,	962	Myrick v. Dame, 9 Cush. 248,	543, 577
Murphy v. Kastner, 24 Atl. Rep. 565,	565	Myrick v. French, 2 Gray, 420,	255, 256
Murphy v. McGraw, 74 Mich. 318,	322	Myrick v. Michigan Central R. Co., 107	
Murphy v. Murphy, 1 S. Dak. 316,	792	U. S. 102,	737
Murphy v. O'Sullivan, 18 Ir. Jur. (11 N.S.)		Myrick v. Slason, 19 Vt. 121,	2185
111,	652, 653	Mytinger v. Springer, 3 W. & S. (Pa.) 405,	1946
Murphy v. Ottenheimer, 84 Ill. 39,	1759		
Murphy v. St. Louis, 8 Mo. App. 482,	890	Mytton v. Midland Ry. Co., 4 H. & N. 615,	736

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

N

Nace v. Hollenbeck , 1 Serg. & R. (Pa.) 540, 1779	National Benefit Co. v. Union Hospital Co. , 45 Minn. 272, 2036, 2041
Nagel v. Loomis , 33 Neb. 499, 30	National Cordage Co. v. Pearson Cordage Co. , 55 Fed. Rep. 812, 812
Nagle v. Newton , 22 Gratt. 814, 1096, 2263	National Distilling Co. v. Cream City Importing Co. , 86 Wis. 352, 2066
Nagle's Estate , <i>In re</i> , 10 Pa. Co. Ct. Rep. 525, 565	National, etc., Bank v. Lougee , 108 Mass. 371, 40
Nairn v. Prowse , 6 Ves. Jr. 752, 221, 223	National, etc., Bank v. Porter , 125 Mass. 333, 1249
Naldred v. Gilham , 1 Pr. Wms. 577, 89	National, etc., Loan Assn. v. Ashworth (Va. 1895), 22 S. E. Rep. 521, 1626
Nan v. Jackman , 58 Iowa, 359, 843	National, etc., Register Co. v. Blumenthal , 85 Mich. 464, 337
Napier v. Union Cotton Mills , 93 Ga. 587, 1216	National Fire Insurance Co. v. Loomis , 11 Paige, 431, 688
Narragansett Bank v. Atlantic Silk Co. , 3 Met. 282, 1358	National Gold Bank v. McDonald , 51 Cal. 64, 448
Nash v. Baker , 37 Neb. 713, 1543	National Investment Co. v. National Savings Assn. , 49 Minn. 517, 1604
Nash v. Drisco , 51 Maine, 417, 869, 902	National, etc., Ins. Co. v. Pursell , 10 Allen, 232, 1285
Nash v. Hodgson , 6 D. M. & G. 474, 469	Nat. Life Ins. Co. v. Huron Board, etc. , 62 Fed. Rep. 778, 1525, 1526, 1527
Nash v. Jewett , 61 Vt. 501, 1802	National Park Bank v. German-American, etc., Security Co. , 116 N. Y. 2-1, 1256
Nash v. Lull , 102 Mass. 60, 9, 233, 234, 235	National Park Bank v. Seaboard Bank , 114 N. Y. 28, 470, 478
Nash v. Minnesota, etc., Trust Co. , 159 Mass. 437, 1878	National Provincial Bank v. Marshall, L. R. , 40 Ch. Div. 112, 2045
Nash v. Towne , 5 Wall. 639, 873, 874	National State Bank v. Vigo Nat. Bank , 141 Ind. 352, 1281
Nashua, etc., R. Co. v. Boston & Lowell R. Co. , 136 U. S. 356, 1458	Nattan v. Riley , 54 Ark. 30, 164
Nashua Lock Co. v. Worcester, etc., R. Co. , 48 N. H. 339, 736, 737	Natusch v. Irving , 2 Coop. T. Cott. 358, 1254
Nashville v. Brown , 9 Heisk. (Tenn.) 1, 1513	Naugatuck R. Co. v. Waterbury Button Co. , 23 Conn. 457, 735
Nashville, City of, v. Sutherland (Tenn.), 21 S. W. Rep. 674, 1513	Naumberg v. Young , 44 N. J. Law, 331, 374
Nashville, Mayor, etc., of, v. Ray , 19 Wall. 468, 782	Nave v. Adams , 107 Mo. 414, 30
Nashville, Mayor of, v. Toney , 10 Lea, 643, 782	Nave v. Wilson , 12 Ind. App. 38, 1930
Nashville Trust Co. v. Fourth Nat. Bank , 91 Tenn. 336, 1644	Naylor v. McSwegan , 21 N. Y. Supl. 930, 321, 323
Nassoi v. Tomlinson , 65 Hun, 491, 518	Naylor v. Minock , 96 Mich. 182, 1765
Natcher v. Natcher , 47 Pa. St. 496, 800	Neal v. Gillaspay , 56 Ind. 451, 360, 361
Natchez Building Association v. Shields , 71 Miss. 630, 1624	Neal v. Gillett , 23 Conn. 437, 1838
Nathan v. Tompkins , 82 Ala. 437, 1906	Neal v. Gregory , 19 Fla. 356, 842
National Bank v. Atkinson , 55 Fed. Rep. 465, 1344	Neal v. Neal , 69 Ind. 419, 629
National Bank v. Burkhardt , 100 U. S. 686, 920	Neal v. Sheffield, Cro. Jac. 254, 515
National Bank v. Carolina, etc., R. Co. , 63 Fed. Rep. 25, 1436	Neal's Executors v. Gilmore , 79 Pa. St. 421, 1128
National Bank v. Case , 99 U. S. 628, 1262	Neale v. Neales , 9 Wall. 1, 839, 846, 849
National Bank v. Dean , 86 Iowa, 656, 474	Nealley v. Greenough , 25 N. H. 325, 1831
National Bank v. Elmira , 53 N. Y. 49, 458	Nebraska Railroad Co. v. Lett , 8 Neb. 251, 2253
National Bank v. First Nat. Bank , 100 Mich. 485, 1643	Neef v. Redmon , 76 Mo. 195, 8
National Bank v. Grand Lodge , 98 U. S. 123, 248, 2184	Neely v. Jones , 16 W. Va. 625, 445, 446
National Bank v. Hall , 101 U. S. 43, 62, 71	Neenan v. Donoghue , 50 Mo. 493, 126
National Bank v. Hartford Fire Ins. Co. , 95 U. S. 673, 313, 317	Neff v. Inhabitants of Wellesley , 148 Mass. 487, 1575
National Bank v. Insurance Co. , 104 U. S. 54, 1280	Neff v. Lightstone , 77 N. Y. 96, 2168
National Bank v. Insurance Co. , 95 U. S. 673, 318	Negley v. Jeffers , 23 Ohio St. 90, 689
National Bank v. Kirk , 90 Pa. St. 49, 1832	Neill v. Chesson , 15 Ill. App. 266, 868
National Bank v. Law , 127 Mass. 72, 1285	Neill v. Shamburg , 158 Pa. St. 263, 1012
National Bank v. Levy , 17 R. I. 746, 447	Neilsen v. United States, etc., Co. , 37 Ill. App. 253, 466
National Bank v. Matthews , 93 U. S. 621, 1249, 1265, 1428, 1836	Neilson v. Hartford , 8 M. & W. 823, 903
National Bank v. Sprague , 20 N. J. Eq. 159, 2000	Neininger v. State , 50 Ohio St. 394, 1058
National Bank v. Taylor , 5 S. D. 99, 2282	Nelichka v. Esterly , 29 Minn. 146, 148
National Bank v. Whitney , 103 U. S. 99, 1249, 1265	Neligh v. Bradford , 1 Neb. 451, 540
National Bank v. Young , 41 N. J. Eq. 531, 1342	Nelligan v. Campbell , 20 N. Y. Supl. 234, 1349
National Bank of Auburn v. Dillingham , 147 N. Y. 603, 1387	Nellis v. Clark , 20 Wend. (N. Y.) 24, 1940
National Bank of Commerce v. National Mech. Bank Assn. , 53 N. Y. 211, 481	Nelson v. Becker , 32 Neb. 99, 194
National Bank of Commerce v. Town of Grenada , 54 Fed. Rep. 100, 1530, 1531	Nelson v. Bevins , 19 Neb. 715, 1741
National Bank of El Paso v. Fink , 86 Texas, 303, 2084, 2086	Nelson v. Bostwick , 5 Hill (N. Y.), 37, 2196
	Nelson v. Boynton , 3 Metc. (Mass.) 396, 594, 596, 597, 599, 601, 610
	Nelson v. Bridges , 2 Beav. 239, 1097
	Nelson v. Cartmel , 6 Dana (Ky.), 7, 559
	Nelson v. Duncombe , 9 Beav. 211, 1815
	Nelson v. First Nat. Bank , 43 Ill. 36, 597
	Nelson v. Loder , 132 N. Y. 288, 415
	Nelson v. Matthews , 2 Hen. & W. 164, 110
	Nelson v. Mayor, etc. , 63 N. Y. 535, 783

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Nelson v. Mayor, etc., New York City, 131 N. Y. 4.	1484	New England Trust Co. v. Abbott, 162 Mass. 148.	1131, 1209
Nelson v. Robson, 17 Minn. 285.	407, 409	Newhall v. Appleton, 114 N. Y. 140.	42, 892, 2179
Nelson v. Shelby, etc., Improvement Co., 96 Ala. 515.	628, 630	Newhall v. Kingsbury, 131 Mass. 445.	167
Nelson v. Smith, 36 N. J. Law. 143.	125	New Hampshire R. Co. v. Johnson, 30 N. H. 390.	157
Nelson v. Spaulding, 11 Ind. App. 453.	1660	New Haven, City of, v. New Haven R. Co., 62 Conn. 252.	1555, 2209
Nelson v. Wilson, 75 Iowa, 710.	409, 414	New Haven, etc., R. Co. v. Chatham, 42 Conn. 465.	1510
Nelson Manufacturing Co. v. Mitchell, 38 Mo. App. 321.	136	New Haven, etc., Co. v. Fowler, 28 Conn. 103.	563
Nenny v. Waddill, 6 Texas C. App. 244.	1401	New Haven, etc., Co. v. Hayden, 119 Mass. 361.	821
Nesbit v. Hanway, 87 Ind. 400.	394, 395	Newkirk v. Marshall, 35 Kan. 77.	850
Nesbit v. Riverside District, 144 U. S. 610.	30, 31, 1526, 1530	Newington v. Levy, L. R. 6 C. P. 180.	30, 568
Neslin v. Wells, Fargo & Co., 104 U. S. 428.	1656	New Jersey v. Yard, 95 U. S. 104.	1581
Nesmith v. Sheldon, 7 How. 812.	1532	New Jersey Ins. Co. v. Meeker, 37 N. J. Law. 382.	563
Nessle v. Reese, 29 How. Pr. (N. Y.) 382.	2073	Newlan v. Shafer, 38 Ill. 378.	1948
Nester v. Continental Brewing Co., 161 Pa. St. 473.	2037, 2061, 2063	Newlin v. Duncan, 1 Harr. (Del.) 204.	780
Netso v. Foss, 21 Fla. 143.	831	Newman, <i>In re</i> , <i>Ex parte</i> Capper, L. R. 4 Ch. D. 724.	759
Nettleton v. Billings, 13 N. H. 446.	886	Newman v. Board of Supervisors, 45 N. Y. 676.	462
Nettleton v. Sikes, 8 Metc. 34.	640	Newman v. City of Emporia, 32 Kan. 456.	1508
Neuendorff v. Duryea, 69 N. Y. 557.	2094	Newman v. Fowler, 37 N. J. Law. 89.	128
Neuendorff v. World, etc., Insurance Co., 69 N. Y. 389.	1305, 1351	Newman v. Graham, 3 Munf. 1st.	828
Neurenberger v. Neurenberger (Ky. 1895).	1072	Newman v. Moore, 94 Ky. 147.	1733
Neustadt v. Hall, 58 Ill. 172.	1871	Newman v. Nellis, 97 N. Y. 285.	2274
Neves v. Scott, 9 How. (U. S.) 196.	1713	Newmarch v. Clay, 14 East, 240.	469
Neville v. Wilkinson, 1 Bro. C. C. 543.	223	New Marlet, etc., Bank v. Gillet, 100 Ill. 254.	1360
Nevius v. Dunlap, 33 N. Y. 676.	1080	Newmeyer v. Missouri R. Co., 52 Mo. 81.	1521
New v. Sailors, 114 Ind. 407.	1859	New Orleans, City of, v. Fireman's Co., 43 La. Ann. 447.	373
New Albany, City of, v. Iron Substructure Co., 141 Ind. 500.	1585	New Orleans, City of, v. Great Southern Telephone and Telegraph Co., 40 La. Ann. 41.	1583
New Albany v. McCullough, 127 Ind. 500.	1564, 1565	New Orleans v. Houston, 119 U. S. 265.	2136
New Albany R. Co. v. Fields, 10 Ind. 187.	260	New Orleans v. Morris, 105 U. S. 600.	1502
New Albany R. Co. v. McCormick, 10 Ind. 499.	155, 259	New Orleans v. New Orleans Water Co., 142 U. S. 79.	1465, 2142
New Albany, etc., R. Co. v. Pickens, 10 Ind. 247.	153	New Orleans, City of, v. Wardens of St. Louis Church, 11 La. Ann. 244.	1922
New Bedford, City of, v. Chace, 5 Gray (Mass.) 28.	1660	New Orleans, etc., Assn. v. Magnier, 16 La. Ann. 338.	2210
New Bedford R. Co. v. Old Colony R. Co., 120 Mass. 397.	1458	New Orleans, etc., Co. v. Hurst, 36 Miss. 660.	2167
Newberry v. Slaughter, 98 Mich. 468.	1189	New Orleans, etc., Co. v. State of Louisiana, 157 U. S. 219.	2152
Newbold v. Peabody Heights Co., 70 Md. 493.	1153	New Orleans, etc., R. Co. v. Delamore, 114 U. S. 501.	1581
Newbold v. Wright, 4 Rawle, 195.	922	New Orleans, etc., R. Co. v. Turcan, 46 La. 155.	784
New Brunswick, etc., Co. v. Tiers, 24 N. J. Law. 697.	275	New Orleans F. & H. S. S. Co. v. Ocean Dry Dock Co., 23 La. Ann. 173.	1259
New Brunswick, etc., Land Co. v. Mugeridge, 1 Drew & S. 363.	1330	New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650.	1482, 1560, 1581, 2133, 2134, 2147
Newburgh, etc., Road Co. v. Miller, 5 Johns. Ch. 101.	1240	New Orleans Water-Works v. Louisiana, etc., Co., 125 U. S. 18.	2143, 2149
Newburger v. Adams, 92 Ky. 26.	1200	New Orleans Water-Works Co. v. Rivers, 115 U. S. 674.	1582, 2134
New Castle, etc., R. Co. v. Simpson, 23 Fed. Rep. 214.	1296	Newport v. Railway Co., 58 Ark. 270.	1484, 1500
New Castle Ry. v. Simpson, 21 Fed. Rep. 533.	1412	Newsom v. Thighen, 30 Miss. 414.	1853
Newcomb v. Andrews, 41 Mich. 518.	1709	Newsome v. Graham, 10 B. & C. 234.	797
Newcomb v. Brackett, 16 Mass. 161.	487, 488, 1164	Newton v. Porter, 69 N. Y. 133.	2279
Newcomb v. City of Davenport, 86 Iowa, 291.	460	Newton v. Wales, 3 Robt. (N. Y.) 453.	2197
Newcomb v. Davenport, 86 Iowa, 291.	804	Newton v. Wilson, 31 Ark. 484.	2124
Newcomb v. Ramer, 2 John. 421, n.	637	Newton Manufacturing Co. v. White, 53 Ga. 395.	781
Newell v. Higgins, 55 Minn. 82.	1640	New York Bank v. Fletcher, 5 Wend. 85.	536
Newell v. Mayor of New York, 61 Hun, 356.	578	New York Bank Note Co. v. Hamilton, etc., Engraving Co., 31 N. Y. Supl. 1060.	2032
Newell v. Meyendorff, 9 Mont. 254.	2076	New York Belting and Packing Co. v. Washington Fire Ins. Co., 10 Bosw. 428.	896
Newell v. Newell, 13 Vt. 24.	1111	New York, etc., Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412.	2053
Newell v. People, 7 N. Y. 9.	1587, 2126		
Newell v. Smith, 49 Vt. 255.	736		
Newell v. Wood, 1 Munf. 555.	830		
New England Bank v. Lewis, 2 Pick. 125.	385		
New England Dredging Co. v. Rockport Granite Co., 149 Mass. 381.	2184, 2185		
New England Iron Co. v. Gilbert R. Co., 91 N. Y. 153.	152, 897, 2171		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

New York, etc., Exchange v. Mellen, 27 Ill. App. 556,	1927	Nightingale v. Eiseman, 121 N. Y. 288,	145, 296
New York, etc., Ferry Co. v. New York, 146 N. Y. 145,	1582	Nightingale v. Withington, 15 Mass. 272,	229
New York Iron Mine v. First Nat. Bank, 99 Mich. 644,	1357	Niklaus v. Conkling, 118 Ind. 289,	1495, 1584
New York, etc., Insurance Co. v. Ely, 5 Conn. 560,	1249	Niles Waterworks Co. v. City of Niles, 59 Mich. 811,	1519, 1567
New York Central Ins. Co. v. National Ins. Co., 20 Barb. 468,	769	Nilles v. Welsh, 89 Iowa, 491,	1106
New York, etc., Ins. Co. v. Fletcher, 117 U. S. 519,	320, 733	Nilson v. Jonesboro, 57 Ark. 168,	757
New York, etc., Ins. Co. v. Tooker, 85 N. J. Eq. 408,	1662	Nilson v. Morse, 82 Wis. 240,	2218
New York Life Ins. Co. v. Statham, 93 U. S. 24,	711, 1611	Nimick v. Mingo Iron Works Co., 25 W. Va. 184,	1382
New York, etc., R. Co. v. Bristol, 151 U. S. 556,	2133	Nimmo v. Walker, 14 La. Ann. 581,	785
New York, etc., R. Co. v. Dixon, 114 N. Y. 80,	1238	Nims v. Ford, 159 Mass. 575,	1242
New York, etc., R. Co. v. Ketchum, 27 Conn. 170,	1314	Nims v. Mt. Hermon Boys' School, 160 Mass. 177,	1248
New York, etc., R. Co., Matter of the, 49 N. Y. 414,	873	Nippolt v. Kammon, 39 Minn. 372,	1120
New York, etc., R. Co. v. Schuyler, 34 N. Y. 30,	1344, 1602	Niver v. Rossman, 18 Barb. (N. Y.) 50,	2039
New York, etc., R. v. Van Horn, 57 N. Y. 473,	2120	Nixon v. Beard, 111 Ind. 137,	452
New York Rubber Co. v. Rothery, 107, N. Y. 310,	2186	Nixon v. Green, 11 Exch. 549,	1333
Niagara Falls Brewing Co. v. Wall, 98 Mich. 158,	1896	Nixon v. State, 76 Ind. 524,	1132
Niagara Fire Ins. Co. v. Scammon, 100 Ill. 644,	895	Nixon v. Zuricalday, 24 N. Y. Supl. 121,	1271
Niagara Ins. Co. v. DeGraff, 12 Mich. 124,	897	Nixon v. Zuricalday, 144 N. Y. 300,	889
Nibert v. Baghurst, 47 N. J. Eq. 201,	842, 844	Noah v. Webb, 1 Edw. (N. Y.) 600,	2034
Niblo v. Binsee, 1 Keyes (N. Y.), 476,	489	Noakes v. Morey, 30 Ind. 103,	110, 421
Nichol v. Thomas, 53 Ind. 42,	1817, 1820, 1850, 2276	Noble v. Goggins, 99 Mass. 231,	690, 952
Nicholas v. Kershner, 20 W. Va. 251,	1032	Noble v. Ward, L. R. 1 Ex. 117,	68
Nicholas v. New York Central R. Co., 89 N. Y. 370,	1963	Nobleboro, Inhabitants of, v. Clark, 68 Maine, 87,	893
Nicholes v. Stretton, 10 A. & E. (N.S.) 346,	301	Nobles v. Bates, 7 Cow. (N. Y.) 307,	2033, 2047
Nicholl v. Plume, 1 C. & P. 272,	663	Noe v. Christie, 51 N. Y. 270,	526, 527
Nicholls v. Stretton, 10 Q. B. 346,	2045	Noe v. Hodges, 3 Humph. 162,	393
Nichols v. Allen, 23 Minn. 542,	683	Noel v. Drake, 28 Kan. 265,	1884, 1985
Nichols v. Ashton, 155 Mass. 205,	162, 163	Noel v. Kinney, 106 N. Y. 74,	1748, 1753
Nichols v. Briggs, 18 S. C. 473,	1151	Noel v. Murray, 13 N. Y. 167,	456
Nichols v. Burlington Ry. Co., 4 Greene, 42,	157	Noel v. Murray, 1 Duer. 388,	455
Nichols v. Marsland, L. R. 2 Ex. D. 1,	273	Nolan v. Whitney, 88 N. Y. 648,	127, 129, 130, 131, 138, 370, 371, 372, 897, 2231
Nichols v. Mase, 94 N. Y. 160,	721	Nolan County v. State, 83 Texas, 182,	1533
Nichols v. McCarthy, 53 Conn. 299,	1041	Nolan v. Bull, 24 Ore. 479,	104
Nichols v. Michael, 23 N. Y. 284,	1334	Noland v. State, 115 Ind. 529,	1176
Nichols v. Mudgett, 32 Vt. 546,	1853, 1884	Norbeck v. Davis, 157 Pa. St. 399,	1663
Nichols v. Oppermann, 6 Wash. 618,	646	Nordaas v. Hubbard, 48 Fed. Rep. 921,	939
Nichols v. Pinner, 18 N. Y. 285,	1334	Norden v. Jones, 33 Wis. 600,	781, 2168
Nichols v. Scranton Steel Co., 137 N. Y. 471,	507, 1284	Nordenfelt v. Maxim, etc., Co., L. R. (1894) App. Cas. 535,	106, 2033
Nichols, Shepard & Co. v. Crandall, 77 Mich. 401,	336	Nordholt v. Nordholt, 87 Cal. 552,	1791, 1792
Nichols v. Weaver, 7 Kan. 373,	617, 654	Norfolk, etc., R. Co. v. Harman, 91 Va. 601,	1968
Nichols, etc., Co. v. Dedrick (Minn.), 63 N. W. Rep. 1110,	206, 616	Norfolk & Western R. v. Pendleton, 156 U. S. 667,	2139
Nicholson v. Bower, 1 E. & E. 172,	669	Nonantum Worsted Co. v. North Adams Mfg. Co., 156 Mass. 331,	932
Nicholson v. Bradfield Union, L. R. 1 Q. B. 620,	304	Nonnemacher v. Nonnemacher, 159 Pa. St. 634,	1839
Nicholson v. Chapman, 2 H. Black, 254,	784	Noonan v. Lee, 2 Black, 499,	122
Nicholson v. Revill, 4 A. & E. 675,	515, 540, 819	Norling v. Allee, 37 N. Y. S. R. 409,	276
Nicholson v. Spencer, 11 Ga. 607,	1841	Norman v. Molett, 3 Ala. 546,	591
Nickelson v. Wilson, 60 N. Y. 362,	2015	Norman v. Phillips, 14 M. & W. 277,	669, 672
Nickerson v. Atchinson, etc., R. Co., 3 McCrary U. S. 455,	876	Norman v. Thompson, 4 Ex. 755,	532, 533
Nickerson v. Nickerson, 127 U. S. 668,	223	Normandin v. Mackey, 33 Minn. 417,	1048
Nicklin v. Betts Spring Co., 11 Ore. 406,	1363	Norrington v. Wright, 115 U. S. 188,	149, 151, 152, 744, 956, 1049
Nicoll v. Sands, 131 N. Y. 19,	863, 876	Norris v. Androscoggin R. Co., 39 Maine, 273,	2133
Nielsen v. United States, etc., Co., 37 Ill. App. 283,	463	Norris v. Blair, 39 Ind. 90,	1434
Niemeyer v. Wright, 75 Va. 239,	1891	Norris v. Blethen, 19 Maine, 348,	800
Niggl v. Foehry, 31 N. Y. Supl. 931,	544	Norris v. Dains (Ohio 1894), 39 N. E. Rep. 680,	1232
Nightingale v. Chafee, 11 E. I. 609,	454	Norris v. Savannah R. Co., 23 Fla. 182,	275
		Norris v. Vosburgh, 98 Mich. 426,	232
		North v. Forrest, 15 Conn. 400,	212, 611
		North v. Kizer, 72 Ill. 172,	654
		North v. Mendel, 73 Ga. 400,	674
		North v. Nichols, 37 Conn. 375,	779
		North v. Phillips, 89 Pa. St. 250,	1922, 1930
		North v. Robinson, 1 Duv. 71,	615
		North v. Wakefield, 13 Q. B. 536,	576
		North v. Wakefield, 13 Ad. & E. (N. S.) 536,	819
		Northampton, In re City of, 158 Mass. 299,	1439

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Northampton Bank v. Pepoon, 11 Mass. 238,	1286	Nugent v. Smith, 85 Maine, 433,	681, 1118
North American, etc., Association v. Sutton, 35 Pa. St. 463,	1607, 1608, 1609	Nugent v. The Supervisors, 19 Wall, 241,	1461, 1462
North Australian Territory Co., <i>In re</i> , L. R. (1892) 1 Ch. 322,	1979	Nugent v. Wolfe, 111 Pa. St. 471,	598, 604, 614, 616
Northern Assur. Co. v. Hotchkiss, 90 Wis. 415,	9	Nunn v. Townes (Texas 1893), 23 S. W. Rep. 1117,	2180
Northcote v. Doughty, L. R. 4 C. P. D. 335,	1806	Nurnberg v. Town of Barnwall, 42 S. Car. 158,	1475
Northern Bank v. Lewis, 73 Wis. 475,	471	Nurney v. Fireman's, etc., Ins. Co., 63 Mich. 633,	121
Northern Bank of Toledo v. Porter T. Trustees, 110 U. S. 608,	1526, 1529	Nute v. American Glucose Co., 55 Kan. 225,	860
Northern Central Co. v. Eslow, 40 Mich. 222,	260	Nutt v. Codrington, 34 Fla. 77,	1737
Northern Cent. R. Co. v. Bastian, 15 Md. 494,	1281	Nutter v. King, 152 Mass. 353,	1643
Northern Ins. Co. v. Potter, 63 Cal. 157,	541, 576	Nutting v. Connecticut, etc., R. Co., 1 Gray, 502,	738
Northern Pac. R. Co. v. Ellis, 144 U. S. 458,	30	O	
Northern Trust Co. v. Markell (Minn. 1895), 63 N. W. Rep. 735,	1208, 2274		
North Hudson Building Assn. v. First Nat. Bank, 79 Wis. 31,	1603	Oakdale Mfg. Co. v. Garst, 18 R. I. 484,	2041
Northrop v. Hale, 72 Maine, 275,	251	Oakden v. Pike, 34 N. J. Ch. (N. S.) 620,	749
Northrop v. Hale, 73 Maine, 66,	249, 252	Oakes v. Cattaraugus Water Co., 143 N. Y. 430,	1268, 1981, 2066
Northrup v. Smothers, 39 Ill. App. 588,	886	Oak Grove Cattle Co. v. Foster (N. Mexico 1895), 41 Pac. Rep. 522,	1285
Northrup v. Standifer (Ky. 1893), 23 S. W. Rep. 348,	1130	Oakland Bank v. Applegarth, 67 Cal. 86,	407
Northrup v. Ward (Ky.), 15 S. W. Rep. 247,	1130	Oakley v. Aspinwall, 4 N. Y. 514,	835
North Side R. Co. v. Worthington (Texas 1875), 30 S. W. Rep. 1055,	1223, 1224, 1421	Oakley v. Boorman, 21 Wend. 588,	232
North Vernon, City of, v. Voegler, 103 Ind. 314,	2166	Oakley v. Morton, 11 N. Y. 25,	161, 2225
Northwestern Conference v. Myers, 36 Ind. 375,	137	Oakley v. Workmen's Benevolent Society, 2 Hilt. 457,	1282
Northwestern Insurance Co. v. Blankenship, 94 Ind. 535,	1817	Oakman v. Dorchester, 93 Mass. 57,	186
Northwestern Ins. Co. v. Hazelett, 105 Ind. 212,	119, 896	Oaks v. Cattaraugus Water Co. (Sup.), 1894,	1237
Northwestern Mutual Life Ins. Co. v. Park Hotel Co., 37 Wis. 125,	1508	Oaks v. Turquand, L. R. 2 H. L. 325,	998
North Wisconsin Lumber Co. v. American Express Co., 73 Wis. 656,	476	Oard v. Oard, 59 Ill. 46,	1134, 2287
Norton v. Baxter, 41 Minn. 146,	408, 411	Oatfield v. Waring, 14 John. 188,	779
Norton v. Dawson, 19 La. Ann. 464,	2021	O'Bear Jewelry Co. v. Volfer (Ala.), 17 So. Rep. 525,	1406
Norton v. Dreyfuss, 106 N. Y. 90,	504, 505	Ober v. Blalock, 40 S. Car. 81,	342
Norton v. Ellam, 2 M. & W. 461,	386	Oberfelder v. Kavanaugh, 29 Neb. 427,	1706
Norton v. Gale, 95 Ill. 5331,	677	Oberlies v. Bullinger, 132 N. Y. 593,	140, 149, 370, 371
Norton v. Higbee, 33 Mo. App. 467,	905	Oberthier v. Stroud, 33 Texas, 225,	1682
Norton v. Kearney, 10 Wis. 443,	867	O'Brien v. Bound, 2 Speer Law (S. Car.), 495,	816
Norton v. Pilger, 30 Neb. 860,	164, 163	O'Brien v. Commercial, etc., Ins. Co., 63 N. Y. 108,	117
Norton v. Preston, 15 Maine, 14,	836	O'Brien v. Gaslin, 20 Neb. 347,	1790
Norton v. Shelby County, 118 U. S. 425,	1337	O'Brien v. Krenz, 36 Minn. 136,	2154
Norton v. Webb, 35 Maine, 218,	490	O'Brien v. Luques, 81 Maine, 46,	1950
Norton v. Young, 3 Greenl. 30,	970	O'Brien v. Mayor, etc., of New York, 47 N. Y. St. R. 258,	126
Nostrum v. Halliday, 39 Neb. 823,	982	O'Brien v. New York, 15 N. Y. Supl. 520,	127
Norwalk Gaslight Co. v. Borough of Norwalk, 63 Conn. 495,	1510	O'Brien v. New York City, 139 N. Y. 543,	1493, 2175
Norway Sav. Bank v. Merriam, 88 Maine, 33 Atl. Rep. 810,	249	O'Brien v. Weiler, 68 Hun, 64,	936
Norwich, etc., Manfg. Co. v. Hockaday, 89 Va. 557,	1332	O'Brien v. Young, 95 N. Y. 428,	2151
Norwood v. Read, Plowd. 180,	378	O'Bryan v. Fitzgerald, 48 Ark. 487,	1870
Nott v. Johnson, 7 Ohio St. 270,	214	O'Bryan v. Jones, 38 Mo. App. 90,	456
Nottidge v. Prichard, 2 Cl. & Fin. 379,	549	O'Callaghan v. Barrett, 21 N. Y. Supl. 368,	476
Nottingham, etc., Tile Co. v. Butler, L. R. 15 Q. B. Div. 261,	1154	O'Callaghan v. Lowndes, 66 Fed. Rep. 356,	970
Nourse v. Prime, 4 Johns. Ch. 490,	412	Ocean Nat. Bank v. Fant, 50 N. Y. 474,	399, 409
Nourse v. United States, 25 Ct. Claims, 7, 281,	282	Oceanic Steamship Co. v. Tappan, 16 Blatchf. (U. S. C. C.) 296,	1829
Noyes v. Chapman-Drake Co., 60 Minn. 88,	1635	Och v. Missouri, etc., R. Co. (Mo.), 31 S. W. Rep. 962,	18, 581
Noyes v. Johnson, 139 Mass. 436,	419	Ochoa v. Miller, 59 Texas, 460,	1738
Noyes v. New Haven R. Co., 30 Conn. 1,	543	Ockenden v. Henley, E. B. & E. 485,	673
Noyes v. Nichols, 24 Vt. 159,	853	Ockerman v. Cross, 54 N. Y. 29,	724
Noyes v. Wyckoff, 114 N. Y. 204,	408	O'Conner v. Chamberlain, 59 Ala. 431,	1658
Noyes v. Wyckoff, 30 Hun, 466,	408	O'Conner v. Huggins, 1 N. Y. Supl. 377,	417
Nugent v. Smith, L. R. 1 C. P. D. 423,	274, 276	O'Conner v. Hurley, 147 Mass. 145,	453, 457
		O'Conner v. Tyrrell (N. J. Eq. 1895), 30 Atl. Rep. 1061,	1095
		O'Conner Mining and Manufacturing Co. v. Coosa Furnace Co., 95 Ala. 614,	1289

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

O'Connor v. Dingley, 26 Cal. 11,	2198	Oliver-Finnie Grocer Co. v. Miller, 53 Mo. App. 107,	1645
O'Connor v. Henderson Bridge Co., 95 Ky. 633,	2259	Oliver, Lee, etc., Bk., <i>In re</i> , 21 N. Y. 1,	1378
O'Daily v. Morris, 31 Ind. 111,	1746	Oller v. Bonebrake, 65 Pa. St. 338,	557
Odd Fellows' Association v. Hegele, 24 Ore. 16,	1225	Ollivant v. Bayley, 5 Q. B. 238,	349
O'Dea v. Winona, 41 Minn. 424,	376	Olmstead v. Bach, 78 Md. 132,	890
Odell v. Montross, 63 N. Y. 499,	422	Olmstead v. Beale, 19 Pick. (Mass.) 523,	2231
O'Dell v. Rogers, 44 Wis. 136,	1787	Olmstead v. Greenly, 13 John. 12,	608
Odineal v. Barry, 24 Miss. 9,	1853	Olmstead v. Mattison, 45 Mich. 617,	1364
O'Donnell v. Bray, 99 Mich. 534,	1657	Olmsted v. Olmsted, 38 Conn. 309,	1057
O'Donnell v. Clinton, 145 Mass. 461,	521, 588	Olson v. Orton, 23 Minn. 36,	201
O'Donnell v. Henry, 44 La. Ann. 845,	959	Olson v. Sharpless, 53 Minn. 91,	686
O'Donnell v. Jackson, 69 Cal. 622,	1162	Omaha, etc., R. Co. v. Brady, 39 Neb. 27,	2003
O'Donnell v. Leeman, 43 Maine, 158,	674, 684	Omaha Horse R. Co. v. Cable Tramway Co., 30 Fed. Rep. 324,	1504
O'Donnell v. Railroad Co., 59 Pa. St. 239,	1432	Omaha Bridge Cases, 51 Fed. Rep. 309,	1527
O'Donnell v. Rodiger, 76 Ala. 222,	2278	Omaha Bridge Cases, 10 U. S. App. 98,	1499, 1527
O'Donnell v. Rosenberg, 14 Abb. Pr. (N. S.) 59,	758	O'Neal v. Hines (Ind.), 43 N. E. Rep. 946,	2044
O'Donnell v. Sweeney, 5 Ala. 467,	2096, 2103	O'Neal v. Seixas, 85 Ala. 80,	1117
O'Donohue v. Leggett, 134 N. Y. 40,	917	O'Neale v. Lodge, 3 Harris & McHenry, 433,	895
Odum v. Rutledge, etc., R. Co., 94 Ala. 488,	381, 398, 413	Oneida, Village of, v. Madison County, 136 N. Y. 269,	1533
O'Fallon v. Kennerly, 45 Mo. 124,	752	Oneida Bank v. Ontario Bank, 21 N. Y. 490,	1895
O'Ferrall v. Van Camp, 121 Ind. 336,	108	Oneida Society v. Lawrence, 4 Cowen, 440,	327, 353
Ofutt v. Flagg, 10 N. H. 46,	699	O'Neil v. Birmingham Brewing Co., 101 Ala. 383,	1749
Ogborn v. Hoffman, 52 Ind. 439,	468	O'Neil v. Lake, etc., Co., 63 Mich. 660,	465, 581
Ogden v. Gibbons, 4 Johns. Ch. 150,	1240	O'Neil v. Percival, 25 Fla. 118,	1699, 1737
Ogden v. Hatry, 145 Pa. St. 640,	959	O'Neill v. Hamill, Beat. 618,	1009
Ogden v. Kirby, 79 Ill. 555,	743	O'Neill v. Nolan, 21 N. Y. Supl. 222,	1825
Ogden v. Murray, 39 N. Y. 202,	1232	Oneto v. Restano, 89 Cal. 63,	17
Ogden v. Ogden, 1 Bland. 284,	227, 617	Onslow v. Eams, 2 Stark. 72,	333
Ogden v. Saunders, 12 Wheat. 213, 24, 772,	2125	Ontario Bank v. Petrie, 3 Wend. 456,	767
Ogden Clay Co. v. Harvey, 9 Utah, 497,	1322	Ontario Salt Co. v. Merchants' Salt Co., 18 Grant Ch. 540,	2062
Oglesby v. Attrill, 105 U. S. 605,	1092	Opdyke v. Pacific Railroad, 3 Dill. (U. S.) 53,	2210
Oglesby v. Bingham, 13 So. Rep. 852; 69 Miss. 795,	1763	Opdyke v. Stephens, 28 N. J. Law. 83,	425
Oglesby's Sureties v. State, 77 Texas, 642,	2258	Oppenheimer v. Clemmons, 18 Fed. Rep. 276,	2252
Ogilvie v. Foljambe, 3 Mer. 52,	691	Orcutt v. Nelson, 1 Gray. 536,	708
Ogilvie v. Knox Insurance Co., 22 How. (U. S.) 380,	1322	Oregon v. Jennings, 119 U. S. 74,	1524, 1528
O'Hara v. Carpenter, 23 Mich. 410,	1985, 2097	Oregon, The, v. Pittsburgh Iron Co., 55 Fed. Rep. 666,	917
O'Herlihy v. Hedges, 1 Sch. & Lef. 123,	836	Oregon Improvement Co. v. Roach, 117 N. Y. 527,	372
Ohio v. Board of Education, 35 Ohio St. 519,	1970	Oregon Improvement Co. v. Sagmeister, 4 Wash. 710,	1760
Ohio L. I. & T. Co. v. Merchants' I. & T. Co., 11 Hump. 1,	1123, 1166	Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1,	1252, 1412
Ohio Life Insurance & Trust Co. v. Debolt, 16 How. (U. S.) 416,	2131, 2135, 2148, 2207	Oregon Short Line R. Co. v. Northern Pac. R. Co., 51 Fed. Rep. 465,	936
Ohio & Mississippi R. Co. v. Crumbo, 4 Ind. App. 456,	126, 565	Oregon Steam Navigation Co. v. Winsor, 20 Wall. (U. S.) 64,	2026, 2031, 2041, 2042, 2044, 2050, 2051, 2052, 2075
Ohio, etc., R. Co. v. McCarthy, 96 U. S. 258,	1225, 1603	Organ v. Memphis, etc., R. Co., 51 Ark. 235,	2167
Ohio, etc., R. Co. v. McClelland, 25 Ill. 140,	2133	Organ v. Stewart, 60 N. Y. 413,	2274
Ohio, etc., R. Co. v. McPherson, 35 Mo. 13,	1298	Oriental Bank, <i>In re</i> , L. R. 32 Ch. Div. 366,	487
Ohio, etc., Railway Co. v. Selby, 47 Ind. 471,	1966	Orleans v. Platt, 99 U. S. 676,	362
Ohio Thresher Co. v. Hensel, 9 Ind. App. 328,	366	Ormerod v. Dearman, 100 Pa. St. 561,	2011
Ohlender v. Dexter, 97 Ala. 476,	1054, 1066, 1068	Ormes v. Dauchy, 82 N. Y. 443,	872, 1906
Ohnsorg v. Turner, 33 Mo. App. 486,	829	Oroville, etc., R. Co. v. Plumas Co., 37 Cal. 361,	1335
Oil Creek, etc., R. Co. v. Pennsylvania Transp. Co., 83 Pa. St. 160,	1249	Orr v. Meek, 111 Ind. 40,	1910
O'Kelly v. Faulkner, 92 Ga. 521,	792	O'Rourke v. Haddock, 114 N. Y. 541,	166
Olcott v. Dunclee, 16 Vt. 478,	490	O'Rourke v. O'Rourke, 43 Mich. 58,	2096, 2112
Olcott v. Supervisors, 16 Wall. (U. S.) 678,	2148, 2207	Ortman v. Chute, 57 Minn. 452,	1729
Olcott v. Tioga R. Co., 27 N. Y. 546,	1277, 1278	Osborn v. Farwell, 87 Ill. 89,	886
Old Colony R. Co. v. Evans, 6 Gray (Mass.), 25,	215	Osborn v. Governors of Guy's Hospital, 2 Str. 728,	786
Old Dominion S. S. Co. v. McKenna, 30 Fed. Rep. 48,	296	Osborn v. Jaines, 17 Wis. 573,	2153
Oldershaw v. King, 2 H. & N. 517,	204	Osborn v. Ketchum, 25 Ore. 352,	1086
Olds v. Marshall, 93 Ala. 138,	1156	Osborn v. Kistler, 35 Ohio St. 99,	181
Oliphant v. Markham, 79 Texas, 543,	1925	Osborn v. Martha's Vineyard R. Co., 140 Mass. 549,	539
Ollivant v. Bayley, 5 Q. B. 197,	351		
Oliver v. Gilmore, 52 Fed. Rep. 562,	2050		
Oliver v. Hunting, 44 Ch. Div. 205,	684		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Osborn v. Moncure, 3 Wend. 170,	385		
Osborn v. Nicholson, 13 Wall. (U. S.) 654,	2122		
Osborn v. Phelps, 19 Conn. 63,	1059		
Osborn v. Robbins, 36 N. Y. 365,	1833		
Osborne v. Baker, 34 Minn. 307,	613, 683, 684,	1132	
Osborne v. Hubbard, 20 Ore. 318,	182		
Osborne v. Monks (Ky.), 21 S. W. Rep. 101,	1446		
Osborne v. Kimball, 41 Kan. 187,	656, 838		
Osment v. McElrath, 68 Cal. 466,	647		
Osborne v. Nelson Lumber Co., 33 Minn. 255,	167		
O-borne v. Rogers, 1 Saund. 264,	193, 197,	783	
Osborne, D. M. & Co. v. Stringham, 1 S. Dak. 406,	956		
Osborne v. Stringham, 4 S. D. 593,	956		
Osborne v. Tunis, 1 Dutch. 633,	1229, 1231		
Osborne v. Williams, 18 Ves. 379,	2050		
Osburn v. Throckmorton, 90 Va. 311,	1701		
Oscanyan v. Arms Co., 103 U. S. 261,	1591, 1885, 1887, 1907, 1986, 1992, 1995, 2079, 2082		
Osgood v. Bauder, 75 Iowa, 550,	714, 1927		
Osgood v. Bauder, 82 Iowa, 171,	1867		
Osgood v. Dewey, 13 Johns. 240,	776		
Osgood v. Franklin, 2 Johns. Ch. 1,	1130		
Osgood v. King, 42 Iowa, 418,	1372		
Osgood v. Lewis, 2 Harris & Gill (Md.) 495,	325, 327, 328		
Osmundson v. Thompson, 90 Iowa, 755,	262, 1065		
Otis, <i>In re</i> , 101 N. Y. 580,	1814, 1844		
Otis v. Adams, 56 N. J. Law, 38,	1049		
Otis v. Beckwith, 49 Ill. 121,	556		
Otis v. Cullom, 92 U. S. 447,	361		
Otis v. Gregory, 111 Ind. 504,	1720		
Otis v. Jones, 21 Wend. 394,	784		
Otisfield, Inhabitants of, v. Mayberry, 63 Maine, 197,	399		
Ottawa v. National Bank, 105 U. S. 342,	1527		
Ottawa, etc., Flint-Glass Co. v. Gunther, 31 Fed. Rep. 208,	340		
Ottawa Plank-Road Co. v. Murray, 15 Ill. 336,	1253		
Ottinger v. Strasburger, 33 Hun, 466,	417		
Ottman v. Moak, 3 Sandf. Ch. (N. Y.) 431,	1779		
Otto v. Klauber, 23 Wis. 471,	189		
Otto v. Alderson, 10 S. & M. 476,	327, 353		
Oughton v. Seppings, 1 B. & Ad. 241,	781		
Outterton v. Fonda Lake Paper Co., 20 N. Y. Supl. 980,	1316, 1317		
Overall v. Ruenzi, 67 Mo. 203,	407		
Overby v. Fayetteville, etc., Association, 81 N. Car. 56,	1609, 1614		
Overby v. Overby, 21 La. Ann. 493,	2021		
Overseer of Poor v. Overseer of Poor, 42 N. J. Law, 493,	1549		
Overseer of Poor v. Overseer of Poor, 44 N. J. Law, 595,	1548		
Overshiner v. Jones, 66 Ind. 452,	1483		
Overton v. Bolton, 9 Heisk. 762,	706		
Overton v. Harvey, 9 C. B. 324,	30		
Owen v. Cawley, 36 N. Y. 600,	1696		
Owen v. Davis, 1 Bailey (S. Car.), 315,	1895		
Owen v. Field, 102 Mass. 90,	642		
Owen v. Hall, 70 Md. 97,	447		
Owen v. Long, 112 Mass. 403,	1772		
Owen v. Louisville, etc., R. Co., 87 Ky. 626,	1967, 1968		
Owen v. Smith, 91 Ga. 564,	1012		
Owens, <i>In re</i> , 18 N. Y. Supl. 850,	1814		
Owens v. Baltimore, etc., Railroad Co., 35 Fed. Rep. 715,	584		
Owens v. Lewis, 46 Ind. 488,	638, 671		
Owings v. Hull, 9 Pot. 607,	1350		
Oxendale v. Wetherell, 9 B. & C. 386,	145		
Oxford v. Provand, L. R. 2 P. C. 135,	135		
Oxford Iron Co. v. Spradley, 51 Ala. 171,	1906		
		P	
Pabodie v. King, 12 Johns. 426,	202		
Pace v. Grove, 26 Ind. 26,	2171		
Pacific Express Co. v. Darnell (Texas Sup.), 6 S. W. Rep. 765,	1968, 1969		
Pacific Express Co. v. Foley, 46 Kan. 451,	1432		
Pacific, etc., Ins. Co. v. Frank, 44 Neb. 320,	2269		
Pacific Postal, etc., Co. v. Western Union, etc., Co., 50 Fed. Rep. 493,	2052		
Pacific R. Co. v. Missouri Pacific R. Co., 23 Fed. Rep. 565,	1453		
Pacific, etc., Co. v. Riverside, etc., Ry. Co., 90 Cal. 627,	87		
Pacific R. Co. v. Seely, 45 Mo. 212,	1976, 1977, 1978, 2083		
Pack v. Hansbarger, 17 W. Va. 427,	1179		
Packard v. First Universalist Society in Quincy, 10 Metc. (Mass.) 427,	1358		
Packard v. Putnam, 57 N. H. 43,	684		
Packard v. Slack, 32 Vt. 10,	333		
Packard v. Taylor, 35 Ark. 402,	738		
Packer v. Belton, 35 Conn. 343,	609		
Packer v. Roberts, 140 Ill. 671,	28		
Packer v. Steward, 34 Vt. 127,	2274		
Packet Co. v. Sickles, 5 Wall. 580,	652		
Paddleford v. Thacher, 48 Vt. 574,	535, 1633		
Paddock v. Fletcher, 42 Vt. 389,	1123		
Paddock v. Robinson, 63 Ill. 99,	278		
Paden v. Goldbaum (Cal. 1894), 37 Pac. Rep. 759,	1691		
Page v. Allen, 58 Pa. St. 345,	1521		
Page v. Cole, 10 Mass. 371,	913		
Page v. Edwards, 64 Vt. 124,	162, 163		
Page v. Marsh, 36 N. H. 305,	776		
Page v. Morgan, L. R. 15 Q. B. D. 228,	666		
Paige, <i>In re</i> , 31 Minn. 136,	724		
Paige v. Parker, 8 Gray, 211,	179		
Paine, <i>In re</i> , 26 Hun, 431,	1552		
Paine v. Drew, 44 N. H. 306,	716		
Paine v. Fulton, 34 Wis. 83,	670		
Paine v. Hutchinson, L. R. 3 Eq. 257,	1103		
Paine v. Jones, 75 N. Y. 593,	1063		
Paine v. Lester, 44 Conn. 196,	725		
Paine v. McClinchy, 56 Maine, 50,	781		
Paine v. Meller, 6 Vesey, 349,	423		
Paine v. Ringold, 43 Mich. 341,	903		
Paine v. Roberts, 82 N. C. 451,	1026		
Paine v. Smith, 33 Minn. 495,	167, 932		
Paine v. Wilcox, 16 Wis. 202,	1201		
Painter v. Polk County, 41 Iowa, 242,	460, 461		
Pakas v. Racy, 13 Daly (N. Y.), 227,	1790		
Paldi v. Paldi, 95 Mich. 410,	2277		
Palk v. Lord Clinton, 12 Ves. 48,	1013		
Palmer v. Albee, 50 Iowa, 429,	99		
Palmer v. Bate, 2 Brod. & B. 673,	2084		
Palmer v. Blain, 55 Ind. 11,	604		
Palmer v. Clark, 106 Mass. 373,	1131		
Palmer v. Continental Ins. Co., 31 Mo. App. 467,	117		
Palmer v. Graham, 1 Pars. Eq. Cas. (Pa.) 476,	2285		
Palmer v. Hand, 13 John. 434,	123		
Palmer v. Mayor, 2 Sand. (N. Y.) 318,	2098		
Palmer v. Miller, 25 Barb. 399,	1773, 1779		
Palmer v. Stebbins, 3 Pick. 183,	180, 2033, 2043, 2049, 2075		
Palmer v. Stevens, 1 Denio, 471,	687		
Palmer v. Stockwell, 9 Gray, 237,	954		
Palmerton v. Huxford, 4 Den. (N. Y.) 166,	522		
Pana v. Bowler, 107 U. S. 529,	1524, 1528		
Panama Telegraph Co. v. India Rubber Co., L. R. 10 Ch. App. 515,	297		
Pangborn v. Continental Insurance Co., 67 Mich. 683,	520, 543		
Pangborn v. Westlake, 36 Iown, 546,	1890, 1897		
Panill v. McKinley, 9 Gratt. 1,	1136		
Panton v. Duluth Gas & W. Co., 50 Minn. 175,	806		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Paradine v. Jane, Aleyn, 26,	280	Parmenter v. Fitzpatrick, 14 N. Y. Supl.	
Parcell v. McComber, 11 Neb. 209,	146	748,	381
Parcells v. Gohagan, 2 J. J. Marsh. (Ky.)	1074	Parmer v. Mangham, 31 La. Ann. 348,	1742
133,	806	Parmlly v. Head, 33 Ill. App. 134,	416, 417, 419
Parcher v. Marathon Co., 52 Wis. 388,		Parr v. State, 71 Md. 220,	2234
Parcher v. Saco, etc., Institution, 78		Parr v. Village of Greenbush, 112 N. Y.	
Maine, 470,	250, 251	246,	495, 545
Pardee v. Kanady, 100 N. Y. 121,	152	Parrett v. Palmer, 8 Ind. App. 356,	1672, 1689
Pardee v. Markle, 111 Pa. St. 548,	470	Parrill v. McKinley, 9 Gratt. 1,	1179
Pardee v. Treat, 82 N. Y. 385,	241	Parrill v. McKinley, 6 W. Va. 67,	1179
Pardee v. Wood, 8 Hun, 584,	192	Parrott, <i>In re</i> , 6 Sawyer (U. S. Cir.), 349,	2161
Pardine v. Jane, Aleyn, 26,	270	Parson v. Clark, 76 Maine, 476,	1576
Pardridge v. Ryan, 14 Ill. App. 598,	2252	Parson v. Hughes, 9 Paige, 691,	566
Paris v. Strong, 57 Ind. 339,	654	Parson v. Phelan, 134 Mass. 109,	674
Paris R. Co. v. Henderson, 89 Ill. 86,	156, 157	Parsons v. Hardy, 14 Wend. 215,	245
Parish v. Foss, 75 Ga. 439,	1910	Parsons v. Joseph, 92 Ala. 403,	1452
Parish v. Stone, 14 Pick. (Mass.) 198,	1860	Parsons v. Keys, 43 Texas, 557,	777
Parish v. United States, 100 U. S. 500,	506	Parsons v. Little, 68 N. H. 339,	1721
Parish v. Wheeler, 22 N. Y. 494,	1249	Parsons v. Loucks, 68 N. Y. 17,	660
Parish of St. James v. Newburyport & A.		Parsons v. McLane, 64 N. H. 472,	1721
H. R. Co., 141 Mass. 500,	1269	Parsons v. Phelan, 134 Mass. 109,	645
Park v. Johnson, 4 Allen, 259,	1131	Parsons v. Robinson, 15 N. Y. Supl. 138,	192
Park v. Lide, 90 Ala. 246,	1004	Parsons v. Rolfe, 66 N. H. 620,	1721
Park v. Preston, 108 N. Y. 434,	274	Parsons v. Thompson, 1 H. Bl. 322,	1583
Park v. Franco-American Trading Co.,		Parsons v. Trask, 7 Gray, 473,	708
120 N. Y. 51,	2233	Parton v. Crofts, 33 L. J. C. P. 675,	685
Parken v. Whitby (Eng. Ch.), Turner &		Parton v. Crofts, 16 C. B. N. S. 11,	215
R. 366,	1887	Partridge v. Colby, 19 Barb. 248,	811
Parker v. Bradley, 2 Hill, 584,	172	Partridge v. Messer, 14 Gray (Mass.), 180,	1632
Parker v. Canfield, 37 Conn. 250,	2252	Paschall v. Hall, 5 Jones Eq. (N. Car.)	
Parker v. Carter, 4 Munf. 273,	183	108,	2286
Parker v. Collins, 32 N. Y. S. R. 1107,	544	Pasewalk v. Bollman, 29 Neb. 519,	190
Parker v. Coop, 60 Texas, 111,	1682	Pasley v. Freeman, 3 T. R. 51,	322, 1879
Parker v. Ellis, 2 Sand. 223,	826	Pass v. Granada County, 71 Miss. 426,	482
Parker v. Fogarty, 4 Texas Civ. App. 615,		Patch v. Collins, 158 Mass. 468,	379
	1680	Patchin v. Cromach, 13 Ver. 330,	215, 1772
Parker v. Fulton, etc., Association, 46 Ga.		Patchin v. Swift, 21 Vt. 292,	218, 683
166,	1619, 1625	Pate v. Oliver, 104 N. Car. 458,	163
Parker v. Great Western R. Co., 7 Man. &		Patee v. Pelton, 48 Vt. 182,	355
G. 253,	803	Pate v. Wright, 30 Ind. 476,	2098
Parker v. Jameson, 32 N. J. Eq. 222,	954	Patnote v. Sanders, 41 Vt. 66,	395
Parker v. Kane, 4 Allen, 346,	1753	Patrick v. Colorado Smelting Co., 20 Colo.	
Parker v. Kane, 4 Wis. 1,	92	268,	2180, 2195
Parker v. Lancaster, 84 Maine, 512,	800	Patrick v. Faulke, 45 Mo. 312,	766
Parker v. Macomber, 17 R. I. 674,	285	Patrick v. Horton, 3 W. Va. 23,	1179
Parker v. Macomber, L. R. 6 C. P. 78,	284	Patrick v. Morehead, 85 N. Car. 62,	856
Parker v. Northern R. Co., 33 Mich. 23,	260	Patrick v. Putnam, 27 Vt. 759,	286
Parker v. Parker, 88 Ala. 392,	1054, 1076, 1078	Patrick v. Smith, 165 Pa. St. 526,	1720
Parker v. Parker, 4 Lea (Tenn.), 392,	1698	Patrick v. Sears, 19 Fla. 856,	1113
Parker v. Parmele, 20 Johns. 130,	115, 179	Patee v. Greely, 13 Metc. (Mass.) 284,	2097, 2101
Parker v. Pitts, 73 Ind. 597,	2096		
Parker v. Platt, 74 Ill. 430,	796	Patten v. Hicks, 43 Cal. 509,	692
Parker v. Scott, 82 Iowa, 266,	291	Patten v. Pearson, 57 Maine, 428,	39
Parker v. South Eastern Ry. Co., L. R. 2		Patterson v. Ackerson, 2 Edw. Ch. 427,	464
C. P. D. 416,	64	Patterson v. Boehm, 4 Pa. St. 507,	1640
Parker v. Staniland, 11 East, 362,	636	Patterson v. Camden, 25 Mo. 13,	95
Parker v. Starr, 21 Neb. 680,	1076	Patterson v. Clark, 126 Mass. 531,	1949
Parker v. Taswell, 2 De Gex & J. 559,	1197	Patterson v. Cox, 25 Ind. 261,	394, 807
Parker v. United States, etc., Associa-		Patterson v. Cunningham, 12 Maine, 506,	620
tion, 19 W. Va. 769,	1599	Patterson v. Donner, 48 Cal. 369,	
Parker v. Wallis, 5 E. & B. 21,	666, 668		1853, 1998, 1999
Parker v. Washoe Mfg. Co., 49 N. J. Law,		Patterson v. Edwards, 29 Miss. 67,	429
465,	1284	Patterson v. Gage, 11 Colo. 50,	883
Parker County v. Sewall, 24 Texas, 238,	428	Patterson v. Galusha, 53 Kan. 367,	1005
Parkerson v. Sessions, 40 Geo. 171,	535	Patterson v. Glassmire, 166 Pa. St. 230,	2263
Parkhurst v. Kinsman, 2 Halst. Ch. 600,	234	Patterson v. Graham, 140 Ill. 531,	544
Parkhurst v. Van Cortlandt, 1 John. Ch.		Patterson v. Kreig, 29 Ill. 514,	1061
273,	676, 677, 679, 1108	Patterson v. Lynde, 112 Ill. 196,	1380
Parkin v. Thorold, 16 Beav. 59,	749	Patterson v. McKinney, 97 Ill. 41,	1664
Parkman v. Suffolk, etc., Bank, 151 Mass.		Patterson v. Robinson, 116 N. Y. 193,	1237, 1282
213,	252		
Parks v. Allen, 42 Mich. 432,	382	Pattinson v. Luckley, L. R. 10 Ex. 330,	187
Parks v. Francis, 50 Vt. 626,	229, 649, 651	Pattison v. Albany, etc., Association, 63	
Parks v. Jack Dold Packing Co., 27 N. Y.		Ga. 373,	1619
Supl. 289,	1894	Pattison v. Association, 63 Ga. 373,	1599
Parmelee v. Lawrence, 44 Ill. 405,	543, 574, 576	Pattison v. Hull, 9 Cowen, 747,	469
		Patton v. Asheville, 109 N. Car. 685,	2123, 2152
Parmelee v. Lawrence, 48 Ill. 331,	2125	Patton v. Garrett, 116 N. Car. 847,	209
Parmelee v. Lowitz, 75 Ill. 116,	274	Patton v. Hassinger, 69 Pa. St. 311,	196
Parmelee v. McNulty, 19 Ill. 556,	274	Patton v. McCane, 15 B. Mon. 355,	162, 664
Parmelee v. Simpson, 5 Wall. 81,	90, 91	Patton v. Taylor, 7 How. 132,	122
Parmelee v. Thompson, 45 N. Y. 58,	189, 202		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Patty v. Hillsboro Mill Co., 4 Texas C. App. 224,	1327	Peers v. Lambert, 7 Beav. 546,	423
Paul v. Baltimore, etc., R. Co., 44 Fed. Rep. 513,	1453	Peers v. McLaughlin, 88 Cal. 294,	1791
Paul v. Travelers' Ins. Co., 112 N. Y. 472,	883	Peeters v. Opie, 2 Wms. Saund. 350,	114, 149
Paul v. Virginia, 8 Wall. (U. S.) 168,	2161	Peavy v. Houghton (Miss. 1855), 17 So. Rep. 378,	1111
Paulding v. Chrome Steel Co., 94 N. Y. 334,	1366	Pegg v. Bidleman, 5 Mich. 26,	2233
Paulmier v. Howland, 49 N. J. Eq. 364,	422	Peine v. Webber, 47 Ill. 41,	757
Pauly v. Coronado Beach Co., 56 Fed. Rep. 428,	1245	Pemberton v. Williams, 87 Ill. 15,	1829
Pauly v. Pauly, 107 Cal. 8,	1296	Pembroke Iron Co. v. Parsons, 5 Gray, 589,	109
Pavement Co. v. Wagner, 139 Pa. St. 623,	1553	Pelham v. Service, 45 Kan. 614,	201
Pavisch v. Bean, 48 Cal. 364,	2195	Pelham v. State, 30 Texas, 422,	13
Paxson v. Brown, 61 Fed. Rep. 874,	1527	Pell v. Chandos (Texas App.), 27 S. W. Rep. 48,	116, 403
Paxon v. Courtney, 2 Foster & T. 131,	924	Pellage v. Pillage, 32 Wis. 136,	792
Paxton v. Smith, 41 Neb. 56,	881	Peltier v. Collins, 3 Wend. 459,	336, 685
Paxton Cattle Co. v. First National Bank, 21 Neb. 621,	1314, 1316	Pence v. Langdon, 99 U. S. 578,	998, 1010, 2289
Payler v. Homersham, 4 Maule & Sel. 423,	566	Pence v. Makepeace, 65 Ind. 345,	1757
Payne v. Avery, 21 Mich. 524,	475	Pendleton Co. v. Amy, 13 Wall. 297,	1524
Payne v. Cave, 3 T. R. 148,	54	Pendleton v. Stewart, 5 Call. 1,	110
Payne v. Echols (Pa. St.), 15 Atl. Rep. 895,	14	Pendolf v. Universal Ins. Co., 85 N. Y. 317,	119
Payne v. Graves, 5 Leigh, 561,	1179	Pengra v. Wheeler, 24 Ore. 532,	2236
Payne v. Still, 10 Wash. 433,	1094	Peninsular, etc., Co. v. Shand, 3 Moore, P. C. (N. S.) 272,	696, 740
Payne v. Thompson, 44 Ohio St. 192,	1754	Peninsular Iron Co. v. Eells, 68 Fed. Rep. 24,	1419
Payne v. Wilson, 74 N. Y. 348,	434	Penley v. City of Auburn, 85 Maine, 278,	1576
Paynter v. Williams, 1 C. & M. 810,	197	Penn v. Bornman, 102 Ill. 523,	1897, 2070, 2071
Payton v. Wight, 2 Hilt. (N. Y.) 77,	2190	Penn v. City of Laredo (Texas Civ. App.), 26 S. W. Rep. 636,	1500
Peabody v. Dewey, 153 Ill. 657,	861	Penn v. Whitehead, 17 Gratt. (Va.) 503,	1678
Peabody v. Hewett, 52 Maine, 33,	1738	Pennell v. Bucki, 84 Hun. 432,	509
Peabody v. Peabody, 59 Ind. 556,	561	Pennell v. Duffell, 4 D. M. & G. 372,	472, 2279
Peabody v. Speyers, 56 N. Y. 230,	661, 675, 684	Pennell v. Delta Trans. Co., 94 Mich. 247,	932
Peabody Heights Co. v. Willson (Md. 1895), 32 Atl. Rep. 386,	1117, 1153	53 N. W. Rep. 1049,	376, 500
Peace v. Haines, 11 Hare, 151,	556	Pennell v. Mayor, etc., 14 N. Y. Supl. 376,	2153
Peacock v. Dewese, 73 Ga. 570,	1112	Penniman's Case, 103 U. S. 714,	556
Peacock v. Dickerson, 2 Car. & P. 51,	401	Pennington v. Gittings, 2 Gill & J. 208,	1028
Peacock v. Williams, 7 R. I. 295,	238	Pennington v. Stanton, 125 Mo. 658,	1888
Peak v. Brinson, 71 Texas, 310,	1729	Penock v. Coe, 23 How. (U. S.) 117,	1415, 1416, 1418
Peake v. Young, 40 S. Car. 41,	1092, 1149, 1151	Pennsylvania Co. v. Fairchild, 60 Ill. 260,	734
Pearce v. Brooks, Law Rep. 1 Ex. 213,	1874	Pennsylvania Co. v. Lombardo, 49 Ohio St. 1,	2005
Pearce v. Foote, 113 Ill. 228,	1927, 1931	Pennsylvania Oil Co. v. American Oil Works, 126 Pa. St. 485,	50
Pearce v. Madison, etc., R. Co., 21 How. (U. S.) 441,	1421, 1429	Pennsylvania R. Co. v. Berry, 68 Pa. St. 272,	835
Pearce v. Railroad, 21 How. 441,	1246, 1403	Pennsylvania Co. v. Dolan, 6 Ind. App. 109,	548, 550, 653, 1986
Pearce v. Walker, 103 Ala. 250,	477, 483	Pennsylvania R. Co. v. Jones, 155 U. S. 333,	1436
Pearshall v. Dwight, 2 Mass. 84,	696	Pennsylvania R. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371,	1277, 1283, 1403
Pearson's Case, L. R. 5 Ch. Div. 336,	1980	Pennsylvania R. Co. v. Miller, 132 U. S. 75,	1462
Pearson v. Concord Railroad Corp., 62 N. H. 537,	1262, 1264, 1292, 1307	Pennsylvania R. Co. v. Riblet, 66 Pa. St. 164,	2133
Pearson v. Henry, 5 T. R. 346,	593	Pennsylvania R. Co. v. St. Louis, etc., R. Co., 118 U. S. 290,	1216, 1257, 1412, 1421, 1453
Pearson v. Thomason, 15 Ala. 700,	446, 518	Pennsylvania R. Co. v. Trimmer (N. J. Eq. 1895), 31 Atl. Rep. 310,	2255
Pearson v. Williams, 26 Wond. 630,	758	Pennyacker v. Leary, 65 Iowa, 220,	644
Pease v. Baxter, 12 Wash. 567,	976	Pennyacker v. Jones, 106 Pa. St. 237,	761
Pease v. Sabin, 38 Vt. 432,	316	Pennyacker v. Umborger, 22 Pa. St. 492,	379
Peaslee v. Breed, 10 N. H. 489,	823	Penobscot R. Co. v. Bartlett, 12 Gray, 244,	155
Peaslee v. Glass, 61 Ill. 94,	463	Penobscot R. Co. v. Dummer, 40 Maine, 172,	239
Peasley v. Boatwright, 2 Leigh, 195,	814	Penobscot R. Co. v. Dunn, 39 Maine, 587,	155
Peckham v. Barker, 8 K. I. 17,	844	Penobscot R. Co. v. White, 41 Maine, 512,	259
Peck v. Burr, 10 N. Y. 294,	1864, 1912	Penocook, etc., Bank v. Sanborn, 60 N. H. 558,	1721
Peck v. Ellis, 2 Johns. Ch. 131,	827	Pensacola Gas Co. v. Lotze's Sons, 23 Fla. 368,	853, 864
Peck v. Hibbard, 26 Vt. 698,	720, 726	Pensacola Gas Co. v. Municipality, 33 Fla. 322,	1104
Pecker v. Konnison, 46 N. H. 488,	451	Pensacola Gas Co. v. Provisional Municipality, 33 Fla. 322,	1125
Peck v. Mayo, 14 Vt. 33,	729, 730	Pensacola Telegraph Co. v. Western Union Tel. Co., 96 U. S. 1,	2052, 2134
Peck v. Peck, 20 Weekly Digest, 83,	465		
Peck v. Stanfield, 12 Wash. 101,	1193		
Peckham v. Stewart, 97 Cal. 147,	378		
Peck v. Vandermark, 99 N. Y. 29,	618, 619, 684		
Peden v. Owens, Rice (Eq.), 55,	110		
Pederson v. Seattle, etc., Co., 33 Pac. Rep. 351, 34 Pac. Rep. 655, 6 Wash. 202,	578		
Pedrick v. Post, 85 Ind. 255,	103		
Peebles v. Patapasco Guano Co., 77 N. C. 223,	345		
Peebles v. Pittsburgh, 101 Pa. St. 304,	807		
Peed v. McKee, 42 Iowa, 689,	1855		
Peek v. Peek, 77 Cal. 106,	819		
Peel v. Blank, 16 Ves. 157,	1039		
Peel v. Northcote, 7 Taunt. 478,	612		
Peelman v. Peelman, 4 Ind. 612,	198		
Peeples v. McTeor, 355 S. C. 610,	943		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Penter v. Roberts, 51 Mo. App. 222,	798	People v. Milk Exchange, Limited, 145	
Penwell v. Wilkinson, 97 Mich. 110,	2191	N. Y. 267,	2058
People v. Albany & V. R. Co., 24 N. Y. 261,	1439	People v. Millspaugh, 11 Mich. 278,	1802
People v. Alameda Co., 45 Cal. 395,	132	People v. Moores, 4 Denio (N. Y.), 518,	1802
People v. Arguello, 87 Cal. 524,	563	People v. New York, etc., R. Co., 28 Hun,	296, 297
People v. Auditors, 13 Mich. 233,	1471, 1523	543,	1439
People v. Baker, 20 Wend. 602,	447	People v. New York, etc., R. Co., 104 N. Y.	1940
People v. Baker, 76 N. Y. 78,	705	58,	1439
People v. Ballard, 134 N. Y. 269, 136 N. Y.	1264	People v. Noelke, 94 N. Y. 137,	1940
639,	230	People v. North River Sugar Refining Co.,	
People v. Bartlett, 3 Hill. 570,	1206, 1236	54 Hun (N. Y.), 354,	2059
People v. Batchelor, 22 N. Y. 128,	1600	People v. North River Sugar Refining Co.,	
People v. Bellett, 99 Mich. 151,	772	121 N. Y. 582,	1251, 1451, 2053, 2058
People v. Bennett, 6 Abb. Pr. (N. Y.) 343,	2140	People v. O'Brien, 111 N. Y. 1,	34, 1563, 2132
People v. Board, 84 N. Y. 610,	34	People v. O'Brien, 53 Hun, 580,	2136
People v. Board, 68 N. Y. 114,	2120	People v. Pacheco, 27 Cal. 175,	1519
People v. Board, 51 N. Y. 401,	464	People v. Potter, 47 N. Y. 375,	1587
People v. Board, 63 Barb. (N. Y.) 83,	190	People v. Power, 25 Ill. 187,	2141
People v. Board, 96 N. Y. 640,	518	People v. Preston, 140 N. Y. 549,	1603
People v. Board, 17 N. Y. Supl. 314,	1439	People v. Purdy, 2 Hill (N. Y.) 31,	1587
People v. Board, 63 Hun, 625,	172	People v. Rome, etc., R. Co., 103 N. Y. 95,	1439
People v. Boston & A. R. Co., 70 N. Y. 569,	2161	People v. Roper, 35 N. Y. 629,	2139
People v. Bostwick, 32 N. Y. 445,	2147	People v. Salem, 20 Mich. 452,	1536
People v. Brady, 40 Cal. 198,	830	People v. Sargeant, 8 Cow. (N. Y.) 139,	1945
People v. Budd, 117 N. Y. 1,	2267	People v. Sheldon et al., 139 N. Y. 251,	2068
People v. Butler, 74 Mich. 643,	155	People v. Spier, 77 N. Y. 144,	24, 773, 780
People v. Campbell, 72 N. Y. 496,	1251, 1252,	People v. Squire, 107 N. Y. 593,	36
People v. Chambers, 42 Cal. 201,	1268, 1427, 1571, 2052, 2053, 2054, 2056, 2705, 2058	People v. Stanford, 77 Cal. 360,	1560
People v. Chicago Gas Trust Co., 130 Ill.		People v. Stephens, 71 N. Y. 527,	1559, 2001
268,		People v. Superintendents of the Poor, 20	
1268, 1427, 1571, 2052, 2053, 2054, 2056, 2705, 2058		N. Y. Supl. 10,	1849
People v. City of Rochester, 5 Lans. (N. Y.)	1477	People v. Supervisors, 121 N. Y. 345,	1850
11,		People v. Supervisors of Macomb Co., 3	
People v. Civil Service, etc., Boards, 103	2175	Mich. 475,	1471, 1523
N. Y. 657,		People v. Supervisors, 7 Hill. 171,	1850
People v. Chicago & A. R. Co., 130 Ill. 175,	1976	People v. Township of Overysel, 11	
People v. Commissioner of Taxes, 23	721	Mich. 222,	1985
N. Y. 224,		People v. Utica Cement Co., 22 Ill. App.	
People v. Commissioners of Taxes, 47	2138	159,	275
N. Y. 501,	34	People v. Walker, 17 N. Y. 502,	768
People v. Common Council, 140 N. Y. 300,	34	People v. Whipple, 9 Cow. (N. Y.) 707,	2015
People v. Common Council, 78 N. Y. 56,	34	People v. Wilmerding, 136 N. Y. 363,	440
People v. Contracting Board, 27 N. Y.	1546	People, etc., v. Speir, 77 N. Y. 144,	772
378,		People, <i>ex rel.</i> , v. Svracuse, 144 N. Y. 63,	1558
People v. Contracting Board, 33 N. Y.	1546	People, <i>ex rel.</i> Schurz, v. Cook, 148 U. S.	
382,	1441	397,	2131
People v. Cook, 148 U. S. 397,	1557	People, <i>ex rel.</i> Smith, v. Commissioners,	
People v. Cunningham, 1 Denio, 524,	2136	100 N. Y. 215,	1814
People v. Davenport, 91 N. Y. 574,		People, <i>ex rel.</i> Winchester, v. Coleman,	
People v. Dayton, 50 How. Pr. (N. Y.),	2085	133 N. Y. 279,	1370
143,	1802	People's, etc., Bank v. Norwalk, 56 Conn.	
People v. De Fore, 64 Mich. 693,	1545	547,	379
People v. Dwyer, 90 N. Y. 402,	1272	People's, etc., Co. v. Chicago, etc., Co., 20	
People v. Eel River R. Co., 98 Cal. 665,	1811	Ill. App. 473,	2057, 2060
People v. Farrell, 31 Cal. 576,		People's Building, etc., Association v.	
People v. Fisher, 14 Wend. (N. Y.) 9,	2054, 2060, 2069, 2072	Billing (Mich. 1895), 62 N. W. Rep. 373,	
154	154	1599, 1601	
People v. Gileon, 126 N. Y. 147,	1548	People's Building and Loan Association	
People v. Gleason, 121 N. Y. 631,		v. Furey, 47 N. J. Eq. 410,	1608
People v. Globe Mutual Life Ins. Co., 91	270, 946	People's Building, etc., Assn. v. McElroy,	
N. Y. 174,	1479	72 Miss. 434,	1618
People v. Gordon, 81 Mich. 306,	203	People's Ferry Co. v. Balch, 8 Gray, 303,	1320
People v. Goss, 99 Ill. 355,	1802	People's, etc., Insurance Co. v. Wescott,	1236
People v. Gould, 70 Mich. 240,	830	14 Gray, 440,	
People v. Harrison, 82 Ill. 64,	172, 511	People's Savings Bank v. Tripp, 13 R. I.	
People v. Hartley, 21 Cal. 585,	158	621,	2116
People v. Holden, 82 Ill. 93,	30	Peoria, City of, v. Calhoun, 29 Ill. 317,	1478
People v. Holladay, 93 Cal. 241,	2132	Peoria and Rock Island R. Co. v. Coal	
People v. Jackson, etc., Co., 9 Mich. 284,	161	Valley Mining Co., 68 Ill. 489,	1426
People v. Johnson, 24 Cal. 630,	30	Peoria, etc., Ins. Co. v. Perkins, 16 Mich.	
People v. Johnson, 38 N. Y. 63,	1798	380,	2233
People v. Kelly, 37 Hun, 160,	1785	Peoria, etc., R. Co. v. Preston, 6 Pick. 23, 1321	
People v. Kendall, 25 Wend. (N. Y.) 399,	1911	Peoria R. Co. v. Preston, 35 Iowa, 115,	154
People v. Lee Wah, 71 Cal. 80,	1439	Peoria Sugar Co. v. Babcock Co., 67 Fed.	
People v. Louisville & N. R. Co., 120 Ill.	811, 831	Rep. 892,	678
48,	1599	Pepe v. City and Suburban Building So-	
People v. Love, 25 Cal. 520,	1515	cietly (1893), L. R. 2 Ch. Div. 311,	1615
People v. Lowe, 117 N. Y. 175,	2146	Pepper v. Haight, 20 Barb. 429,	867
People v. Manning, 8 Cow. 297,		Perdue v. Brooks, 85 Ala. 459,	476
People v. May, 9 Colo. 80,		Perkins v. Clay, 54 N. H. 518,	648, 653, 655
People v. Mayor, 32 Barb. (N. Y.) 102,			

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Perkins v. Cummings, 2 Gray (Mass.), 253,	1867	Petrie v. Hannay, 3 T. R. 418,	1554, 1872, 1929
Perkins v. Dickinson, 3 Gratt. 335,	1062	Petrie v. Williams, 68 Hun, 589,	1771
Perkins v. Eaton, 3 N. H. 152,	1947, 1918	Petrie v. Williams, 23 N. Y. Supl. 237,	1781, 1800
Perkins v. Fourniquet, 14 How. 313,	532	Pettee v. Case, 2 Allen, 546,	490
Perkins v. Guy, 55 Miss. 153,	717	Pettigrew Machine Co. v. Harmon, 45 Ark. 290,	577
Perkins v. Hadsell, 50 Ill. 216,	183, 688	Pettingell v. City of Chelsea, 161 Mass. 363,	1476
Perkins v. Hasbrouck, 155 Pa. St. 494,	793	Pettis v. Atkins, 60 Ill. 454,	1384
Perkins v. Headley, 49 Mo. App. 556,	523	Pettis v. Johnson, 56 Ind. 139,	1556
Perkins v. Hinsdale, 97 Mass. 157,	599	Pettit, <i>Ex parte</i> , 2 Paige (N. Y.) 596,	1844
Perkins v. Jones, 26 Ind. 499,	2109, 2111	Pettit v. Parsons, 9 Utah, 223,	1646
Perkins v. Jordan, 35 Maine, 23,	910	Pettit v. Pettit, 32 Ala. 238,	1398
Perkins v. Littlefield, 5 Allen, 370,	597	Pettit v. Pettit, 107 N. Y. 677,	1758, 2010
Perkins v. Lockwood, 100 Mass. 249,	532, 534, 1631	Pettit v. Shepard, 32 N. Y. 97,	110
Perkins v. Lyman, 9 Mass. 522, 2033, 2049,	2056	Peugh v. Davis, 96 U. S. 332,	422
Perkins v. Proud, 62 Barb. 420,	200	Peyser v. Mayor, etc., New York, 70 N. Y. 497,	459, 2283
Perkins v. Wakeham, 86 Cal. 580,	1161	Peyser v. Myers, 135 N. Y. 599,	1648
Perkins v. Washington Insurance Co., 4 Cow. 645,	1277, 2206	Peyton's Case, 9 Coke, 78,	508, 525
Perkins v. Whelan, 116 Mass. 542,	359	Peyton v. Scott, 2 How. (Miss.) 870,	832
Perkins v. Wright, 3 Har. & McH. 324,	1171	Pfaff v. Cummings, 67 Mich. 143,	612
Perley v. Balch, 23 Pick. 283,	970	Pfaff v. Prag, 79 Md. 369,	1641
Perley v. Spring, 12 Mass. 297,	616	Pfau v. Reynolds, 53 Ill. 212,	1557
Perls v. Saalfeld, L. R. (1892) 2 Ch. 149,	2045	Pfeiffer v. Adler, 37 N. Y. 164,	603
Perron v. Cooper, 17 Colo. 80,	468, 469	Pfeiffer v. Campbell, 111 N. Y. 631,	189
Perry, Matter of, 5 Misc. (N. Y.) 149,	788	Pfleger v. Browne, 28 Beav. 391,	535
Perry v. Bailey, 12 Kan. 539,	755	Pluger v. Wilschusen, 17 N. Y. Supl. 516,	8
Perry v. Board of Missions, 102 N. Y. 99,	434	Phadenhauer v. Germania Ins. Co., 7 Heisk. 567,	119
Perry v. Carr, 41 N. H. 371,	1157	Pharis v. Gere, 110 N. Y. 336,	1844
Perry v. Council Bluffs City Waterworks Co., 67 Hun, 456,	1357	Phelan v. Brady, 119 N. Y. 587,	427
Perry v. Knight, 85 Maine, 184,	1070	Phelan v. City of New York, 119 N. Y. 86,	1497
Perry v. Manufacturing Co., 37 Conn. 520,	1510	Phelan v. Douglas, 11 How. Pr. 193,	763
Perry v. Mount Hope Iron Co., 15 R. I. 380,	83, 87	Phelan v. Hazard, 5 Dill. 45,	1374
Perry v. Provident Life Insurance, etc., Co., 99 Mass. 162,	—	Phelps v. Beebe, 71 Mich. 554,	372
Perry v. Quackenbush, 105 Cal. 299,	1044, 2223	Phelps v. Clasen, 3 Nat. Bank Reg. 22,	900
Perry v. Ruby, 81 Va. 317,	1718	Phelps v. Holderness, 56 Ark. 300,	1926
Perry v. Waggoner, 68 Iowa, 403,	1419	Phelps v. Hubbard, 51 Vt. 489,	388
Perry v. Young, 80 Wis. 133,	164	Phelps v. Johnson, 8 John. 54,	569
Perryman v. Wolfe, 93 Ala. 290,	1916, 1918	Phelps v. Mayor, 112 N. Y. 216,	458, 459, 460
Personette v. Pryme, 34 N. J. Eq. 26,	644	Phelps v. Reeder, 39 Ill. 172,	430
Perrth Amboy Manufacturing Co. v. Condit, 21 N. J. Law, 659,	904	Phelps v. Stillings, 60 N. H. 505,	677
Peru, City of, v. Gleason, 91 Ind. 566,	1513	Phelps v. Whitaker, 37 Mich. 72,	336
Peter v. Beverley, 10 Pet. 532,	452, 455, 1929	Phelps v. Zuschlag, 34 Texas, 371,	1832
Peter v. Compton, Skinner, 353,	647, 650	Phelps-Biglow Windmill Co. v. Piercy, 41 Kan. 763,	40
Peter v. Wright, 6 Ind. 183,	1000	Phoenix Ins. Co. v. Liverpool, etc., Co., 22 Fed. Rep. 715,	740
Peterborough v. Lancaster, 14 N. H. 382,	799, 801	Photteplace v. Bucklin, 18 R. I. 297,	480
Peters v. Bain, 133 U. S. 670,	1393	Philadelphia v. Collector, 5 Wall. 720,	807
Peters v. Compton, Skin. 353,	656	Philadelphia v. Fox, 64 Pa. St. 169,	2142
Peters v. Delaplaine, 49 N. Y. 362,	1172	Philadelphia, City of, v. Ridge Ave. Pass. Ry. Co., 143 Pa. St. 444,	1584
Peters v. Ft. Madison Construction Co., 72 Iowa, 405,	1689	Philadelphia Iron Co. v. Hoffman (Pa. Supl.), 4 Atl. Rep. 848,	326
Peters v. Gallagher, 37 Mich. 407,	2173	Philadelphia Loan Co. v. Towner, 13 Conn. 219,	1895
Peters v. Peters, 101 Mich. 291,	1827	Philadelphia Mercantile Loan Assn. v. Moore, 47 Pa. St. 233,	1636
Peters v. Phillips, 19 Texas, 70,	679, 1199	Philadelphia R. Co. v. Hickman, 28 Pa. St. 318,	157
Peters v. Soame, 2 Vern. 428,	1644	Philadelphia R. Co. v. Snowden, 166 Pa. St. 263,	942
Peters v. Westborough, 19 Pick. 364,	649, 650, 652	Philadelphia & E. R. Co. v. Catawissa R. Co., 53 Pa. St. 20,	1414
Petersburg, Town of, v. Mappin, 14 Ill. 193,	1473	Philadelphia, etc., R. Co. v. River Front R. Co., 168 Pa. St. 357,	1410
Peterson v. Brabrook Tailoring Co., 150 Ill. 290,	1391, 1404	Philadelphia, Wilmington, etc., R. Co. v. Lehman, 56 Md. 209,	2095, 2106
Peterson v. Chicago, etc., Railroad, 38 Minn. 511,	538	Philanthropic Association v. McKnight, 35 Pa. St. 472,	1608
Peterson v. Emmerson, 135 Ill. 55,	1160	Philbrook v. Burgess, 52 Maine, 271,	490
Peterson v. Laik, 24 Mo. 541,	1794	Phillips v. Peters, 21 Barb. 351,	196
Peterson v. Mayer, 46 Minn. 468,	188	Phillip v. Gallant, 62 N. Y. 256,	131, 140, 372, 2194
Peterson v. Mayor, 17 N. Y. 449,	7782	Phillip Best Brewing Co. v. Pillsbury Elevator Co., 5 Dak. 62,	1643
Peterson v. Mille Laes Lumber Co., 51 Minn. 90,	2245	Phillips, The Enos B., 53 Fed. Rep. 153,	396
Peterson v. Society, 24 N. J. L. 385,	2142	Phillips v. Adams, 70 Ala. 373,	728
Petillon v. Noble, 73 Ill. 567,	1048	Phillips v. Afialo, 43 Eng. C. L. R. 436,	902
Petit v. Woodlief, 115 N. Cas. 120,	512		
Peto v. Brighton R. Co., 1 Hem. & M. 468,	1212		
Petrol Guano Co. v. Jarnette, 25 Fed. Rep. 675,	1836		
Petrie v. Bury, 3 B. & C. 353,	814		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Phillips v. Bateman, 16 East, 356,	221	Platt, County of, v. Goodell, 97 Ill. 84,	1033
Phillips v. Bistolli, 2 B. & C. 511,	662, 1578	Picard v. East Tennessee, etc., R. Co., 130	
Phillips v. Breck, 79 Ky. 465,	421	U. S. 637,	2139
Phillips v. Claggett, 11 M. & S. 84,	548	Picard v. Hine, L. R. 5 Ch. App. 274,	1653
Phillips v. Coffee, 17 Ill. 154,	1243	Picard v. McCormick, 11 Mich. 68,	1878
Phillips v. Cooley, 2 Greene (Iowa), 456,	2198	Pickaway County Bank v. Prather, 12 Ohio	
Phillips v. Edwards, 33 Beav. 440,	843	St. 497,	1944
Phillips v. Hall, 100 Pa. St. 60,	1684	Pickens v. Bozell, 11 Ind. 275,	116, 148
Phillips v. Innes, 4 C. & F. 234,	2098	Pickering v. Fisk, 6 Vt. 102,	697
Phillips v. Jefferson Co., 5 Kan. 412,	804	Pickering v. Greenwood, 114 Mass. 479,	744
Phillips v. Leavitt, 54 Maine, 405,	626	Pickering v. Ilfracombe R. Co., L. R. 3 C.	
Phillips v. Lloyd, 13 R. I. 99,	1799	P. 235,	1639, 1860
Phillips v. Louisiana Ins. Co., 26 La. Ann.		Pickering v. Stevenson, L. R. 14 Eq. 322,	1254
404,	119	Pickersgill v. Lahens, 15 Wall. 140,	822, 823
Phillips v. Moor, 71 Maine, 78,	296	Pickert v. Marsten, 68 Wis. 465,	932
Phillips v. Mullings, 7 Ch. App. 244,	253	Pickett v. Ferguson, 36 Tenn. 642,	900
Phillips v. Plato, 42 Hun, 189,	828	Pickett v. Green, 120 Ind. 584,	48
Phillips v. Porter, 3 Ark. 18,	424	Pickett v. School District, 25 Wis. 551,	
Phillips v. Pullen, 50 N. J. Law, 439,	209, 210		1505, 1506, 1589
Phillips v. Port Townsend Lodge, 8 Wash.		Pickney v. Pickney, 2 Rich. Eq. (S. Car.)	
St. 529,	1086, 1084		219, 1780
Phillips v. Skinner, 6 Bush, 662,	120	Piedmont & A. Ins. Co. v. Young, 58 Ala.	
Phillips v. South Park Commissioners, 119		476,	769, 895
Ill. 626,	2003	Piedmont Land Co. v. Thomson Co. (Ala.),	
Phillips v. Stauch, 20 Mich. 369,	1155	12 So. Rep. 768,	162
Phillips v. Stevens, 16 Mass. 238,	270, 2237	Piedmont Mfg. Co. v. Columbia, etc., Rail-	
Phillips v. Thompson, 1 John. Ch. 131,		road, 19 S. Car. 353,	738
	620, 641, 1096	Pierce v. Benjamin, 14 Pick. 356,	165
Phillips v. Thorp, 10 Ore. 494,	2007	Pierce v. Bryant, 5 Allen, 91,	1385
Phillips v. Towles, 73 Ala. 406,	396	Pierce v. Corf, L. R. 9 Q. B. 210,	677
Phillips v. Vandergrift, 146 Pa. St. 357,	959	Pierce v. Estate of Payne, 28 Vt. 34,	
Phillips, etc., Academy v. Davis, 11 Mass.			648, 649, 655, 656
113,	254	Pierce v. Fuller, 8 Mass. 223,	
Phillips Construction Co. v. Seymour, 91			180, 2033, 2043, 2049
U. S. 646,	144, 745, 747, 956, 2193	Pierce v. Jones, 8 S. Car. 273,	535
Philpot v. Bingham, 55 Ala. 435,	1778	Pierce v. O'Brien, 129 Mass. 314,	1644
Philpot v. Briant, 4 Bing. 717,	594	Pierce v. Pierce, 71 N. Y. 154,	619, 1713, 1714
Philpot v. Gruninger, 14 Wall. 570,	178	Pierce v. Schenck, 3 Hill, 28,	502
Philpot v. Sandwich Manufacturing Co.,		Pierce v. Sweet, 33 Pa. St. 121,	565
18 Neb. 54,	1783, 1789	Pierce v. Travelers' Ins. Co., 34 Wis. 389,	
Philpott v. Jones, 2 A. & E. 41,	471		118, 119
Philpott v. St. George's Hospital, 6 H. L.		Pierce v. Woodward, 6 Pick. 206,	2075
Cas. 338,	1882	Piercy, <i>Ex parte</i> , L. R. 9 Ch. 33,	239
Philpott v. Wallet, 3 Lev. 65,	227, 617	Pierrepont v. Barnard, 6 N. Y. 279,	638, 641
Phillpotts v. Evans, 5 M. & W. 475,		Pierrepont v. Barnard, 5 Barb. 371,	638
	497, 498, 499, 2221	Pierson v. Ballard, 32 Minn. 263,	676, 1120
Phinizy v. Augusta, etc., R. Co., 62 Fed.		Pierson v. Crooks, 115 N. Y. 539,	
Rep. 678,	1423, 1437, 1457		340, 504, 565, 566, 569, 1578
Phinney v. Mut. Life Ins. Co., 67 Fed. Rep.		Pierson v. Fuhrmann, 1 Colo. App. 187,	1950
493,		Pierson v. Hooker, 3 Johns. 68,	566, 577
Phinney v. Phinney, 81 Maine, 450,	2154	Pierson v. McCahill, 21 Cal. 122,	261, 533
Phippen v. Stickney, 3 Metc. (Mass.) 384,		Pierson v. Morch, 82 N. Y. 503,	335
	2000, 2001, 2002, 2020	Pierson v. Thompson, 1 Edw. Ch. (N. Y.)	
Phipps v. Hope, 16 Ohio St. 586,	16	212,	1975
Phipps v. Jones, 20 Pa. St. 260,	258, 1329	Pigg v. Corder, 12 Leigh, 69,	1179
Phipps v. Tarpley, 24 Miss. 597,	110	Pike v. Baker, 53 Ill. 163,	1731
Phoenix Bank v. Bumstead, 18 Pick. 77,	543	Pike v. Balch, 33 Maine, 302,	674
Phoenix Co. v. Badger, 6 Hun, 293,	156	Pike v. Bangor, etc., R. Co., 68 Maine, 445,	154
Phoenix Bessemer Steel Co., <i>In re</i> , L. R.		Pike v. Brown, 7 Cush. 133,	607
4 Ch. Div. 108,	153, 492, 2235	Pike v. Butler, 4 N. Y. 360,	2194
Phoenix Bessemer Steel Co., <i>In re</i> , 44 L.		Pike v. Fitzgibbon, L. R. 17 Ch. D. 454,	1653
J. Ch. 683,	867	Pike v. King, 16 Iowa, 49,	1890, 2103
Phoenix Bridge Co. v. Keystone Bridge		Pike v. Munroe, 36 Maine, 309,	884
Co., 142 N. Y. 425,	1980, 2071	Pike v. Pike, 104 Ala. 642,	2277, 2278
Phoenix Ins. Co. v. Boyer, 1 Ind. App. 329,	143	Pike v. Pettis, 71 Ala. 93,	1118
Phoenix Ins. Co. v. Badger, 53 Wis. 283,	121	Pike v. Van Riper (N. J.), 30 Atl. Rep. 529,	209
Phoenix Ins. Co. v. Church, 81 N. Y. 218,	453	Pile v. Pile, 94 Ky. 308,	1840
Phoenix Insurance Co. v. Hinesley, 75		Pilkington v. Scott, 15 M. & W. 657,	231
Ind. 1,	2171	Pillans v. Van Mierop, 3 Burr. 1663,	
Phoenix Insurance Co. v. Moog, 78 Ala.			11, 177, 178
284,	2182	Pillbury v. Willoughby, 61 Maine, 274,	414
Phoenix Ins. Co. v. Readinger, 28 Neb.		Pilmer v. Branch of State Bank, 16 Iowa,	
587,	407, 415	321,	914
Phoenix Life Ins. Co. v. Raddin, 120 U. S.		Pimental v. Marques, 109 Cal. 406,	960
183,	177, 320	Pimental v. San Francisco, 21 Cal. 351,	783
Phoenix Warehousing Co. v. Badger, 67		Pinches v. The Swedish Church, 55 Conn.	
N. Y. 294,	153, 1323, 1325	183,	139
Phosphate Sewage Co. v. Hartmont, L. R.		Pinckard v. Pinckard, 23 Ala. 649,	850
5 Ch. Div. 394,	1980	Pinckney v. Burrage, 31 N. J. Law, 21,	1642
Platt v. Oliver, 3 McLean, 27,	646	Pinckston v. Brown, 3 Jones Eq. (N. Car.)	
Platt v. Oliver, 1 McLean C. C. R. 295,	2001	494,	1039, 1041
Platt v. United States, 22 Wall. 496,	178		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Pindall v. Trevor, 30 Ark. 249,	844	Plumer v. Lord, 5 Allen (Mass.), 460,	1754
Pinkham v. Appleton, 62 Maine, 574,	162	Plumer v. Smith, 5 N. H. 553,	1934
Pinkham v. Mattox, 53 N. H. 600,	664, 672	Plummer v. Christmas, 11 Tayl. (N. Car.)	67,
Pinkston v. Taliaferro, 9 Ala. 547,	413		2197
Pinnel's Case, 5 Coke, 117,	189, 519, 538	Plump v. Bank, 48 Kan. 484,	1332
Pinney v. Andrus, 41 Vt. 631,	329, 333	Plymouth, City of, v. Schultheis, 135 Ind.	339,
Pinney v. Bugbee, 13 Vt. 623,	573		1557
Pinney v. Fellows, 15 Vt. 525,	1680	Plymouth R. Co. v. Colwell, 39 Pa. St. 337,	1421
Pinney v. First Div., etc., R. Co., 19 Minn.	251,	Poague v. Allen, 2 J. J. Marsh. 421,	110
	746	Pogel v. Meilke, 60 Wis. 248,	574
Piper v. Kingsbury, 48 Vt. 480,	525	Pogue v. Clark, 25 Ill. 333,	811
Piper v. True, 36 Cal. 606,	901	Poirier v. Gravel, 88 Cal. 79,	2212
Pipes v. Buckner, 51 Miss. 848,	621	Poland v. Brownell, 131 Mass. 138,	1877
Pipkin v. James, 1 Humph. 327,	679	Polhemus v. Heiman, 45 Cal. 573,	144, 321
Piqua Branch Bank v. Knoop, 16 How.	(U. S.) 369,	Polk's Lessee v. Wendal, 9 Cranch, 87,	1532
	2130	Pollak v. Graves, 72 Ala. 347,	1743
Piscataqua Bridge, Proprietors of, v. New		Pollard, <i>Ex parte</i> , 40 Ala. 77,	2151
Hampshire Bridge, 7 N. H. 35,	2134	Pollard v. Clayton, 1 K. & J. 462,	751
Pitchee v. Wilson, 5 Mo. 46,	631	Pollen v. LeRoy, 30 N. Y. 549,	388
Pitkin v. Harris, 69 Mich. 133,	4449	Pollitz v. Trust Co., 53 Fed. Rep. 210,	1145
Pitkin v. Long Island R. Co., 2 Barb. Ch.	221,	Pollock v. Meyer, 96 Ala. 172,	1364
	643	Pollock v. Wilson, 3 Dana, 25,	110
Pitkin v. Noyes, 48 N. H. 294,	212, 657	Pomeroy v. Ainsworth, 22 Barb. 118,	405, 711
Pitkins v. Peet, 87 Iowa, 268,	1714	Pomfret v. Windsor, 2 Ves. Sr. 472,	1780
Pitman v. Poor, 33 Maine, 237,	635	Pomeroy v. Mills, 3 Vt. 279,	642
Pitney v. Bolton, 45 N. J. Eq. 871,	—	Ponce v. Smith, 84 Maine, 266,	149, 2229
Pitney v. Glen's Falls Ins. Co., 65 N. Y. 6,	904	Pond v. Harwood, 139 N. Y. 111,	—
Pitt v. Coomes, 2 A. & E. 459,	803		29, 46, 171, 478
Pitt v. Pursord, 8 Mees. & W. 538,	826	Pond v. Sheean, 132 Ill. 312,	849, 1181
Pitt v. Yalden, 4 Burr. 2060,	797	Pond v. Williams, 1 Gray, 360,	542, 574
Pitts v. Beckett, 13 M. & W. 743,	692	Pond Machine Co. v. Robinson, 38 Minn.	272,
Pitts v. Mangum, 2 Bailey, 588,	559		167
Pittsburgh Carbon Co. v. McMillin, 119	N. Y. 46,	Pondville Co. v. Clark, 25 Conn. 97,	1404
	2057, 2058	Ponton v. Griffin, 72 N. Car. 362,	22
Pittsburgh Mining Co. v. Spooner, 74 Wis.	307,	Pool v. Boston, 5 Cush. 219,	188
	1979, 1980	Pool v. Horner, 64 Md. 131,	193, 194
Pittsburgh and C. R. Co. v. Bedford and		Poole v. Hayes, 14 N. Y. St. Rep. 585,	693
B. R. Co., 81½ Pa. St. 104,	1414	Poole v. Shergold, 2 Bro. C. C. 118,	426
Pittsburgh, etc., Ry. Co. v. Columbus,		Poole v. Tumbridge, 2 M. & W. 223,	387, 406
etc., Ry. Co., 8 Biss. 456,	873	Pooler v. Cristman, 145 Ill. 405,	1022
Pittsburgh R. Co. v. Gilleland, 56 Pa. St.	415,	Pooley v. Buffalo, 4 N. Y. Supl. 450,	461
	275	Poor v. Oakman, 104 Mass. 309,	640
Pittsburgh, etc., R. Co. v. Keokuk Bridge		Poorman v. Kilgore, 26 Pa. St. 365,	851
Co., 131 U. S. 371,	1251, 1263	Poots v. Plaisted, 30 Mich. 149,	411
Pittsburgh, etc., R. Co. v. Keokuk Bridge		Pope v. Allis, 115 U. S. 363,	347, 665, 701
Co., 155 U. S. 156,	1457	Pope v. Burlington Savings Bank, 56 Vt.	254,
Pittsburgh, etc., Ry. Co. v. Morton, 61 Ind.	539,		251
	737	Pope v. Capital Bank, 20 Kan. 440,	1335
Pixley v. Nichols, 8 Iowa, 106,	135, 148, 291	Pope v. Cole, 55 N. Y. 124,	822, 825
Pixley v. Boynton, 79 Ill. 351,	1017, 1919	Pope v. Lewyns, Cro. Jac. 630,	192
Pixley v. Western Pac. R. Co., 33 Cal. 133,	1275, 1318	Pope v. Linn, 50 Maine, 83,	2101, 2108, 2112
	1975	Pope v. Nickerson, 3 Story, 365,	740
Place v. Hayward, 117 N. Y. 487,	1975	Pope v. Porter, 33 Fed. Rep. 7,	238, 244
Place v. Proctor, 2 Penny. (Pa.), 264,	2247	Pope v. Porter, 102 N. Y. 366,	149, 744
Plaisted v. Boston, etc., Navigation, 27	Maine, 132,	Pope v. Terre Haute, etc., Manufacturing	Co., 107 N. Y. 61,
	275		2182
Plaisted v. Palmer, 63 Maine, 576,	2108	Pope Iron Co. v. Best, 14 Mo. App. 502,	132, 134
Planche v. Colburn, 8 Bing. 14,	297, 299, 2222		27
Planch v. Jackson, 128 Ind. 424,	1808, 1932	Poppers v. Meager, 33 Ill. 147,	—
Plank Tavern Co. v. Burkhard, 87 Mich.	182,	Pordage v. Cole, 1 Wms. Saund. 320,	113, 114, 123
	1329	Porter v. Arrowhead Reservoir Co., 100	Cal. 500,
Plano Manufacturing Co. v. Ellis, 63 Mich.	101,		2231
	133	Porter v. Briggs, 38 Iowa, 166,	1697
Planters' Bank v. Sharp, 6 How. (U. S.)	301,	Port Clinton R. Co. v. Cleveland R. T. R.	Co., 13 Ohio St. 544,
	2130		2271
Planters' Bank v. Union Bank, 16 Wall.	483,	Porter v. Collins, 90 Ala. 510,	1003
	1306, 1851, 1895, 1904, 1933	Porter v. Day, 71 Wis. 296,	1944
Planters' Bank v. Whittle, 78 Va. 737,	1393, 1406	Porter v. Dougherty, 25 Pa. St. 405,	1102
Planters', etc., Bank v. Padgett, 69 Ga.	159,	Porter v. Fisher (Cal. 1893), 34 Pac. Rep.	700,
	1135		1866
Plath v. Minnesota, etc., Association, 23	Minn. 479,	Porter v. Goble, 88 Iowa, 565,	1769
	888	Porter v. Hill, 9 Mass. 33,	621
Platt v. Brand, 26 Mich. 173,	496	Porter v. Jafferis, 40 S. Car. 92,	1061
Platt v. Broderick, 70 Mich. 577,	133	Porter v. Jones, 52 Mo. 399,	1987, 1988
Platt v. Phila. R. Co., 65 Fed. Rep. 872,	1441	Porter v. Kingsbury, 5 Hun, 597,	161
Player v. Railway Co., 62 Iowa, 723,	1432	Porter v. Land and Water Co., 84 Maine,	193,
Pleasant Tp. v. Aetna Life Ins. Co., 138	U. S. 67,		1099
	1510	Porter v. Pierce, 120 N. Y. 217,	765
Plemons v. Southern Improvement Co.,	108 N. Car. 614,	Porter v. Swan, 17 N. Y. Supl. 351,	943
	1211	Porter v. Woodhouse, 59 Conn. 568,	14, 15
Plevins v. Downing, L. R. 1 C. P. D. 220,	52	Porter v. Wormser, 94 N. Y. 431,	693

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Porter v. Young, 85 Va. 49,	1712	Pratt v. Carroll, 8 Cranch, 471,	1166
Port Huron, City of, v. McCall, 46 Mich. 565,	1499	Pratt v. Castle, 91 Mich. 484,	558, 565
Portland Bank v. Maine Bank, 11 Mass. 205,	764	Pratt v. Chase, 40 Maine, 269,	672
Portland Natural Gas & Oil Co. v. State, 135 Ind. 54,	1222	Pratt v. Chase, 44 N. Y. 597,	2125
Posner v. Bay, 79 Md. 30,	1140	Pratt v. Draughton, 21 La. Ann. 194,	2021
Post v. Aetna Ins. Co., 43 Barb. 251,	566	Pratt v. Dwelling House Insurance Co., 53 Hun, 101,	1351
Post v. Pulaski Co., 49 Fed. Rep. 628,	1537	Pratt v. Dwelling House, etc., Insurance Co., 130 N. Y. 206,	1305
Postel v. Oard, 1 Ind. App. 252,	333, 354	Pratt v. Eaton, 65 Mo. 157,	428
Poston v. Balch, 69 Mo. 115,	2290	Pratt v. Eby, 67 Pa. St. 396,	417, 418, 422
Poston v. Gillespie, 5 Jones Eq. (N. Car.) 258,	1727	Pratt v. Hedden, 121 Mass. 116,	204
Potomac Coal Co. v. Cumberland Coal Co., 38 Md. 226,	440, 801	Pratt v. Hudson River, etc., R. Co., 21 N. Y. 305,	3, 305
Potter v. Brown, 5 East. 124,	728	Pratt v. Morrow, 45 Mo. 404,	550
Potter v. Brown, 35 Mich. 274,	614, 616	Pratt v. Oshkosh Match Co., 89 Wis. 406,	1310
Potter v. Carpenter, 76 N. Y. 157,	784	Pratt v. Paris Gaslight Co., 155 Ill. 531,	983
Potter v. Douglass, 44 Conn. 541,	438, 523	Pratt v. Parkman, 24 Pick. 42,	667
Potter v. Earnest, 51 Ind. 384,	2244	Pratt v. Paules (Pa. Supl.), 4 Atl. Rep. 751,	326
Potter v. Green, 6 Allen, 442,	573	Pratt v. Telephone Co., 141 Mass. 225,	1102
Potter v. Lee, 94 Mich. 140,	351	Pratt v. Trustees, 93 Ill. 475,	257, 1329
Potter v. Majestic, 60 Fed. Rep. 624,	739	Pratt v. Short, 79 N. Y. 437,	1893, 1895
Potter v. Phenix Ins. Co., 63 Fed. Rep. 382,	870, 905	Pray v. Mitchell, 60 Maine, 490,	661
Potter v. Potter, 3 N. J. Law, 9,	186	Pray v. Stebbins, 141 Maine, 219,	1766
Potter v. Sheets, 5 Ind. App. 506,	1726	Preble v. Baldwin, 6 Cush. 549,	607, 635
Potter v. Smith, 36 Ind. 231,	483, 1817	Prentiss v. Brimball, 123 Mass. 291,	2184
Potter v. Tuttle, 22 Conn. 512,	749	Prentiss v. Savage, 13 Mass. 20,	728
Pottlitzer v. Wesson, 8 Ind. App. 472,	340, 511	Prentiss v. Wood, 132 Mass. 486,	575
Potts v. Blanchard, 19 La. Ann. 167,	814	Presbrey v. Kline, 20 D. C. 513,	419
Potts v. Hart, 99 N. Y. 168,	1646	Presbury v. Fisher, 13 Mo. 50,	1970, 2044
Potts v. Merritt, 14 B. Mon. 406,	222, 619	Presbyterian Church v. Cooper, 112 N. Y. 517,	255, 256, 258, 268
Potts v. Plaisted, 30 Mich. 149,	391	Presbyterian Church, Trustees of, v. National State Bank (N. J. 1894), 29 Atl. Rep. 320,	2239
Potts v. Polk County, 80 Iowa, 401,	209, 212	Prescott v. Locke, 51 N. H. 94,	657
Potts v. Whitehead, 23 N. J. Eq. 512,	67, 68	President, etc., v. Doolittle, 14 Pick. 123,	513
Potts v. Whitehead, 20 N. J. Eq. 55,	57	President, etc., v. Hagner, 1 Pet. 455,	114
Powder Co. v. Burkhardt, 97 U. S. 110,	906	President, etc., City Bank v. Cutter, 3 Pick. 414,	365
Powder River Stock Co. v. Lamb, 38 Neb. 339,	1284	President, etc., of Bank v. Messenger, 9 Cow. 87,	543
Powell v. Berry (Va.), 22 S. E. Rep. 365,	634	President of Bank v. Treat, 6 Greenl. 207,	831
Powell v. Board, 46 Wis. 210,	440, 461, 804	Prescott v. Everts, 4 Wis. 314,	401
Powell v. Bradlee, 9 Gill & J. (Md.) 220,	912	Prescott v. Holmes, 7 Rich. Eq. 9,	360
Powell v. Chittick, 89 Iowa, 513,	337	Prescott v. Locke, 51 N. H. 94,	657
Powell v. Clark, 5 Mass. 355,	424, 425	Prescott, etc., Bank v. Butler, 157 Mass. 548,	1249, 2113
Powell v. Madison, 107 Ind. 106,	2116	Preston v. Boston, 12 Pick. 7,	459, 806, 1835
Powell v. Maguire, 43 Cal. 11,	2216	Preston v. Grant, 34 Vt. 201,	438, 510, 512, 522
Powell v. McAshan, 28 Mo. 70,	635	Preston v. Liverpool, etc., R. Co., 7 Eng. Law & Eq. 124,	1316
Powell v. Mills, 30 Miss. 231,	274	Preston v. Liverpool, etc., R. Co., 5 H. L. Cas. 605,	1315
Powell v. Newell, 59 Mich. 406,	271	Preston v. Luck, L. R. 27 Ch. Div. 497,	87
Powell v. New England, etc., Security Co., 87 Ala. 602,	1728	Preston v. Smith, 156 Ill. 359,	855
Powell v. Thompson, 80 Ala. 51,	907	Preston v. Whitney, 23 Mich. 260,	166
Power v. Barham, 4 A. & E. 473,	324	Preston v. Yates, 24 Hun, 534,	779
Power v. Haffey, 85 Ky. 671,	1988	Preston National Bank v. George T. Smith Middlings Purifier Co., 84 Mich. 364,	1282
Power v. Hathaway, 43 Barb. 214,	716	Prewitt v. Garrett, 6 Ala. 128,	2091
Power v. Kane, 5 Wis. 265,	932	Prewitt v. Wilson, 103 U. S. 22,	221, 223, 1714
Power v. Rankin, 114 Ill. 52,	610	Pribble v. Hall, 13 Bush (Ky.), 61,	1712
Power v. Reeder, 9 Dana (Ky.), 6,	2259	Price v. Andrew, 51 Ohio St. 405,	1011
Power v. Sheil, 1 Moll. 296,	1715	Price v. Assheton, 1 Young & C. Ex. 441,	2286
Power v. Village of Athens, 26 Hun, 282,	876	Price v. Barnes, 9 Ind. App. 1,	452
Power v. Village of Athens, 99 N. Y. 592,	1240	Price v. Dyer, 17 Ves. 356,	690
Powers v. Benedict, 88 N. Y. 605,	1001	Price v. Easton, 4 B. & Ad. 433,	237
Powers v. Clarke, 127 N. Y. 417,	872	Price v. Furman, 27 Vt. 268,	1781, 1903
Powers v. Fowler, 4 E. & B. 511,	61	Price v. Green, 16 M. & W. 346,	301, 1860, 2044, 2047
Powers v. Lynch, 3 Mass. 77,	728	Price v. Grand Rapids, etc., R. Co., 13 Ind. 137,	818, 2190
Powers v. Provident Institution, 124 Mass. 377,	251	Price v. Hopkin, 13 Mich. 318,	2158
Powers v. Russell, 26 Mich. 179,	1748	Price v. Laing, 152 Ill. 380,	1641
Powers v. Russell, 13 Pick. (Mass.) 69,	1811	Price v. Livingstone, L. R. 9 Q. B. D. 679,	869
Powers v. Skinner, 34 Vt. 274,	1852, 1992	Price v. Page, 4 Ves. Jr. 680,	692
Powers v. Strout, 67 Iowa, 341,	2039	Price v. Pepper, 13 Bush, 42,	232
Poullain v. Brown, 80 Ga. 27,	830	Price v. Powell, 3 N. Y. 322,	124
Pounds v. Clarke, 70 Miss. 263,	1012	Price v. Rhea (Iowa), 60 N. W. Rep. 208,	267
Poussard v. Spiers, L. R. 1 Q. B. D. 410,	117, 151	Price v. Sanders, 60 Ind. 310,	1798, 1799
Poynter v. Poynter, Cro. Car. 194,	226		
Prater v. Miller, 25 Ala. 320,	204		
Prather v. Ross, 17 Ind. 495,	903		
Pratt, The David, 1 Ware, 509,	552		
Pratt v. Adams, 7 Paige (N. Y.), 615,	1972		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Price v. Winter, 15 Fla. 66,	2285	Pulcifer v. Page, 32 Maine, 404,	502
Prideaux v. Lonsdale, 1 De Gex, J. & S. 433,	253	Pulse v. Miller, 81 Ind. 190,	17, 1177, 1483
Priest v. Chouteau, 85 Mo. 398,	1280	Pulvertoft v. Pulvertoft, 18 Ves. 84,	178
Priest v. Cummings, 16 Wend. (N. Y.) 318,	1715	Pumpelly v. Green Bay Company, 13 Wall. (U. S.) 166,	2145
Priest v. Watkins, 2 Hill, 225,	514, 543	Purcell v. Goshorn, 17 Ohio, 105,	1738
Prignon v. Daussat, 4 Wash. 199,	222	Purcell v. Minor, 4 Wall. 513,	620, 621, 845, 1129, 1191
Primm v. Legg, 67 Ill. 500,	466	Purdy v. City of Independence, 75 Iowa, 356,	1512
Prince v. Lynch, 38 Cal. 523,	510	Purmont v. McCrea, 5 Paige, 620,	465
Prince v. Overholser, 75 Wis. 646,	1022	Purner v. Piercy, 40 Md. 212,	637, 640
Prince v. City of Quincy, 105 Ill. 138,	1519	Purple v. Farrington, 119 Ind. 164,	1397
Prince v. Quincy, 123 Ill. 443,	1521	Pursley v. Hayes, 22 Iowa, 11,	1176
Princeton v. Vierling, 40 Ind. 340,	458, 459	Purves v. Landell, 12 C. & Fin. 91,	797
Princeton, etc., Turnpike Co. v. Gulick, 16 N. J. Law, 161,	780	Purvis v. Butler, 87 Mich. 248,	829
Pringle v. Woolworth, 90 N. Y. 502,	1423	Pust v. Dowie, 5 B. & S. 20,	135
Prior v. Williams, 3 Abb. Dec. 624,	1058	Puterbaugh v. Puterbaugh, 7 Ind. App. 280,	2172
Printing, etc., Co. v. Sampson, L. R. 19 Eq. 462,	1123, 1936, 1953, 2035	Puterbaugh v. Puterbaugh, 131 Ind. 283,	844, 1192, 1196
Pritchard v. Norton, 106 U. S. 124,	695, 713, 714, 715, 717	Putnam v. Dike, 13 Gray, 535,	717
Pritchard v. Pritchard, 69 Wis. 373,	702	Putnam v. Dutch, 8 Mass. 287,	667
Probate Court v. May, 52 Vt. 182,	1057, 1058	Putnam v. Grace, 161 Mass. 237,	70, 1119
Proctor v. Jones, 2 Carr. & P. 532,	667	Putnam v. Grand Rapids, 53 Mich. 416,	1519
Proctor v. Lewis, 50 Mich. 329,	831	Putnam v. Tennyson, 50 Ind. 456,	1697
Proctor v. Pool, 4 Dev. 370,	1083	Putnam v. Town, 34 Vt. 429,	792
Proctor v. Robinson, 35 Mich. 284,	380	Putnam v. Wise, 1 Hill, 234,	781
Proctor v. Thompson, 13 Abb. N. C. 340,	950, 951	Putnam v. Woodbury, 63 Maine, 58,	192
Proctor v. Thrall, 22 Vt. 262,	1701	Putney v. Day, 6 N. H. 430,	641
Prole v. Soady, 2 Giffard, 1,	223	Putney v. Farnham, 27 Wis. 187, 238, 597, 2210	2033
Prole v. Wiggins, 3 Bing. N. Cas. 230,	1573	Pyke v. Thomas, 4 Bibb (Ky.), 486,	691
Propeller Mohawk, 8 Wall. 153,	275	Pym v. Campbell, 6 E. & B. 370,	691
Proprietors of City Hotel v. Dickinson, 6 Gray, 588,	155	Q	
Proprietors of Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35,	2134		
Prospect Park, etc., Co. v. Coney Island, etc., R. Co., 144 N. Y. 152,	1101, 1103, 2271	Quain's Appeal, 22 Pa. St. 510,	288
Protestant Episcopal School, <i>In re</i> , 58 Barb. (N. Y.) 161,	2120	Quantock v. England, 5 Burr. 2628,	716
Proudfoot v. Wightman, 78 Ill. 553,	1127	Quarles v. Lacy, 4 Munf. (Va.) 251,	1718
Prout v. Pittsfield Fire Dist., 154 Mass. 450,	209, 219, 1473	Quarles v. State, 14 L. R. A. 192,	2098
Prout v. Wiley, 28 Mich. 164,	1791	Queen v. Justices of Shropshire, 8 Ad. & E. 273,	764
Prouty v. Edgar, 6 Iowa, 353,	1791	Queen v. Lords of the Treasury, 16 Q. B. 357,	988
Prouty v. Wilson, 123 Mass. 297,	204, 205	Queen v. St. Mary, 1 El. & Bl. 816,	761
Providence Bank v. Billings, 4 Pct. 514,	1348, 2130, 2137	Queen City, etc., Co. v. Crawford, 127 Mo. 356,	1311
Providence, etc., Assur. Soc. v. Reutlinger, 58 Ark. 528,	309, 315	Queen Ins. Co. v. State, <i>ex rel.</i> (Tex. Civ. App.), 22 S. W. Rep. 1048,	2060
Provident, etc., Assur. Soc. v. Llewellyn, 58 Fed. Rep. 940,	307, 313	Queen Insurance Co. v. State, <i>ex rel.</i> , 86 Texas, 250,	2056, 2060, 2063
Provost v. Calder, 2 Wend. 517,	25	Quertermous v. Hatfield, 54 Ark. 16,	432
Pruitt v. Hannibal, etc., R. Co., 62 Mo. 527,	275	Quick v. Lemon, 105 Ill. 578,	259, 260
Pruitsman v. Baker, 30 Wis. 644,	14	Quick v. Ludburrow, 3 Bulst. 29,	288
Prun, Matter of, 141 N. Y. 544,	564	Quick v. Wheeler, 78 N. Y. 300,	57
Pryor v. Cain, 25 Ill. 292,	257	Quigley v. DeHaas, 82 Pa. St. 267,	890
Pryor v. Foster, 130 N. Y. 171,	2275	Quigly v. Harold, 22 Ill. App. 269,	789
Pryor v. Hunter, 31 Neb. 678,	214	Quimby v. Shearer, 56 Minn. 434,	1006
Pryse v. McGuire, 81 Ky. 608,	362	Quinby v. Strauss, 90 N. Y. 664,	2246
Public Ledger Co. v. Memphis, 93 Tenn. 71,	1555	Quincy, City of, v. Chicago B. & Q. R. Co., 94 Ill. 537,	1435
Pucci v. Barney, 21 N. Y. Supl. 1099,	923, 2246	Quincy, City of, v. Warfield, 25 Ill. 317,	1539
Puckett v. Alexander, 102 N. Car. 95,	1909	Quincy R. Co. v. Adams Co., 88 Ill. Rep. 615,	1453
Pugh v. Duke of Leeds, Cowp. 714,	763	Quincy, etc., R. Co. v. Humphreys, 145 U. S. 82,	1496
Puch v. Stringfield, 3 C. B. N. S. 2,	814	Quinlan v. Providence Ins. Co., 133 N. Y. 356,	117
Pulliam v. Schimpf (Ala.), 19 So. Rep. 428,	105	Quinn v. Roath, 37 Conn. 16,	749
Pulliam v. Taylor, 50 Miss. 251,	509, 532	Quinn v. Stockton, 2 Lit. 343,	549
Pullman v. Alley, 53 N. Y. 637,	554	Quintard v. Bacon, 99 Mass. 185,	669
Pullman v. Corning, 9 N. Y. 93,	2194	Quirk v. Muller, 14 Mont. 467,	1997
Pullman v. Upton, 96 U. S. 328,	1385	R	
Pullman Car Co. v. Booth (Texas App.), 28 S. W. Rep. 719,	218		
Pullman Car Co. v. Missouri, 152 U. S. 301,	1456	Rabbermann v. Wiskamp, 54 Ill. 179,	597
Pullman Palace Car Co. v. Metropolitan R. Co., 157 U. S. 94,	342	Rabe v. Dunlap, 51 N. J. Eq. 40,	1447
Pullman's Palace Car Co. v. Missouri Pacific Railway, 115 U. S. 587,	1455	Rabbito v. Orr, 83 Ala. 185,	1744
		Race v. Weston, 86 Ill. 92,	980, 1127

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Racine County Bank v. Ayres, 12 Wis. 512,		Raisler v. Athens, 66 Ala. 194,	460
	2083	Rake v. Pope, 7 Ala. 161,	855
Racine, etc., R. Co. v. Farmers' Loan Co.,		Ralls, County of, v. Douglas, 105 U. S. 728,	1535
49 Ill. 331,	1453		
Radebaugh v. Tacoma, etc., R. Co., 8		Ralston v. Aultman (Texas App.), 26 S.W.	
Wash. 570,	1416	Rep. 746,	454
Rader v. Southeasterly, etc., District, 36		Ralston v. Wood, 15 Ill. 159,	443
N. J. Law, 273,	2141, 2145	Ramey v. Allison, 64 Texas, 697,	985
Radich v. Hutchins, 95 U. S. 210,	803	Ramsdell v. Edgarton, 8 Mete. (Mass.)	
Radley v. Kenedy, 14 N. Y. Supl. 268,	1785	227,	1640
Raffensberger v. Chlison, 28 Pa. St. 426,	951	Ramsdell v. Fuller, 28 Cal. 37,	1761
Ragland v. McFall, 137 Ill. 81,	1391	Ramsey v. Ramsey, 121 Ind. 215,	1848
Ragsdale v. Burnett, 10 Ind. 478,	1713	Ramsgate Victoria Hotel Co. v. Montefi-	
Ragsdale v. Gossett, 2 Lea (Tenn.), 729,		ore, L. R. 1 Exch. 109,	61
	1699, 1750	Rand v. Mather, 11 Cush. 1,	690, 1155, 1859
Raikes v. Todd, 8 Adol. & Ell. 846,	683	Rand v. Rand, 4 N. H. 267,	763
Railroad Commission Cases, 116 U. S.		Randal v. Tatum, 98 Cal. 390,	410
307,	2133	Randall v. Ghent, 19 Ind. 271,	1079
Railroad Commissioners v. Portland & O.		Randall v. Howard, 2 Black, 585,	622
C. R. Co., 63 Maine, 269,	1439	Randall v. Morgan, 12 Ves. 67,	227, 619
Railroad Co. v. Bartlett, 120 Ill. 603,	864	Randall v. National Building Association,	
Railroad Co. v. Bowser, 42 Pa. St. 29,	1400	42 Neb. 809,	1611, 1624
Railroad Co. v. Brown, 17 Wall. (U. S.)		Randall v. Nat. Building, etc., Union, 43	
445,	1436	Neb. 876,	1606
Railroad Co. v. Commissioners, 98 U. S.		Randall v. Newson, L. R. 2 Q. B. Div. 102,	349
541,	458, 459, 460, 461, 463, 806, 807	Randall v. Randall, 37 Mich. 563,	1207
Railroad Co. v. Durant, 95 U. S. 576,	1306	Randall v. Sackett, 77 N. Y. 480,	823
Railroad Co. v. Estes, 37 Kan. 715,	1433	Randle v. Stone, 77 Geo. 501,	167
Railroad Co. v. Gaines, 97 U. S. 697,	2132	Randolph v. Daly, 16 N. J. Eq. 313,	821, 2188
Railroad Co. v. Georgia, 98 U. S. 350,		Randon v. Toby, 11 How. (U. S.) 493,	1854
	1456, 2132, 2140	Ranger v. Great Western R. Co., 5 H. L.	
Railroad Co. v. Ham, 114 U. S. 587,	1454	C. 72,	187, 1131
Railroad Co. v. Hendricks, 41 Ind. 48,	1454	Rankin v. Montimore, 7 Watts, 371,	995
Railroad Co. v. Johnson, 15 Wall. 195,	392	Rankin v. West, 25 Mich. 195,	1748
Railroad Co. v. Lockwood, 17 Wall.		Rankin v. Woodworth, 3 P. & W. (Pa.)	
(U. S.) 357,	1953, 1959, 1961, 1966, 1969	48,	769
Railroad Co. v. Manufacturing Co., 16		Rann v. Hughes, 7 T. R. 346,	
Wall. 318,	737		
Railroad Co. v. McCarthy, 96 U. S. 258,	417		
Railroad Company v. McClure, 10 Wall.		Rannels v. Gerner, 80 Mo. 474,	1657, 1812
(U. S.) 411,	2117	Ransom v. Brown, 63 Texas, 188,	120
Railroad Co. v. Maine, 96 U. S. 499,	1456, 2140	Ransome v. State, 91 Tenn. 716,	1946
Railroad Co. v. National Bank, 102 U. S.		Raphael v. Thames Valley Railway, L. R.	
14,	178	2 Eq. 37,	1212
Railroad Co. v. Pennsylvania, 15 Wall.		Rapid v. The Schooner, 1 Gall. (U. S.	
(U. S.) 300,	2141	C. C.) 295,	2020
Railroad Co. v. Powell, 40 Ind. 37,	1454	Rapid Transit Land Co. v. Sanford (Texas	
Railroad Co. v. Pratt, 22 Wall. 123,	735, 737	1893), 24 S. W. Rep. 557,	1776
Railroad Co. v. Railway Co., 44 Ohio St.,		Rapier v. Gulf City Co., 64 Ala. 330,	1645
287, 864		Rapley v. Klugh, 40 S. Car. 134,	2178
Railroad Co. v. Richmond, 96 U. S. 521,	1581	Rapps v. Gottlieb, 142 N. Y. 164,	1034
Railroad Co. v. Shirley, 54 Tex. 125,	1454	Rasmussen v. State Nat. Bank, 11 Colo.	
Railroad Co. v. Trimble, 10 Wall. (U. S.)		301,	1633
367,	858, 877	Ratcliffe v. Anderson, 31 Gratt. (Va.) 716,	2150
Railroad Co. v. United States, 101 U. S.		Ratcliff v. Davies, Cro. Jac. 244,	411
543,	775	Ratcliff v. Davis, Yelv. 178,	411
Railroad Co. v. Whitton, 13 Wall. 270,	1453	Rathbum v. McConnell, 27 Neb. 239,	881
Railroad Co. v. Winans, 17 How. 30,	1252	Rathbum v. Snow, 123 N. Y. 343,	1238, 1359
Railroad Co. v. Womack, 84 Ala. 149,	1433	Rathbum v. Thurston County, 8 Wash.	
Railroad Co. v. Wynn, 88 Tenn. 330,	1966	238,	2235
Railroad Companies v. Schutte, 103 U. S.		Rattoon v. Overacker, 8 Johns. 126,	514
118,	869	Rau v. Union Paper Mill Co., 95 Ga. 208,	1393
Railway Co. v. Boney, 117 Ind. 501,	1454	Rau v. Van Zedlitz, 132 Mass. 164,	1827
Railway Co. v. Langdon, 92 Pa. St. 21,	1432	Raub v. Blairstown Creamery, 56 N. J.	
Railway Co. v. Marshall, 136 U. S. 393,	1123	Law, 262,	1284
Railway Co. v. Mayes, 58 Ark. 397,	1967	Raub v. Smith, 61 Mich. 543,	645
Railway Co. v. McCarthy, 96 U. S. 258,	2073	Raubitschek v. Blank, 80 N. Y. 478,	684
Railway Co. v. Redmond, 10 C. B. (N. S.)		Rawdon v. Rawdon, 28 Ala. 565,	2278
675,	1224	Rawley v. Stoddard, 7 John. 206,	577
Railway Co. v. Spangler, 44 Ohio St. 471,	1962	Rawson v. Bell, 46 Ga. 19,	847
Railway Co. v. Stevens, 95 U. S. 655,	1961	Rawson v. Clark, 70 Ill. 656,	290, 489, 2226
Railway Co. v. Whitley, 54 Ark. 199,	646	Rawson v. Fox, 65 Ill. 200,	1023
Railway Co. v. Wynn, 88 Tenn. 320,	1958, 1969	Rawson v. Johnson, 1 East, 203,	123, 378
Railway, etc., Co., <i>In re</i> , L. R. 29 Ch. Div.		Rawson Co. v. Richards, 69 Wis. 643,	170
204,	761	Rawson v. Spencer, 113 Mass. 40,	2142
Railway, etc., Co. v. Burwell, 44 Ind. 460,	117	Ray v. Bank of Kentucky, 3 B. Mon. 510,	
Railway Sleepers Supply Co., <i>In re</i> , L. R.			800, 936
29 Ch. Div. 204,	764	Ray v. Rood, 62 Vt. 293,	194, 195, 196, 197
Rainbolt v. East, 56 Ind. 538,	618, 619	Ray v. Simmons, 11 R. I. 266,	253
Rainey v. Capps, 22 Ala. 288,	2104	Ray v. Tubbs, 50 Vt. 688,	1802
Rainey v. Smizer, 28 Mo. 310,	829	Ray v. West, etc., Gas Co., 138 Pa. St. 576,	659
Raisin v. Clark, 41 Md. 158,	932	Ray v. Wilcoxon, 107 N. Car. 514,	1732
		Ray v. Young, 13 Texas, 550,	692

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Rayburn v. Comstock, 80 Mich. 443,	299, 506	Reeves v. Brymer, 6 Ves. 516,	553
Raymond v. Borough of Rutherford, 55 N. J. Law, 441,	1549	Reeves v. Butcher, 31 N. J. Law, 224,	2108
Raymond v. Flavel, 27 Ore. 219,	364	Reeves v. Corning, 51 Fed. Rep. 774,	990
Raymond v. Leavitt, 46 Mich. 447,	2030	Reeves v. Earne, 1 M. & W. 323,	526
Raymond v. Rhodes, 135 Mass. 337,	100	Reeves v. Linam, 57 Ala. 564,	1743
Rayner v. Preston, L. R. 18 Ch. Div. 1,	6, 10, 13, 1173	Reeves v. Morgan, 43 N. J. Eq. 415,	1813, 1722
Raynes v. Bennett, 114 Mass. 424,	1660	Refeld v. Woodfolk, 22 How. 318,	122
Raynor v. Drew, 72 Cal. 307,	422	Regan v. Baldwin, 126 Mass. 485,	800
Re Manhattan Sav. Inst., 82 N. Y. 142,	1553	Regents of University v. Williams, 9 G. & J. (Md.) 365,	2141
Re Merriam, 84 N. Y. 596,	1553	Reg. v. Lord, 12 Q. B. 757,	1807
Re Metropolitan Gas Light Co., 85 N. Y. 526,	1553	Register v. Dodge, 19 Blatchf. 79,	962
Re Paine, 26 Hun. 431,	1553	Registering Co. v. Sampson, L. R. 19 Eq. 465,	235
Re Rhodes, 62 L. T. R. N. S. 22,	1843	Reichart v. Wilhelm, 83 Iowa, 510,	14
Re Sherry, L. R. 25 Ch. Div. 692,	60	Reichel v. Jeffrey, 9 Wash. 250,	513
Rea v. Bishop, 41 Neb. 202,	1837	Reichwald v. Commercial Hotel Co., 106 Ill. 439,	1391, 1406
Read v. Atlantic City, 49 N. J. L. 558,	1519	Reicke v. Saunders, 3 Mo. App. 566,	288
Read v. Buffum, 79 Cal. 77,	1276	Reid v. Cook, 88 Iowa, 717,	1055
Read v. Bullock, Dyer, 56 b,	564	Reid v. Explosives Co., L. R. 19 Q. B. D. 264,	488
Read v. City of Plattsburgh, 107 U. S. 568,	1539	Reid v. Hoskins, 6 E. & B. 953,	498
Read v. Dingess, 60 Fed. Rep. 21,	978	Roid v. Stevens, 38 S. Car. 519,	1693, 1742
Read v. Nash, 1 U. S. 305,	610	Reigart v. Ellmaker, 14 S. & R. 121,	543
Read v. Smith, 60 Texas, 379,	2087	Reigart v. White, 52 Pa. St. 438,	1720
Read v. Taft, 3 R. I. 175,	1902	Reigne v. Desportes, Dud. Law (S. Car.), 118,	196
Reade v. Livingstone, 3 Johns. Ch. 471,	620, 1653, 1710	Reilly v. Daly, 159 Pa. St. 605,	2238
Reader v. Kingham, 13 C. B. (N. S.), 344,	596, 614, 615	Reilly v. Jones, 1 Bing. 302,	756
Reading Railroad v. Johnson, 7 Watts & S. 317,	562	Reiman v. Hamilton, 111 Mass. 245,	1753
Real Estate Investment Co. v. Roop, 132 Pa. St. 496,	1720	Reimensnyder v. Gans, 110 Pa. St. 17,	258
Real Estate Savings Institution v. Linder, 74 Pa. St. 371,	800	Reinheimer v. Carter, 31 Ohio St. 579,	648, 649, 656
Rearich v. Swinehart, 11 Pa. St. 233,	899	Reinschoff v. Rogge, 37 Ind. 207,	1816, 1826, 2241
Rebman v. San Gabriel Land Co., 95 Cal. 390,	2222	Reisan v. Mott, 42 Minn. 49,	408
Recknagle v. Schmaltz, 72 Iowa, 63,	846	Reissner v. Oxley, 80 Ind. 580,	865
Rector v. Collins, 46 Ark. 167,	1065	Remick v. Sanford, 120 Mass. 300,	665, 672
Rector v. McDermott (Ark.), 13 S. W. Rep. 334,	488	Remington v. Palmer, 62 N. Y. 31,	635
Rector, etc., v. County of Philadelphia, 24 How. (U. S.) 300,	2138, 2140	Remy v. Olds, 58 Cal. 537,	299
Rector of St. David's v. Wood, 24 Ore. 396,	1203	Renard v. Tuller, 4 Bosw. (N. Y.) 107,	532, 533, 535, 1633
Redding v. Wilkes, 3 Brown Ch. R. 400,	618, 843, 1717	Renals v. Cowlshaw, L. R. 9 Ch. Div. 1154	
Reddish v. Smith, 10 Wash. 178,	976, 1044	Rendleman v. Rendleman, 156 Ill. 568,	9
Redfield v. Holland, etc., Co., 56 N. Y. 354,	190, 465	Renick v. Ludington, 20 W. Va. 511,	1179
Redman v. Thomas, 89 Mo. App. 143	415	Renizer v. Fogassa, Plowden, 1,	526
Reech v. Kennegal, 1 Ves. Sen. 123	593	Renihan v. Wright, 125 Ind. 536,	511, 544
Reed v. Bartlett, 19 Pick. 273,	538	Renner v. Bank of Columbia, 9 Wheat. 581,	941
Reed v. Boardman, 20 Pick. 441,	469, 523	Rensselaer Glass Factory v. Reid, 5 Cow. 577,	186
Reed v. Brewer (Miss.), 16 So. Rep. 350,	266	Renwick v. Wheeler, 48 Fed. Rep. 431,	209, 211
Reed v. Dougan, 54 Ind. 306,	1932	Requa v. Snow, 76 Cal. 535,	1162
Reed v. Evans, 17 Ohio, 123,	683	Resolution, The, 2 Dall. (U. S.) 10,	2020
Reed v. Field, 15 Vt. 672,	867	Resseter v. Waterman, 151 Ill. 169,	205, 607
Reed v. Goldring, 2 M. & S. 86,	404	Rex v. Adderley, Doug. 462,	768
Reed v. Holcomb, 31 Conn. 360,	598, 614, 617	Rex v. Cross, 3 Camp, 224,	1506
Reed v. Insurance Co., 95 U. S. 23,	859, 873	Rex v. Hucks, 1 Stark, 424,	902
Reed v. Lane, 61 Vt. 481,	1772, 1773	Rex v. Inhabitants of Horndon-on-the-Hill, 4 M. & Sel. 562,	641
Reed v. Lowe, 8 Utah, 39,	95	Rexford v. Marquis, 7 Lans. 249,	26
Reed v. Newcomb, 64 Vt. 49,	1753	Rex v. Peckham, Carth. 406,	768
Reed v. Randall, 29 N. Y. 358,	504	Rex v. Younger, 5 T. R. 449,	2099
Reed v. Reed, 135 Ill. 482,	1677	Reynolds, <i>in re</i> , 21 N. Y. Supl. 592,	565
Reed v. Wilson, 41 N. J. Law, 39,	385	Reynolds v. Barnard, 36 Ill. App. 218,	207
Reed v. Wood, 9 Vt. 285,	41, 193, 236	Reynolds v. Bridge, 6 E. & B. 528,	757
Reed v. Woodman, 17 Maine, 43,	414	Reynolds v. Bridge, 37 Eng. L. & Eq. 122,	759
Reed Lumber Co. v. Lewis, 94 Ala. 626,	1749	Reynolds v. Burlington, etc., R. Co., 11 Neb. 186,	749
Reeder v. Gorsuch, 55 Kan. 553,	1065	Reynolds v. Continental Insurance Co., 36 Mich. 132,	932, 935
Reedy v. Smith, 42 Cal. 245,	67	Reynolds v. Excelsior Coal Co. (Ala. 1893), 14 So. Rep. 573,	1003
Rees v. Rees, 11 Rich. Eq. 86,	559	Reynolds v. Geary, 26 Conn. 179,	2147
Reese v. Berrington, 2 Ves. Jr. 540,	207	Reynolds v. Hewett, 27 Pa. St. 176,	632
Reese v. Medlock, 27 Texas, 120,	2180	Reynolds v. Kingsbury, 15 Iowa, 238,	1642
Reese v. Reese, 157 Pa. St. 200,	1670	Reynolds v. Kirk (Ala. 1895), 17 So. Rep. 95,	628
Reeside, The, 2 Sumn. 567,	926	Reynolds v. Lansford, 16 Texas, 256,	1733
Reeve v. Ladies' Building Assn., 56 Ark. 335,	1618, 1619	Reynolds v. McCurry, 100 Ill. 356,	1781, 1784, 1803

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Reynolds v. McKinney, 4 Kan. 94,	1942	Richardson v. County of Grant, 27 Fed.	
Reynolds v. Necessary, 88 Va. 125,	1136	Rep. 495,	783
Reynolds v. Nichols, 12 Iowa, 398,	1861	Richardson v. Crandall, 48 N. Y. 348,	1853
Reynolds v. Nugent, 25 Ind. 323,	187, 198, 199	Richardson v. De Giverville, 107 Mo. 422,	720
Reynolds v. O'Neil, 26 N. J. Eq. 223,	1111	Richardson v. Delaware Loan Assn., 9	
Reynolds v. Reynolds, 55 Ark. 389,	190, 519	Houst. (Del.) 354,	1602
Reynolds v. Reynolds, 92 Ky. 556,	793	Richardson v. Draper, 87 N. Y. 337,	824
Reynolds v. Stevenson, 4 Ind. 619,	2098, 2112	Richardson v. Duncan, 3 N. H. 508,	1830
Reynolds v. Ward, 5 Wend. 502,	189	Richardson v. Estate of Merrill, 32 Vt. 27,	1680
Reynolds & Henry Const. Co. v. Police		Richardson v. Goddard, 23 How. 23,	124
Jury, 44 La. Ann. 863,	1349	Richardson v. Green, 133 U. S. 30,	1301, 1396
Rhodes, Appeal of, 156 Pa. St. 337,	1635	Richardson v. Harris, L. R. 22 Q. B. D.	
Rhodes, Re, 62 L. T. R. (N. S.) 22,	1843	268,	386
Rhoda v. Alameda Co., 52 Cal. 350,	161	Richardson v. Horn, 8 Houst. (Del.) 26,	997
Rhodes v. Andrews (Ark.), 13 S. W. Rep.		Richardson v. Jackson, 8 M. & W. 298,	400
422,	407	Richardson v. Jones (Kan.), 43 Pac. Rep.	
Rhodes v. Cleveland Rolling Mill Co., 17		1127,	1857
Fed. Rep. 426,	899	Richardson v. Jones, 53 Ind. 240,	835
Rhoades v. Davis, 51 Mich. 306,	1207	Richardson v. Lawrence County, 14 Sup.	
Rhey v. Ebensburg, etc., Co., 27 Pa. St.		Ct. Rep. 1157,	1537
261,	260	Richardson v. McLemore, 5 Baxter, 586,	543
Rhodes v. Forwood, L. R. 1 App. Cas. 256,	488	Richardson v. Mellish, 2 Bing. 229,	1952
Rheel v. Hicks, 25 N. Y. 289,	481	Richardson v. Pate, 93 Ind. 423,	1787
Rhoads v. Hoernerstown, etc., Assn., 82		Richardson v. Peacock, 26 N. J. Eq. 40,	
Pa. St. 180,	1597		2043, 2047
Rhoades v. Parker, 10 N. H. 83,	490	Richardson v. Peacock, 33 N. J. Eq. 597,	
Rhodes v. Rhodes, 3 Sandf. Ch. 279,	848, 1211		2040, 2046
Rhodes v. Rhodes, L. R. 44 Ch. Div. 94,	777	Richardson v. Pierce, 7 R. I. 390,	654
Rhodes v. Storr, 7 Ala. 814,	630	Richardson v. Pitts, 71 Mo. 123,	1311
Rhodes v. Wilson, 12 Colo. 65,	900	Richardson v. Richardson, 148 Ill. 563,	1712
Rice v. Austin, 17 Mass. 197,	668	Richardson v. Shaw, 1 Mo. App. 234,	291
Rice v. Carter, 11 Ired. 298,	122	Richardson v. Sibley, 11 Allen, 65,	1403
Rice v. Churchill, 2 Denio, 145,	500	Richardson v. Squires, 37 Vt. 640,	662
Rice v. D'Arville, 162 Mass. 559,	2265	Richardson v. Watson, 4 B. & Ad. 737,	901
Rice v. Dudley, 34 Mo. App. 383,	447	Richelieu Hotel Co. v. International Mil.	
Rice v. Ege, 42 Fed. Rep. 661,	373	Encampment Co., 141 Ill. 248,	
Rice v. Frayser, 24 Fed. Rep. 460,	1645		256, 258, 518, 1329, 1878
Rice v. Gibbs, 40 Neb. 264,	1059	Richey v. Branson, 33 Mo. App. 418,	2209
Rice v. Gibbs, 33 Neb. 460,	234, 235	Richey v. Carpenter, 9 Pa. Co. Ct. 106,	28
Rice v. Gist, 1 Strobb. (S. Car.) 82,	1914	Richey v. Daemicke, 86 Mich. 647, 324, 343, 344,	
Rice v. Peet, 15 Johns. 503,	632	Richie v. Atkinson, 10 East, 306,	117
Rice v. Roberts, 24 Wis. 461,	635	Richland, County of, v. County of Law-	
Rice v. Rockefeller, 134 N. Y. 174,	1425	rence, 12 Ill. 1,	2143
Rice v. Rockefeller, 56 Hun (N. Y.), 516,	2058	Richlands Glass Co. v. Hildebeitel (Va.),	
Rice v. Rock Island, etc., R. Co., 21 Ill. 93,	1335	22 S. E. Rep. 806,	43, 926
Rice v. Savary, 22 Iowa, 470,	237, 248	Richmond, City of, v. Dudley, 129 Ind.	
Rice v. Sims, 8 Rich. L. 416,	214	118,	1557
Rice v. Town of Haywards, 107 Cal. 398,	1517	Richmond v. Dubuque R. Co., 26 Iowa,	
Rice v. Webster, 18 Ill. 331,	576	191,	1952, 2073
Rice v. Wood, 113 Mass. 133,	2002	Richmond v. Gray, 3 Allen, 25,	753
Rich v. Calhoun (Miss. 1893), 12 So. Rep.		Richmond v. Koenig, 43 Minn. 480,	1140
707,	2211	Richmond, Mayor of, v. Judah, 5 Leigh	
Rich v. Cockell, 9 Ves. 369,	1671	(Va.), 305,	460
Rich v. Flanders, 39 N. H. 304,	2152	Richmond v. Moore, 107 Ill. 429,	2098
Rich v. Hotchkiss, 16 Conn. 409,	234	Richmond v. Roberts, 7 Johns. (N. Y.)	
Rich v. Lord, 18 Pick. 322,	566, 567	319,	1975
Ricard v. Sanderson, 41 N. Y. 179,	237	Richmond v. Robinson, 12 Mich. 193,	748
Richards v. American Desk Co., 37 Wis.		Richmond v. Voorhees, 10 Wash. 316,	1708
503,	2027, 2030	Richmond v. Woodward, 32 Vt. 833,	859
Richards v. Angell, 21 N. Y. Supl. 646,	565	Richmond, etc., Co. v. Shomo, 90 Ga. 496,	868
Richards v. Fuller, 37 Mich. 161,	336	Richmond Gas Light Co. v. Middletown,	
Richards v. Green, 23 N. J. Eq. 536,	1105	59 N. Y. 228,	1504
Richards v. Grinnell, 63 Iowa, 644,	644	Richmond Const. Co. v. Richmond R. Co.,	
Richards v. May, L. R. 10 Q. B. Div. 400,	1131	68 Fed. Rep. 105,	1221
Richards v. Merrill, 13 Pick. (Mass.) 405,	1524	Richmond and Danville R. Co. v. Bedell,	
Richards v. New Hamp. Insurance Co., 43		88 Ga. 591,	2208
N. H. 263,	1366	Richmond, etc., R. Co. Hissong, 99 Ala.	
Richards v. Shaw, 67 Ill. 222,	144	187,	920
Richards v. Warring, 39 Barb. 42,	863	Richmond, etc., R. Co. v. Louisa R. Co.,	
Richardson, In the Matter of, 2 Story, C.		13 How. (U. S.) 71,	2146
C. 571,	762	Richmond, etc., Railroad Co. v. Payne,	
Richardson v. Akin, 87 Ill. 138,	2122	86 Va. 481,	1967
Richardson v. Bates, 8 Ohio St. 257,	231	Richmond R. Co. v. Walker, 92 Geo. 485,	550
Richardson v. Boright, 9 Vt. 368,	1779	Richter v. Poffenhansen, 42 N. Y. 373, 821,	825
Richardson v. Boston, etc., 9 Metc. 42,	399	Richter v. Richter, 111 Ind. 456,	972
Richardson v. Buhl, 77 Mich. 632,		Rick v. Gilson, 1 Pa. St. 54,	549
1426, 2054, 2055, 2056, 2057, 2058		Rickard v. Moore, 38 L. T. Rep. (N. S.)	
Richardson v. Chicago, etc., Railway Co.,		841,	666
61 Wis. 596,	1960	Rickard v. Stanton, 16 Wend. 25,	785
Richardson v. City of Denver, 17 Colo. 398,		Ricker v. Cross, 5 N. H. 570,	667
459, 462		Ricker v. Fairbanks, 40 Maine, 43,	869
Richardson v. Cook, 37 Vt. 599,	2151	Ricker v. Moore, 77 Maine, 292,	1157

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Ricketts v. Harvey, 106 Ind. 564,	1853	Robbins v. Alton, etc., Insurance Co., 12	
Ricketts v. Spraker, 77 Ind. 371,	2273	Mo. 380,	1950
Ricketts v. Village of Hyde Park, 85 Ill.		Robbins v. Armstrong, 84 Ya. 810,	1718
110,	1498	Robbins v. Board, etc., Morgan Co., 91	
Rico v. Brandenstein, 98 Cal. 465,	1735	Ind. 537,	1485
Riddle v. Hall, 99 Pa. St. 116,	2011,	Robbins v. Clark, 129 Mass. 145,	1131
Riddle v. Perry, 19 Neb. 505,	1947	Robbins v. Doverill, 20 Wis. 142,	2244
Rider v. Morrison, 54 Md. 429,	1400	Robbins v. Kimball, 55 Ark. 414,	878
Rider v. Union India Rubber Co., 28		Robbins v. Morgan, 56 Minn. 304,	1127
N. Y. 379,	782	Robbins v. Webb, 63 Ala. 393,	2077
Riddle v. Backus, 38 Iowa, 81,	654	Roberge v. Winne, 144 N. Y. 709, 144, 2274,	2275
Ridgeway v. Darwin, 8 Ves. 66,	1846	Roberts v. Blair, 11 Colo. 64,	1933
Ridgway v. English, 22 N. J. Law, 409,	791	Roberts v. Brett, 38 C. B. 561,	116
Ridgway v. Ingram, 50 Ind. 145,	678, 1484	Roberts v. Brett, 11 H. L. C. 337,	769
Ridgway v. Wharton, 6 H. L. Cas. 238,		Roberts v. Brett, 34 L. J. C. P. 241,	869
	6, 684, 691	Roberts v. Bury Commissioners, L. R. 4	
Riehl v. City of San Jose, 101 Cal. 442,	1545	C. P. 755,	299
Rife v. Lybarger, 49 Ohio St. 422,		Roberts v. Cobb, 103 N. Y. 600,	258
	416, 417, 418, 419	Roberts v. Cocke, 23 Gratt. (Va.) 207,	2124
Rigdon v. Conley, 111 Ill. 568,	501	Roberts v. Columbat, 63 Cal. 22,	153
Rigdon v. Conley, 43 Ill. App. 593,	375	Roberts v. Deming Wood Working Co.,	
Riggles v. Erney, 154 U. S. 244,	839	111 N. C. 432,	1234
Riggs v. Adams, 12 Ind. 199,	1955, 1956	Roberts v. Derby, 23 N. Y. Supl. 34,	1055
Riggs v. American Tract Society, 95 N. Y.		Roberts v. Derby, 68 Hun, 299,	969
503,	1819, 1820, 1823	Roberts v. Ellwood, 116 N. Y. 651,	545
Riggs v. American, etc., Society, 84 N. Y.		Roberts v. Frisby, 38 Texas, 219,	2008
330,	1818, 1819, 1823, 1825	Roberts v. Griswold, 35 Vt. 496,	220, 262
Riggs v. Hawley, 116 Mass. 596,	210, 1475	Roberts v. Hartford, 36 Maine, 460,	1709
Riggs v. Magruder, 2 Cr. C. C. 143,	661	Roberts v. Jenkins, 21 N. H. 116,	333
Riggs v. Weise, 24 Wis. 545,	2248	Roberts v. Levy (Cal. 1892), 31 Pac. Rep.	
Rikhoef v. Brown's, etc., Machine Co., 68		570,	1907, 1908
Ind. 388,	1325	Roberts v. Morgan, 2 Cow. 438,	231
Riley v. Hartford, etc., Ins. Co., 25 Fed.		Roberts v. Rockbottom Co., 7 Metc. 46,	654
Rep. 315,	119	Roberts v. Summit Park Co., 72 Hun, 458,	646
Riley v. Kepler, 94 Ind. 308,	993	Roberts v. Ward, 4 McLean, 585,	233
Riley v. Mallory, 33 Conn. 201,	1771, 1783	Roberts v. Washington Nat. Bank, 11	
Riley v. McNamara, 83 Texas, 11,	396	Wash. 550,	1297
Riley v. Norman, 39 Ark. 158,	2167	Roberts v. Watkins, 14 C. B. (N. S.) 592,	127
Riley v. Riley, 25 Conn. 154,	618	Roberts v. American, etc., Association,	
Riley v. Vaughn, 116 Mo. 169,	1675	69 Am. Dec. 150,	1599, 1611
Riley v. Walker, 6 Ind. App. 622,	2171	Robertson v. French, 4 East, 135,	870
Riley v. White, 6 N. Y. Leg. Obs. 272,	465	Robertson v. Hayes, 83 Ala. 290,	1698
Riley v. Wilson, 86 Texas, 245,	1672	Robertson v. Hogsheds, 3 Leigh, 667,	1136
Rindge v. Baker, 57 N. Y. 209,	827, 847, 1143	Robertson v. Homestead, etc., Associa-	
Rindge v. Coleraine, 11 Gray, 157,	542	tion, 69 Am. Dec. 163,	1610
Rindge v. Society, 146 Mass. 286,	1241	Robertson v. March, 4 Ill. 198,	817
Rindskopf v. Barrett, 14 Iowa, 101,	914	Robertson v. Marsh, 42 Texas, 149,	1038
Rindskopf v. Myers, 87 Wis. 80,	1856	Robertson v. Maxcey, 6 Dana, 101,	443
Ringle v. Pennsylvania R. Co., 164 Pa. St.		Robertson v. National Steamship Co., 139	
529,	587	N. Y. 416,	933
Ringo v. Biscoe, 13 Ark. 563,	1392	Robertson v. Paul, 16 Texas, 472,	431
Rio Grande Cattle Co. v. Burns, 82 Texas,		Robertson v. Robertson, 25 Iowa, 350,	1735
50,	1452	Robertson v. Smith, 18 Johns. 459,	828
Ripley v. Aetna Ins. Co., 30 N. Y. 136,	869	Robertson v. Van Cleave, 129 Ind. 217,	
Ripley v. Case, 86 Mich. 261,	362		1496, 2156
Ripley v. Crooker, 47 Maine, 370,	816, 819	Robeson v. Whitesides, 16 S. & R. 320,	755
Ripley v. Greenleaf, 2 Vt. 129,	765	Robinson v. Appleton, 124 Ill. 276,	1107
Ripley v. McClure, 4 Exch. 345,	498, 500, 2221	Robinson v. Bidwell, 22 Cal. 379,	1336
Rishton v. Whatmore, L. R. 8 Ch. Div.		Robinson v. Bland, 2 Burr, 1077,	710, 1893
467,	677	Robinson v. Bland, 1 W. Bl. 234,	696
Rising v. Cummings, 47 Vt. 345,	518, 527	Robinson v. Bullock, 66 Ala. 548,	955
Risley v. Brown, 67 N. Y. 160,	823	Robinson v. Bullock, 58 Ala. 618,	859, 863
Risley v. Smith, 64 N. Y. 576,	298	Robinson v. Burlington, 50 Iowa, 240,	460
Risley v. Village of Howell, 57 Fed. Rep.		Robinson v. Charleston, 2 Rich. L. (S.	
514,	1536	Car.) 317,	460
Rison v. Newberry, 90 Va. 513,		Robinson v. Cook, 6 Taunt. 336,	394
	981, 1059, 1092, 1136, 1152	Robinson v. Cushman, 2 Denio, 10,	790
Ristine v. State, 20 Ind. 328,	2126	Robinson v. Davison, L. R. 6 Ex. 269,	283
Ritchie v. Atkinson, 10 East, 295,	135	Robinson v. Detroit, 84 Mich. 658,	527
Ritenour v. Matthews, 42 Ind. 7,	198	Robinson v. Doolittle, 12 Vt. 246,	473
Ritger v. Parker, 8 Cush. 145,	642	Robinson v. Gilman, 43 N. H. 485,	
River Rendering Co. v. Behr, 7 Mo. App.			594, 597, 598, 607
345,	1479	Robinson v. Godfrey, 2 Mich. 408,	2239
River Steamer Co., <i>In re</i> , L. R. 6 Ch.		Robinson v. Gordon, 23 Up. Can. Q. B. 143,	668
App. 822,	196	Robinson v. Gould, 11 Cush. 55,	204, 205, 206
Rivers v. Thayer, 7 Rich. Eq. 136,	227	Robinson v. Green, 3 Met. (Mass.) 159,	
Rives v. Duke, 105 U. S. 132,	874		1859, 1901
Rives v. Lamar, 94 Ga. 156,	1216	Robinson v. Harris, 5 Ky. Law Rep. 928,	1236
Roach v. Dickinsons, 9 Gratt. (Va.) 154,	2200	Robinson v. Howe, 13 Wis. 341,	2154
Rout v. Puff, 3 Barb. 353,	424, 425	Robinson v. Hyer, 35 Fla. 544,	9, 10, 11, 41
Roach v. Bancroft, 13 Kan. 123,	854	Robinson v. Jarvis, 25 Mo. App. 421,	117
		Robinson v. Jewett, 116 N. Y. 40,	187, 188, 199

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Robinson v. Magee, 9 Cal. 81,	2116	Rogers v. Cox, 96 Ind. 157,	643
Robinson v. McAfee, 59 Mich. 375,	183	Rogers v. De Bardeleben Coal and Iron Co., 97 Ala. 154,	1804
Robinson v. McCracken, 52 Fed. Rep. 726,	1901	Rogers v. Decker, 131 N. Y. 490,	1370, 1388
Robinson v. McFaul, 19 Mo. 549,	665	Rogers v. Gosnell, 58 Mo. 589,	236, 244
Robinson v. McNeill, 51 Ill. 225,	334	Rogers v. Hadley, 2 H. & C. 227,	691
Robinson v. Miller, 2 Bush, 179,	207	Rogers v. Hargo, 92 Tenn. 35,	1611, 1624
Robinson v. Mollett, L. R. 7 H. L. 802,	922	Rogers v. Ingham, L. R. 3 Ch. Div. 351,	800
Robinson v. Neill, 34 W. Va. 123,	1677	Rogers v. Inhabitants of Greenbush, 53 Maine, 90,	462
Robinson v. Page, 3 Russ. 114,	691	Rogers v. Kingston, 10 Moore, 97,	1882
Robinson v. Pittsburgh R. Co., 32 Pa. St. 334,	156, 157	Rogers v. Kneeland, 13 Wend. 114,	862
Robinson v. Raynor, 23 N. Y. 494,	186	Rogers v. Le Sueur County, 57 Minn. 434,	1574
Robinson v. Reinhart, 137 Ind. 674,	1000	Rogers v. Maddocks, L. R. (1892) 3 Ch. 346,	2034, 2045
Robinson v. Ring, 72 Maine, 140,	249, 250, 252	Rogers v. Phoenix Ins. Co., 121 Ind. 570,	896
Robinson v. Robinson, 9 Gray, 447,	490	Rogers v. Rogers, 53 Wis. 36,	92
Robinson v. Sanders, 24 Miss. 391,	2188	Rogers v. Rogers, 139 Mass. 440,	199, 954
Robinson v. Siple, 123 Mo. 208,	975	Rogers v. Saunders, 16 Maine, 92,	753
Robinson v. Smith, 3 Paige, 222,	1307, 2284	Rogers v. Sheerer, 77 Maine, 323,	863
Robinson v. Stow, 39 Ill. 568,	854	Rogers v. Smith, 47 N. Y. 324,	883
Robinson v. United States, 13 Wall. 363,	879, 891, 931	Rogers v. Stephens, 86 N. Y. 623,	1535
Robinson v. Ward, 8 Q. B. 920,	397	Rogers v. Torbut, 58 Ala. 523,	1157
Robinson v. Woodford, 37 W. Va. 377,	1667	Rogers v. Western Union Tel. Co., 78 Ind. 169,	2105
Robinson v. McCracken, 52 Fed. Rep. 726,	1306	Rogers v. Whitehouse, 71 Maine, 222,	170
Robnett v. Robnett, 43 Ill. App. 191,	794	Rogers v. Wiley, 131 N. Y. 527,	200, 203
Robson v. Mississippi Logging Co., 61 Fed. Rep. 893,	220, 2237	Rogers v. Woodruff, 23 Ohio St. 632,	125
Roby v. Carter, 6 Texas C. App. 295,	1990	Rogers v. Yarnell, 51 Ark. 193,	475
Roby v. Phelon, 118 Mass. 541,	1745	Rogers Mach. Works v. Helm, 154 U. S. 610,	1124, 1190
Roby v. West, 4 N. H. 285,	1902	Rohr v. Baker, 13 Ore. 350,	186
Roche v. Roanoke, etc., Seminary, 56 Ind. 198,	215	Rollin v. Pickett, 2 Hill, 552,	99
Rochester, City of, v. Town of Rush, 80 N. Y. 302,	1502	Rolph v. Crouch, L. R. 3 Exch. 44,	370
Rochester Land Co. v. Davis, 79 Hun, 69,	1060	Rolt v. Cozens, 18 C. B. 673,	114
Rockafellow v. Baker, 41 Pa. St. 319,	981	Roll v. Raguet, 4 Ohio, 400,	1853, 1863
Rockafellow v. Newcomb, 57 Ill. 186, 1713,	2287	Roller v. Ott, 14 Kan. 609,	2047
Rockebrandt v. City of Madison, 9 Ind. App. 227,	1573	Roman v. Mali, 42 Md. 513,	1040
Rockey's Estate, <i>In re</i> , 155 Pa. St. 453,	578	Rome R. Co. v. Chattanooga Co., 94 Ga. 422,	1413
Rockford, etc., R. Co. v. Sage, 65 Ill. 328,	1314	Romeyn v. Sickles, 108 N. Y. 650,	2176
Rockhill v. Spraggs, 9 Ind. 30,	48	Rommel v. Wingate, 103 Mass. 327,	304, 745
Rock Island Lumber Co., etc., v. Fairmount Town Co., 51 Kan. 394,	1143	Ronanye v. Sherrard, 11 Irish Rep. (C. L.) 146,	635
Rockland, etc., Steamboat Co. v. Sewall, 80 Maine, 400,	154, 1321	Rondeau v. Wyatt, 2 N. Bl. R. 63,	656
Rockwell v. Charles, 2 Hill, 490,	2114	Roof v. Stafford, 7 Cow. (N. Y.) 179,	1789
Rockwell v. Elkhorn Bank, 13 Wis. 653,	1348	Rooney v. Michael, 84 Ala. 589,	1744
Rockwell v. Newton, 44 Conn. 333,	890	Roop, Appeal of, v. Real Estate, etc., Co., 132 Pa. St. 496,	1746
Rockwood v. Walcott, 3 Allen, 458,	954	Roosa v. Crist, 17 Ill. 450,	715
Roddy v. Fitzgerald, 6 H. L. C. 823,	884	Roosevelt v. Bull's Head Bank, 45 Barb. 579,	381, 399
Rodemacher v. Milwaukee, etc., R. Co., 41 Iowa, 297,	2133	Root v. French, 13 Wend. 570,	1002
Rodgers v. Brazeale, 34 Ala. 512,	1658	Root v. Great Western R. Co., 45 N. Y. 524,	735, 738
Rodgers v. Jones, 129 Mass. 420,	668	Root v. Johnson, 99 Ala. 90,	1430
Rodgers v. Maw, 15 M. & W. 444,	781	Root v. Railway Co., 105 U. S. 189,	2263
Rodgers v. Olshoffsky, 110 Pa. St. 147,	1174	Root v. Reynolds, 32 Vt. 139,	1663
Rodgers v. Phillips, 40 N. Y. 519,	663, 669	Root v. Sinnerock, 120 Ill. 350,	1399
Rodgers v. Smith, 2 Ind. 526,	356	Root v. Stevenson, 24 Ind. 115,	1930
Rodman v. Rodman, 54 Ind. 444,	993	Roper v. Johnson, L. R. 8 C. P. 167,	150, 492, 494, 2213, 2221, 2222
Rodwell v. Phillips, 9 M. & W. 501,	636	Ropes v. Upton, 125 Mass. 258,	2049
Roe v. Conneley, 74 N. Y. 201,	952	Roquette v. Overmann, L. R. 10 Q. B. 525,	727
Roe v. Moore, 35 N. J. Eq. 526,	1661	Rorer Iron Co. v. Trout, 83 Va. 397,	995
Roe v. Taylor, 45 Ill. 455,	1026	Roscorla v. Thomas, 3 Q. B. 234,	192
Roe v. Vernon, 5 East, 51,	862	Rose v. Bunn, 21 N. Y. 275,	432
Roebers v. Remboff, 55 N. J. Law, 475,	1549	Rose v. Cash, 58 Ind. 278,	993
Roehl v. Haumesser, 114 Ind. 311,	1177	Rose v. Daniels, 8 R. I. 381,	519
Roehner v. Knickerbocker Life Ins. Co., 63 N. Y. 160,	764, 765	Rose v. Duncan, 49 Ind. 269,	398
Roesner v. Hermann, 8 Fed. Rep. 782,	584	Rose v. Foord, 96 Cal. 152,	194
Rogan v. Wabash Railway Co., 51 Mo. App. 665,	1966	Rose v. Meeks (Iowa), 59 N. W. Rep. 30,	352
Roger Williams Ins. Co. v. Carrington, 43 Mich. 252,	950	Rose v. Mitchell, 6 Colo. 102,	1902
Rogers v. Adams, 66 Ala. 600,	1642	Rose v. Nicholas (1794), Wythe R. 59 (new ed. 268),	1093, 1179
Rogers v. Atkinson, 1 Ga. 12,	854	Rose v. O'Riley, 111 Mass. 57,	371
Rogers v. Ball, 64 Geo. 15,	518	Rose v. Story, 1 Pa. St. 190,	162
Rogers v. Brightman, 10 Wis. 55,	651, 655	Rose v. Truax, 21 Barb. (N. Y.) 361,	1972, 1992, 1993
Rogers v. City of Spokane, 9 Wash. 168,	523	Roseboom v. Whittaker, 132 Ill. 81,	1354, 1403
Rogers v. Colt, 21 N. J. Law, 704,	904	Rosenberg v. Doe, 146 Mass. 191,	521

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Rosenberger v. Jones, 118 Mo. 559,	1197	Ruege v. Gates, 71 Wis. 634,	12
Rosenburg v. Northumberland Building Society, L. R. 22 Q. B. D. 373,	174, 1616	Ruesens v. Mexican Co., 20 Central Law Jour. 34,	488
Rosenfeld v. New, 10 N. Y. Supl. 232,	544	Rugan v. Sabin, 53 Fed. Rep. 415,	1010
Rosepaugh v. Vredenburg, 16 Hun, 60,	693	Rugg v. Minett, 11 East, 210,	285
Rosenthal v. Freeburger, 26 Md. 75,	846	Ruggles v. Illinois, 118 U. S. 526,	2133
Rosenthal v. Walker, 111 U. S. 382,	58	Ruggles v. Keeler, 3 John. 263,	716
Ross v. Baker, 72 Pa. St. 186,	1174	Rulon v. Inhabitants of Woolwich, 55 N. J. Law, 489,	1571
Ross v. Espy, 66 Pa. St. 481,	599	Rumely v. Emmons, 85 Mich. 511,	334, 335, 337, 345
Ross v. Hannan, 19 Can. S. C. R. 227,	124	Rumsey v. Berry, 65 Maine, 570,	1869, 1918, 1922
Ross v. Hawkeye Ins. Co., 83 Iowa, 586,	118	Rumsey Strange v. Crowley, 91 Mo. 287,	70
Ross v. Kennison, 38 Iowa, 396,	246	Rush v. Vought, 55 Pa. St. 437,	1684
Ross v. Milne, 12 Leigh, 204,	239	Rushing v. Clancey, 92 Barb. 769,	1658
Ross v. Parks, 93 Ala. 153,	1112	Rushton v. Burke, 6 Dakota, 478,	460
Ross v. Ross, 47 Mich. 185,	1697	Rushville Gas Co. v. City of Rushville, 121 Ind. 206,	1532, 1573
Ross v. Ross, 6 Hun, 80,	194	Rusk v. Gray, 83 Ind. 589,	518
Ross v. Sadgbeer, 21 Wend. 166,	180, 2030, 2078	Rusk v. Soutter, 67 Barb. 371,	542
Ross v. Stackhouse, 114 Ind. 200,	1554	Ruppe v. Peterson, 67 Mich. 437,	604
Ross v. Union Pac. R. Co., 1 Woolw. 26,	1101, 1203	Russel v. Palmer, 2 Wils. 325,	797
Ross v. Worthington, 11 Minn. 438,	1082	Russell v. Alabama Midland R. Co., 94 Ga. 510,	1432
Rosser v. Harris, 48 Ga. 512,	847	Russell v. Allerton, 108 N. Y. 288,	130, 131, 360
Rossiter v. Cooper, 23 Vt. 522,	133	Russell v. Annable, 109 Mass. 72,	2184
Rossiter v. Miller, L. R. 5 Ch. Div. 648,	5	Russell v. Burton, 66 Barb. (N. Y.) 539,	1887
Roswell v. Vaughan, Cro. Jac. 196,	192	Russell v. Cook, 3 Hill, 504,	213
Roth v. Buffalo, etc., R. Co., 34 N. Y. 548,	2251	Russell v. Failor, 1 Ohio St. 327,	826
Roth v. Goerger, 113 Mo. 556,	1200	Russell v. Haddock, 3 Gilm. 233,	375
Rotherham, etc., Co., <i>In re</i> , 50 Law T. R. (N. S.) 219,	1309, 1311	Russell v. Lea, 1 Lev. 86,	1772
Rothmiller v. Stein, 143 N. Y. 581,	1330	Russell v. Lytle, 6 Wend. 390,	525
Rothrock v. Perkinson, 61 Ind. 39,	1955, 1956	Russell v. Merrifield, 131 Ind. 148,	860
Rothschild v. Brookman, 5 Bligh, 165,	1856	Russell v. Murdock, 79 Iowa, 101,	2109
Rothschild v. Frensdorf, 21 Mo. App. 318,	117	Russell v. Nicoll, 3 Wend. 112,	125, 149
Rounds v. Baxter, 4 Greenl. 454,	165	Russell v. People's, etc., Bank, 39 Mich. 671,	1696, 1746
Rounds v. Smith, 42 Ill. 245,	451	Russell v. Piston, 7 N. Y. 171,	238
Roundtree v. Smith, 104 U. S. 269,	1916, 1917	Russell v. Place, 91 U. S. 606,	1217
Rouso v. Manchester, etc., Bank, 46 Ohio St. 393,	1390	Russell v. Richards, 10 Maine, 429,	643
Rousillon v. Rousillon, L. R. 14 Ch. Div. 351,	2041, 2046, 2075	Russell v. Rogers, 10 Wend. (N. Y.) 474,	1637
Routledge v. Worthington Co., 119 N. Y. 592,	46, 47	Russell v. Sa da Bandeira, 13 C. B. N. S. 149,	299
Rowbotham v. Wilson, 8 Ellis & B. 123,	642	Russell v. Slade, 12 Conn. 455,	653
Rowe v. Young, 2 Brod. & Bing. 165,	402	Russell v. Stewart, 64 N. Car. 487,	2191
Rowland v. Old Dom. Building Association, 116 N. Car. 877,	1622	Russell v. Stewart, 44 Vt. 170,	60, 188
Rowland v. Old Dominion, etc., Association, 115 N. Car. 825,	1606, 1612, 1622	Russell v. Sweezy, 22 Mich. 235,	1176
Rowland v. Phalen, 1 Bosw. 43,	161	Russell v. Winne, 37 N. Y. 591,	1646
Rowland v. State, 12 Texas App. 418,	2147	Rust v. Strickland (Colo. 1895), 40 Pac. Rep. 350,	1124
Rowley v. Ball, 3 Cow. 303,	400	Rutherford v. Hill, 22 Ore. 218,	1407
Rowley v. Stoddart, 7 Johns. 207,	540, 572, 818, 819	Rutherford v. Morris, 77 Ill. 397,	1022
Rownetree v. Jacob, 2 Taunt. 141,	552	Rutherford v. Stovel, 12 Up. Can. C. P. 9,	757
Rowton v. Rowton, 1 Henning and Munford s. 92,	1179	Rutherford v. Tracy, 43 Mo. 325,	892, 1174
Roxbury, City of, v. Boston, etc., R. Co., 6 Cush. 424,	1439	Ruthrauff v. Hagenbuch, 58 Pa. St. 103,	296
Roy v. Boteler, 40 Mo. App. 213,	126, 127, 2236	Rutland's Case, 5 Colo. 26,	517, 553
Roy Co. v. Hartley Co., 11 Wash. 399,	1289, 1290	Rutland, Town of, v. Paige, 24 Vt. 181,	1058
Royal Ins. Co. v. Davies, 40 Iowa, 469,	824	Rutland R. Co. v. Central Vermont R. Co., 63 Vt. 1,	2149
Royall v. Virginia, 121 U. S. 102,	32	Rutledge v. Price Co., 66 Wis. 35,	460
Royall v. Virginia, 116 U. S. 572,	2159	Rutter v. Kilpatrick, 63 N. Y. 604,	1462
Rozell v. Vansyckle, 11 Wa-h. 79,	624, 2291	Ryan v. Goodwyn, McMull. Eq. (S. C.) 451,	1071
Ruble v. Turner, 2 Hen. & Munf. 38,	574	Ryan v. Gross, 68 Md. 377,	581, 588
Ruby v. Railroad Co., 8 W. Va. 269,	465	Ryan v. Judy, 7 Mo. App. 74,	1937
Ruchizky v. De Haven, 97 Pa. St. 202,	1931	Ryan v. Price (Ala. 1895), 17 So. Rep. 734,	1015
Rucker v. Steelman, 73 Ind. 396,	629, 844	Ryan v. Railway Co., 21 Kan. 365,	1226
Ruckmaboye v. Mottichund, 8 Moore P. C. 4,	716	Ryan v. Riddle, 78 Mo. 521,	829
Ruckman v. Bryan, 3 Den. (N. Y.) 340,	1938	Ryan v. Rogers, 96 Cal. 319,	2211
Ruckman v. Pitcher, 1 N. Y. 392,	1939	Ryan v. Ryan, 61 Texas, 473,	1739
Rude v. Mitchell, 97 Mo. 365,	960	Ryan v. Ulmer, 108 Pa. St. 332,	348, 352
Rudolph v. Winters, 7 Neb. 15,	1920, 1922, 1930	Ryan v. United States, 136 U. S. 68,	684
Rue v. Miers, 43 N. J. Eq. 377,	206	Ryan v. Ward, 48 N. Y. 204,	190, 465, 520
Rue v. Missouri Pacific Railway Co., 74 Texas, 474,	2086	Ryce v. City of Osage, 88 Iowa, 558,	1511
Rue v. Rue, 21 N. J. Law, 369,	95, 100	Ryder v. Hathaway, 21 Pick. 298,	123
		Ryder v. Loomis, 161 Mass. 161,	1152
		Ryder v. Wombwell, L. R. 23 Ex. 90,	1799
		Ryer v. Stockwell, 14 Cal. 134,	60
		Ryno v. Darby, 20 N. J. Eq. 231,	951, 2108

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

S

Saalfeld v. Manrow, 165 Pa. 114,	208	Sanders v. Gillespie, 59 N. Y. 250,	596, 614, 615, 616
Sabin v. Columbia River Co., 25 Ore. 15,	1363	Sanders v. Hutchinson, 26 Ill. App. 633,	128
Sabin v. The Senate, 90 Mich. 177,	118	Sanders v. Ochiltree, 5 Porter, 73,	766
Sackett v. Sackett, 14 N. Y. St. Rep. 251,	231	Sanders v. Pottlitzer, 144 N. Y. 209,	3, 83
Sacketts, etc., Bank v. Codd, 18 N. Y. 240,	1895	Sanders v. Smith, 5 Misc. Rep. 1,	2170
Sacramento, City of, v. Dunlap, 14 Cal. 421,	172	Sanders v. Wilson, 19 D. C. 555,	163
Sadler v. Niesz, 5 Wash. 182,	1762	Sanderson v. Railway Co., 11 Beav. 497,	1122
Sadler v. Nixon, 5 Barn. & Ad. 936,	826	Sandfoss v. Jones, 35 Cal. 481,	1792
Safety, etc., Sable Co. v. Baltimore, 66 Fed. Rep. 140,	1584	Sandidge v. Sanderson, 21 La. Ann. 757,	2022
Safford v. McDonough, 120 Mass. 290,	668	San Diego v. San Diego, etc., R. Co., 44 Cal. 106,	1304, 1590
Sage v. Ranney, 2 Wend. 532,	406	San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549,	1215
Sage v. Valentine, 23 Minn. 102,	532, 535	San Diego Water Co. v. City of San Diego, 59 Cal. 517,	1508
Sage v. Wilcox, 6 Conn. 81,	593, 594, 683	Sandilands v. Marsh, 2 Barn. & Ald. 673,	1684
Saginaw Gas Light Co. v. City of Saginaw, 23 Fed. Rep. 529,	1504, 1582	Sands v. Crooke, 46 N. Y. 564,	10, 74, 335
Sainsbury v. Matthews, 4 M. & W. 343,	636	Sands v. Edmunds, 116 U. S. 585,	32, 2159
Sainter v. Ferguson, 7 C. B. 716, 757, 2039,	2045	Sands v. Gelton, 15 Johns. 511,	194
Salazar v. Taylor, 18 Colo. 538,	486	Sands v. Lyon, 18 Conn. 18,	386, 389, 763
Salem Milldam Corp. v. Ropes, 6 Pick. 23,	1321	Sands v. Smith, 1 Neb. 108,	721
Saleno v. Neosho City (Mo. 1895), 30 S. W. Rep. 190,	1518	Sands v. Sparling, 63 N. Y. St. Rep. 558,	1659
Salfield v. Sutter Co., etc., Reclamation Co., 94 Cal. 546,	1275	Sands v. Thompson, 43 Ind. 18,	843
Salinas v. Ellis, 26 So. Car. 337,	401	Sanford v. Abrams, 24 Fla. 181,	525
Salinas v. Stillman, 66 Fed. Rep. 677,	985	Sanford v. Bartholomew, 10 Wash. St. 35,	1145
Salisbury v. Herchenroder, 106 Mass. 458,	275	Sanford v. Bulkley, 30 Conn. 344,	399, 401
Salmon v. Davis, 4 Binney (Pa.), 375,	543	Sanford v. Claffin, 18 N. Y. Supl. 295,	2180
Salmon, etc., Mfg. Co. v. Goddard, 14 How. 446,	686, 692	Sanford v. Sornborger, 26 Neb. 295, 1830, 1831	
Salmon Falls Co. v. Bark Tangier, 1 Clifford, 396,	124	Sandford Fork and Tool Co. v. Howe, Brown & Co., 157 U. S. 312,	1303, 1396
Salmon Falls Mfg. Co. v. Portsmouth Co., 46 N. H. 249,	863	San Francisco Gas Co. v. San Francisco, 9 Cal. 453,	782, 1508
Saloy v. City of New Orleans, 33 La. Ann. 79,	2145	Sang v. City of Duluth, 58 Minn. 81,	1490
Salt Company v. East Saginaw, 13 Wall. (U. S.) 373,	2129	Sanger v. Upton, 91 U. S. 56,	1322, 1325, 1371, 1398, 1400
Salter v. Burt, 20 Wend. 205,	385, 386, 766	San Joaquin, etc., Water Co. v. Beecher, 101 Cal. 70,	1320
Salt Lake City v. Hollister, 118 U. S. 256,	1577	San Joaquin Water Co. v. West, 94 Cal. 399,	1320
Saltmarsh v. Spaulding, 147 Mass. 224,	1296	San Jose Sav. Bank v. Sierra Lumber Co., 63 Cal. 179,	1339
Saltmarsh v. Tuthill, 13 Ala. 390,	2114	Sankey v. Cook, 78 Iowa, 419,	476
Salut v. Everett, 20 Wend. (N. Y.) 267,	1706	Sanquirico v. Benedetti, 1 Barb. (N. Y.) 315,	2073
Sammis v. Clark, 13 Ill. 514,	1948	Santa Ana Water Co. v. Buenaventura, 56 Fed. Rep. 339,	1550, 1578, 1590
Sample v. Bridgforth, 72 Miss. 293,	2280	Santa Clara, etc., Co. v. Hayes, 76 Cal. 387,	1425, 2029, 2053, 2060
Sample v. Hale, 34 Neb. 220,	1493	Santa Cruz R. Co. v. Spreckels, 65 Cal. 193,	1296
Sampson v. Burnside, 13 N. H. 264,	640	Saratoga County Bank v. King, 44 N. Y. 87,	1867, 2069
Sampson v. Camperdown, etc., Mills, 64 Fed. 939,	631	Saratoga, etc., Bank v. Pruyn, 90 N. Y. 250,	1696
Sampson v. City of Boston, 161 Mass. 288,	1496	Sargeant v. Butts, 21 Vt. 99,	2109
Sampson v. Gazzam, 6 Port. 123,	915	Sargent v. Graham, 5 N. H. 440,	390
Sampson v. Jackson, 103 Ala. 550,	1644, 1645	Sargent v. Metcalf, 5 Gray, 306,	170
Sampson v. Sampson, 63 Maine, 328,	2158	Sargent v. Webster, 13 Metc. (Mass.) 497,	1406
Sampson v. Shaw, 101 Mass. 145,	822, 2060, 2072	Sarmiento v. Davis Boat Co. (Mich. 1895), 63 N. W. Rep. 205,	1282
Samson v. Thornton, 3 Metc. 275,	15	Satterfield v. Spurlock, 21 La. Ann. 771,	2022
Samuels v. Oliver, 130 Ill. 73,	913, 1892, 2060, 2072	Satterlee v. Matthewson, 2 Pet. (U. S.) 380,	2119
San Antonio v. French, 80 Texas, 575,	1500, 1522	Satterthwaite v. Emley, 4 N. J. Eq. 489,	620, 1717
San Antonio Brewing Association v. Arctic Ice Co., 81 Texas, 99,	164, 168, 169	Saul v. His Creditors, 17 Martin (5 N. S.), 569,	708
Sanborn v. Benedict, 78 Ill. 309,	1919	Sauls v. Freeman, 24 Fla. 209,	32
Sanborn v. Clough, 40 N. H. 316,	884	Saunders v. Brock, 30 Texas, 421,	2179
Sanborn v. Cole, 63 Vt. 590,	476	Saunders v. Frost, 5 Pick. 259,	387, 398, 399, 401
Sanborn v. Doe, 92 Cal. 152,	1302	Saunders v. Jackson, 2 B. & P. 238,	675
Sanborn v. Flagler, 9 Allen, 474,	678, 687	Saunders v. Kastenbine, 6 B. Mon. 17,	651
Sanborn v. Sarnborn (Mich. 1895), 62 N. W. Rep. 371,	1006	Saunders v. New York, etc., R. Co., 144 N. Y. 75,	35, 36
Sanders v. Bagwell, 32 S. Car. 238,	180	Saunders v. Richard, 35 Fla. 28,	996, 2284, 2285
Sanders v. Branch Bank, 13 Ala. 353,	536	Saum v. Shell, 45 Kan. 205,	415
Sanders v. Bryer, 152 Mass. 141,	381	Saunders v. Topp, 4 Ex. 390,	662
Sanders v. Carter, 91 Ga. 450,	755, 761	Saunders v. Wakefield, 4 Barn. & Ald. 595,	591, 683
Sanders v. Clason, 13 Minn. 379,	1459	Saunders v. Wood, 1 Munf. 406,	830

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Saunderson v. Jackson, 2 Bos. & Pul. 238,	688	Schetter v. Southern Oregon Co., 19 Ore.	1247
Sauner v. Phoenix Ins. Co., 41 Mo. App.	480,	192,	2248
Savage v. Bartlett, 78 Md. 561,	1330	Schettler v. Jones, 20 Wis. 412,	487,
Savage v. Blanchard, 148 Mass. 348,	545,	Schewsbury, Earl of, v. Gould, 2 B. & Ald.	883
Savage v. City of Salem, 23 Ore. 381,	1556	Schields v. Horback, 30 Neb. 536,	120, 1111
Savage v. Everman, 70 Pa. St. 315,	538	Schiffer v. Dietz, 83 N. Y. 300,	998, 1009
Savage v. Foster, 9 Mod. 35,	223	Schierl v. Baumele, 75 Wis. 69,	446, 457
Savage v. Lichlyter, 59 Ark. 1,	1771	Schilling v. Durst, 42 Pa. St. 126,	527
Savannah, etc., R. Co. v. Atkinson, 94 Ga.	780,	Schillinger v. United States, 24 Ct. Cl.	776
780,	1009	Schipper v. City of Aurora, 121 Ind. 154,	1511
Saville v. Welch, 58 Vt. 683,	781	Schley v. Pullman's, etc., Car Co., 120 U. S.	575,
Savings Bank v. Benton, 2 Metc. (Ky.)	240,	1642	
240,	1282	Schlitz Brewing Co. v. McCann, 118 Pa.	2262
Savings Bank of San Diego County v.		St. 314,	
Burns, 104 Cal. 473,	1873	Schloss v. Hewlett, 81 Ala. 266,	2084, 2085, 2086, 2089
Sawin v. Kenny, 93 U. S. 289,	831	Schloss v. Montgomery Co., 87 Ala. 411,	154
Sawtells v. Howard (Mich. 1885), 62 N.W.	1217	Schlosser v. State, 55 Ind. 82,	2244
Rep. 156,	1217	Schmalz v. Avery, 16 Q. B. 655,	2184
Sawyer v. Brossart, 67 Iowa, 678,	68, 71	Schmerhorn v. Vanderheyden, 1 Johns.	236
Sawyer v. Colgan, 102 Cal. 283,	33	Schmid v. Schmid, 37 Neb. 629,	1235
Sawyer v. Cox, 63 Ill. 130,	1243	Schmidt v. Barker, 17 La. Ann. 261,	1128
Sawyer v. Haley, 6 Gray, 243,	552	Schmidt v. Dean, 31 S. Car. 498,	1683
Sawyer v. Hebard's Estate, 58 Vt. 375,	793	Schmidt v. Opie, 33 N. J. Eq. 138,	1662
Sawyer v. Hoag, 17 Wall. 610,	1375, 1398,	Schmidt v. Reed, 132 N. Y. 108,	753
Sawyer v. McLouth, 46 Barb. 350,	232	Schmidt v. State, 78 Ind. 41,	1910
Sawyer v. Menominee Loan Association		Schmidt v. Thomas, 75 Wis. 529,	662
(Mich. 1894), 61 N. W. Rep. 521,	1602	Schmidt's Estate, <i>In re</i> , 56 Minn. 256,	1673
Saxon v. Whitaker, 30 Ala. 237,	2278	Schmucke v. Waters, 125 Ind. 265,	1855
Saxon v. Beach, 50 Mo. 488,	1520	Schnabel v. Betts, 23 Fla. 178,	1699, 1737
Sayles v. Sayles, 21 N. H. 312,	2007	Schnell v. Nell, 17 Ind. 29,	211
Sayles v. Wellman, 10 R. I. 465,	2111	Schneider v. Norris, 2 M. & S. 286,	13, 687
Saylor's Case, 14 Ct. Cl. 453,	496	Schneider v. Turner, 130 Ill. 28,	854, 869, 1927, 2072
Sayre v. Harpold, 33 W. Va. 553,	32	Schneider v. Turner, 27 Ill. App. 220,	1927
Sayre v. Louisville, etc., Association, 1	1983	Schoener v. Lessauer, 107 N. Y. 111,	1828, 1832
Duv. (Ky.) 143,	2100	Schofield v. Robb, 2 Moo. & R. 210,	—
Sayre v. Wheeler, 32 Iowa, 559,	1074	Schofield v. Tompkins, 95 Ill. 190,	754
Scales v. Ashbrook, 1 Metc. (Ky.) 358,	557	Scholl v. Albany, etc., Steel Co., 101 N. Y.	2172
Scales v. Maude, 6 De G., M. & G. 43,	2094	602,	
Scales v. State, 47 Ark. 476,	2224	School Directors v. Kline, 1 Pitts. R. (de-	1487
Scammon v. Denio, 72 Cal. 393,	905	ecided last term),	
Scanlan v. Hodges, 52 Fed. Rep. 354,	1360	School Directors v. McBride, 22 Pa. St.	1486
Scanlan v. Keith, 102 Ill. 634,	1672	215,	
Scarborough v. Watkins, 9 B. Mon. (Ky.)	2045	School District v. Dauchy, 25 Conn. 530,	289
540,	1755	School Dist. v. Estes, 13 Neb. 52,	881
Scarfe v. Morgan, 4 Mees. & W. 270,	1042,	School District v. Rogers, 8 Iowa, 316,	378
Scarlett v. Snodgrass, 82 Ind. 262,	134	School District No. 2 v. Boyer, 46 Kan. 54,	135, 144
Scarmen v. Castell, 1 Esp. 270,	676	School Town of Carthage v. Gray, 10 Ind.	272
Scarritt v. St. John's Church, 7 Mo. App.	346,	App. 428,	
174,	119	School Trustees v. Bennett, 27 N. J. Law,	513,
Scarth v. Security, etc., Society, 75 Iowa,	775	139, 289, 2227,	2237
346,	209	Schoonmaker v. Hoyt, 148 N. Y. 425,	52
Seeva v. True, 53 N. H. 627,	1276	Schopp v. City of St. Louis, 117 Mo. 131,	1506, 1580, 1581
Schaben v. Brunning, 74 Iowa, 102,	2222	Schreyer v. Turner Mills Co. (Ore. 1896),	43 Pac. Rep. 719,
Schallard v. Eel River, etc., Navigation	476	1312, 1313, 1314	107
Co., 70 Cal. 144,	1025	Schrieber v. Butler, 84 Ind. 576,	793
Schallert-Ganahl L. Co. v. Neal, 90 Cal.	1744	Schrimpf v. Settegast, 36 Texas, 296,	500
213,	461	Schriner v. Peters, 39 Ill. App. 309,	268
Schallert-Ganahl Co. v. Neal, 91 Cal. 362,	1010	Schroder v. Neilson, 39 Neb. 335,	1109
Schaps v. Lehner, 54 Minn. 208,	138, 372	Schroeder v. Gemeinder, 10 Nev. 355,	897
Scharf v. Moore, 102 Ala. 468,	473	Schroeder v. Stock, etc., Ins. Co., 46 Mo.	174,
Scharf v. Billig v. Scharf, 51 Minn. 359,	890	Schroeder v. Trade Ins. Co. of Camden,	109 Ill. 157,
Scheffel v. Hays, 58 Fed. Rep. 457,	355	895	
Scheible v. Klein, 89 Mich. 376,	885, 886	Schuelenburg v. Martin, 2 Fed. Rep. 747,	470
Scheik v. Trustees, 24 Ill. App. 369,	1467, 1488	Schuff v. Ransom, 79 Ind. 458,	1817, 1818
Scheland v. Erpelding, 6 Ore. 258,	260	Schuler v. Myton, 48 Kan. 282,	187, 258
Schell v. Stephens, 50 Mo. 375,	1742, 1743	Schultz v. Catlin, 78 Wis. 611,	1833
Schemerhorn v. Vanderheyden, 3 Am. Dec.	483	Schultz v. Culbertson, 46 Wis. 313,	1833
304,	1141	Schultz v. Culbertson, 49 Wis. 122,	119
Schenck v. Saunders, 13 Gray, 37,	1972	Schultz v. Ins. Co., 40 Ohio St. 217,	1484
Schenectady, City of, v. Trustees of Union		Schumm v. Seymour, 24 N. J. Eq. 143,	1690
College, 21 N. Y. Supl. 147,		Schurman v. Marley, 29 Ind. 458,	780, 935
Schenectady, etc., Plank R. Co. v.		Schurr v. Savigny, 85 Mich. 144,	
Thatcher, 11 N. Y. 102,		Schuster v. Bauman Jewelry Co., 79 Tex-	1641
Schepp v. Smith, 35 La. Ann. 6,		as, 179,	
Scherer v. Ingerman, 110 Ind. 428,			
Scherff v. Missouri Pac. R. Co., 81 Texas,			
471,			
Schermerhorn v. Niblo, 2 Bosw. (N. Y.)			
161,			
Schermerhorn v. Talman, 14 N. Y. 94,			

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Schwab v. Coghlan, Daily Reg. (N. Y.) Dec. 4th, 1883,	495	Searight v. Calbraith, 4 Dall. 324,	393
Schwab v. Rigby, 38 Minn. 395,	14, 2108	Searight v. Dwyer, 44 Minn. 809,	101
Schwabacher v. Van Reyppen, 6 Wash. 154,	1762	Searight v. Payne, 6 Lea. 283,	1225, 1421
Schwalm v. Holmes, 49 Cal. 665,	2038	Searle v. Keeves, 2 Esp. 598,	668
Schwartz v. Saunders, 46 Ill. 18,	289, 2226	Searles v. Sadgrave, 5 E. & B. 639,	397
Schwarzenbach v. Odorless Excavating Apparatus Co., 65 Md. 34,	801	Sears v. Shafer, 6 N. Y. 268,	1824
Schwenk v. Wyckoff, 46 N. J. Eq. 560,	1884, 2085	Sears v. Smith, 2 Mich. 243,	429, 430
Scipio v. Wright, 101 U. S. 665,	1532	Seat v. McWhirter, 93 Tenn. 542,	1026
Scobey v. Gibson, 17 Ind. 572,	2153	Seaver v. Morse, 20 Vt. 620,	285
Scobey v. Waters, 10 Lea (Tenn.), 563,	1698	Seavey v. Drake, 62 N. H. 393,	851
Scofield v. Day, 20 John. 102,	730	Seavey v. Seavey, 37 N. H. 125,	794
Scofield v. Jones, 85 Ga. 816,	1753	Seawell v. Berry, 55 Fed. Rep. 731,	393
Scofield v. Parlin, etc., Co., 61 Fed. Rep. 604,	1236	Seawell v. Henry, 6 Ala. 226,	456
Scofield v. Quinn, 54 Minn. 9,	1082, 1083	Sebastian Co. v. Codd, 17 Md. 293,	296
Scorgin v. Slater, 22 Ala. 687,	635	Seckel v. Scott, 66 Ill. 106,	749
Scollans v. Flynn, 120 Mass. 271,	1949	Secombe v. Steele, 20 How. 94,	720
Scorell v. Boxall, 1 Y. & J. 396,	638	Second Nat. Bank v. Heminway, 31 Ohio St. 168,	720
Scorthorn v. South Staffordshire Ry. Co., 8 Exch. 341,	736	Second Nat. Bank v. O'Rourke, 40 N. J. Eq. 92,	1662
Scotland, County of, v. Thomas, 103 U. S. 523,	1461	Seculovich v. Morton, 101 Cal. 673,	1161
Scottson v. Pegg, 6 H. & N. 295,	192	Security, etc., Association v. Lake, 69 Ala. 456,	157
Scott v. Alexander, 21 Wash. (Va.) 77,	543	Sedalia Brewing Co. v. Sedalia Water- works Co., 34 Mo. App. 49,	876
Scott v. Avery, 5 H. L. Cas. 811,	2224	Sedalia R. Co. v. Abell, 17 Mo. App. 645,	155
Scott v. Battle, 85 N. Car. 184,	1740	Sedalia R. Co. v. Wilkerson, 83 Mo. 235,	259, 1329
Scott v. Bourdillion, 5 B. & B. (2 New R.) 213,	869	Seddon v. Rosenbaum, 85 Va. 928,	647, 655
Scott v. Brown, L. R. (1892) 2 Q. B. 724,	1874	Sedgwick v. Railroad Co., 73 Iowa, 158,	1432
Scott v. Brown, 54 Mo. App. 606,	1920, 1924	Sedgwick v. Stanton, 14 N. Y. 289,	1972, 1989, 1994
Scott v. Buchanan, 11 Humph. 467,	215, 1779	Seear v. Cohen, 45 L. T. R. (N. S.) 589,	1832
Scott v. Bush, 26 Mich. 418,	688	Seeds v. Kahler, 76 Pa. St. 262,	1684
Scott v. Colburn, 26 Beav. 276,	1362	Seeger v. Duthie, 8 C. B. (N. S.) 45,	117
Scott v. Eastern, etc., Ry. Co., 12 M. & W. 33,	662	Seeley v. Price, 14 Mich. 541,	1030
Scott v. Edes, 3 Minn. 377,	1643	Seeley v. San Jose, etc., Lumber Co., 59 Cal. 22,	1296
Scott v. Frink, 54 N. Y. 635,	232	Seeligson v. Lewis, 65 Texas, 215,	1862, 1863, 1925
Scott v. Godwin, 1 B. & P. 67,	814	Segrist v. Crabtree, 131 U. S. 287,	162
Scott v. Hix, 2 Sneed. 192,	340	Seibel v. Rapp, 35 Va. 28,	15, 16
Scott v. Hix, 62 Am. Dec. 460,	356	Seiber v. Price, 26 Mich. 518,	1832
Scott v. Kittanning Coal Co., 89 Pa. St. 231,	150, 890	Seither v. Philadelphia Co., 125 Pa. St. 397,	577
Scott v. Liverpool, 5 Jur. N. S. 105,	858	Seitz v. Brewers' Refrigerating Co., 141 U. S. 510,	334, 335, 342, 344, 350
Scott v. Manchester Print Works, 44 N. H. 507,	699	Seitz v. Machine Co., 141 U. S. Rep. 510,	351
Scott v. Norfolk R. Co. (Va.), 17 S. E. Rep. 882,	43	Seitz v. Mitchell, 94 U. S. 580,	1685
Scott v. Pilkington, 15 Abb. (N. Y.) Pr. —,	2210	Selby v. Mut. L. Ins. Co., 67 Fed. Rep. 490,	314, 320
Scott v. School Dist., 67 Vt. 150,	1588	Selby v. Selby, 3 Meriv. 2,	687
Scott v. Scott, 89 Wis. 93,	1045	Selby v. Wilmington, etc., R. R. Co., 113 N. Car. 588,	1967
Scott v. Scott, 105 Ind. 584,	553	Seldonridge v. Connable, 32 Ind. 375,	2171
Scott v. Scott, 95 Mo. 300,	13	Self v. Cordell, 45 Mo. 345,	631, 655
Scott v. Uxbridge R. Co., L. R. 1 C. P. 596,	405	Seligman v. Pinet, 78 Mich. 50,	577, 818, 819
Scott v. White, 71 Ill. 287,	610	Sell v. Steller (N. J. Eq.), 32 Atl. Rep. 211,	244
Scovill v. Thayer, 105 U. S. 143,	1337, 1375, 1401, 1504	Sellers v. Johnson, 65 N. Car. 104,	903
Scranton v. Clark, 39 N. Y. 220,	357	Sellers v. Stevenson, 163 Pa. 262,	352
Scroggin v. Wood, 87 Iowa 437,	333	Sells v. Rosedale Grocery Co., 72 Miss. 590,	1389
Scrutchfield v. Sauter, 119 Mo. 615,	1657	Selma R. Co. v. Tipton, 5 Ala. 787,	259, 260
Scudder v. Anderson, 54 Mich. 122,	1359	Seminary v. Mott, 136 Ill. 289,	1234
Scudder v. Howe, 44 La. Ann. 1103,	1674	Semmes v. Worthington, 38 Md. 298,	1191
Scudder v. Union Nat. Bank, 91 U. S. 406, 695, 697, 712, 715	302	Semple v. Cook, 50 Cal. 26,	158
Scully v. Kirkpatrick, 79 Pa. St. 324,	79	Senter v. Williams (Ark.), 17 S. W. Rep. 1029,	471
Scully v. Scully, 28 Iowa 548,	24, 799	Serat v. Smith, 40 N. Y. St. Rep. 45,	464
Seabury v. Bolles, 51 N. J. Law, 103,	2252	Serrell v. Rothstein, 49 N. J. Eq. 885,	765
Seagraves v. Alton, 13 Ill. 366,	782	Servante v. James, 10 B. & C. 410,	814
Sea Isle City, etc., Association v. McTague (N. J. Err. 1895), 31 Atl. Rep. 727,	997	Sessions v. Irwin, 8 Neb. 5,	702
Seal v. Puget Sound Loan and Invest. Co., 5 Wash. 422,	1363	Sessions v. Johnson, 95 U. S. 347,	830
Seal v. Puget Sound R. Co., 7 Wash. 487,	1274	Sessions v. Little, 9 N. H. 271,	696, 699
Seals v. Martinant, 2 T. R. 100,	779	Setter v. Alvey, 15 Kan. 157,	1040, 2023
Seaman v. Ascherman, 51 Wis. 678,	1241, 1241	Seton v. Slade, 7 Ves. 265,	749, 1104
Seaman v. O'Hara, 29 Mich. 66,	950	Sewall v. Corp, 1 Car. & P. 392,	909
Seaman v. Slater, 18 Fed. Rep. 485,	821	Sewall v. Eastern R. Co., 9 Cush. 5,	260
Seare v. Prentice, 8 East, 347,	797	Sewall v. Fitch, 8 Cow. 215,	660
		Seward v. Hayden, 150 Mass. 158,	763
		Seward v. Huntington, 94 N. Y. 104,	241
		Sewell v. Mead, 85 Iowa, 343,	544

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Sewing Machine Co. v. Radcliff, 63 Md. 496,	1677	Shaw v. Picton, 4 B. & C. 715,	469
Severin v. Rueckerick, 62 Wis. 1,	1374	Shaw v. Pratt, 22 Pick. 305,	540, 574, 818
Sexton v. Fleet, 6 Abb. Pr. (N. Y.) 8,	1703	Shaw v. Railroad Co., 100 U. S. 605,	1445
Sexton v. Wheaton, 8 Wheat. (U. S.) 229,	1666	Shaw v. Railroad Co., 101 U. S. 557,	1346
Soyk v. Millers Ins. Co., 74 Wis. 67,	117	Shaw v. Republic Ins. Co., 69 N. Y. 286,	495
Seymour v. Atlantic, etc., R. Co., 25 Barb. 284,	1435	Shaw v. Robberds, 6 Adol. & E. 75,	317
Seymour v. Davis, 2 Sandf. 239,	536	Shaw v. Saranac Horse-Nail Co., 144 N. Y. 220,	1369
Seymour v. Delancey, 6 Johns. Ch. (N. Y.) 222,	2270	Shaw v. Schoonover, 130 Ill. 448,	1102
Seymour v. Farquhar, 93 Ala. 292,	165	Shaw v. Sears, 3 Kan. 242,	398
Seymour v. Hartford, 21 Conn. 481,	2136	Shaw v. Smith, 45 Kan. 334,	346
Seymour v. McCormick, 16 How. 480,	505	Shaw v. Spooner, 9 N. H. 197,	454
Seymour v. Minturn, 17 John. 169,	549	Shaw v. Tinton, 49 N. J. Law, 399, 1550,	1551
Seymour v. Spring Forest Cemetery Assn., 144 N. Y. 333,	1280, 1291	Shaw v. Turnpike Co., 2 Pen. & W. 454,	57
Shaaber, Appeal of (Pa. Sup.), 17 Atl. Rep. 209,	1446	Shaw v. Webber, 79 Hun. 307,	581
Shackelford v. New Orleans, etc., Co., 37 Miss. 202,	915	Shaw v. Woodcock, 7 Barn. & C. 73,	2283
Shackle v. Baker, 14 Ves. 468,	2044	Shaw Lumber Co. v. Manville (Idaho, 1895), 39 Pac. Rep. 559,	670
Shackleford v. Ward, 3 Ala. 37,	1942	Shawhan v. Zinn, 79 Ky. 300,	1450
Shacklett v. Polk, 51 Miss. 378,	714	Shawmut Bank v. Plattsburg & M. R. Co., 31 Vt. 491,	1225
Shacklett v. Polk, 4 Heisk. (Tenn.) 104,	1699, 1750	Shay v. Milford, 145 Mass. 528,	1491
Shadburne v. Daly, 76 Cal. 355,	200, 204, 206	Shealy v. Toole, 56 Ga. 210,	192, 193
Shadwell v. Shadwell, 9 C. B. (N. S.) 159,	192, 226	Sheanon v. Pacific, etc., Co., 83 Wis. 507,	578, 581
Shaffer v. Kugler, 107 Mo. 53,	1017	Shear v. Wright, 60 Mich. 159,	292
Shaffer v. Ryan, 84 Ind. 140,	609	Sheble v. Strong, 128 Pa. St. 315,	32, 1335
Shaffer v. Union M. Co., 55 Md. 74,	2161	Sheehan v. Davis, 17 Ohio St. 571,	1232
Shaffner v. Pinchback, 133 Ill. 410,	1871, 1946	Sheehan v. Owen, 82 Mo. 459,	1554
Shahan v. Swan, 48 Ohio St. 25,	1181, 1182, 1210	Sheehy v. Adarene, 41 Vt. 541,	649
Shakespeare v. Alba, 76 Ala. 351,	631	Sheehy v. Chalmers (Cal.), 36 Pac. Rep. 514,	442
Shakespeare v. Markham, 10 Hun. 311,	786	Sheehy v. Mandeville, 6 Cranch, 254,	452, 832, 1929
Shamp v. Meyer, 20 Neb. 223,	236	Sheehy v. Miles, 93 Cal. 288,	418, 423
Shane v. St. Paul, 26 Minn. 543,	807	Sheehy v. Shinn, 103 Cal. 325,	1928
Shannon v. Dunn, 43 N. H. 194,	1619	Sheet v. Russell, 12 Ind. App. 677,	511
Shardlow v. Cotterell, L. R. 18 Ch. Div. 280,	684	Sheets v. Selden's Lessee, 2 Wall. 177,	763, 768
Share v. Anderson, 7 S. & R. 43,	2009	Sheid v. Stamps, 2 Sneed (Tenn.), 172,	688
Sharkey v. McDermott, 91 Mo. 647,	848, 1210, 1133	Sheffield Canal Co. v. Sheffield, etc., R. Co., 3 Eng. Ry. & C. Cas. 121,	63
Sharlow v. Cotterell, 20 L. R. Ch. Div. 90,	676	Sheffield Furnace Co. v. Hull Coke Co., 101 Ala. 446,	115, 924
Sharon v. Gager, 46 Conn. 189,	1038, 1828, 1832	Sheffield, etc., Iron Co. v. Gordon, 151 U. S. 285,	158, 323
Sharp v. Bonner, 36 Ga. 418,	485	Sheffer v. Nadelhoffer, 133 Ill. 536,	872
Sharp v. Carthage, 48 Mo. App. 26,	805	Sheldon v. Benham, 4 Hill. 129,	767
Sharp v. County of Contra Costa, 34 Cal. 284,	2207	Sheldon v. Hat-Blocking Machine Co., 90 N. Y. 607,	1253
Sharp v. Farmer, 4 Dev. & B. (N. Car.) 122,	1909	Sheldon v. Haxtun, 91 N. Y. 134,	727
Sharp v. Leach, 31 Beav. 491,	253	Sheldon v. Mann, 85 Mich. 265,	1642
Sharp v. San Paulo R. Co., L. R. 8 Ch. 597,	128	Sheldon v. Mayers, 31 Wis. 627,	168
Sharp v. Taylor, 2 Phil. Ch. 801,	2066	Shelby v. Mikkelson (N. D. 1895), 63 N. W. Rep. 210,	1142
Sharp v. United States, 4 Watts, 21,	171, 172	Sheldon v. Pruessner, 52 Kan. 579,	1884, 2240
Sharp v. Wyckoff, 39 N. J. Eq. 376,	955	Sheldon v. Purple, 15 Pick. (Mass.) 405,	1524
Sharpe v. Railway Co., L. R. 8 Ch. App. 597,	1131	Sheldon v. Williams, 11 Neb. 272,	572
Sharpe v. Robertson, 76 Ala. 343,	177	Sheldon Axle Company v. Scofield, 85 Mich. 577,	472
Sharpe v. Williams, 41 Kan. 58,	574, 821	Shell v. Duncan, 31 S. Car. 547,	227
Sharpless v. Mayor, 21 Pa. St. 147,	882	Shelley v. Boothe, 73 Mo. 74,	1364
Sharrington v. Strotton, 1 Plowden, 298,	179	Shellington v. Howland, 53 N. Y. 371,	1376, 1378
Shattock v. Cunningham, 166 Pa. St. 368,	1163, 1174	Shelmire v. Williams and Clark Fertilizer Co., 68 Hun. 196,	868
Shattuck v. Green, 104 Mass. 42,	355, 357	Shelthar v. Gregory, 2 Wend. (N. Y.) 422,	1758
Shaul v. Rinker, 139 Ind. 163,	1793	Shelton v. Hadlock, 62 Conn. 143,	1385
Shaver v. Hardin, 82 Iowa, 378,	1357	Shelton v. Holderness, 94 Ga. 671,	1710
Shaver v. Mining Co., 10 Cal. 396,	1514	Shelton v. Johnson, 40 Iowa, 84,	755
Shaw v. Barnhart, 17 Ind. 183,	969, 1014, 2167	Shelton v. Marshall, 16 Texas, 344,	2087
Shaw v. Beery, 35 Maine, 279,	549	Shenandoah, etc., R. Co. v. Lewis, 76 Va. 833,	1136
Shaw v. Broadbent, 120 N. Y. 111,	30	Shepard v. Carpenter, 54 Minn. 153,	97, 98
Shaw v. Bryant, 19 N. Y. Supl. 618,	1739	Shepard v. Kain, 5 B. & Al. 240,	328
Shaw v. Burton, 5 Mo. 478,	525	Shepard v. Little, 14 Johnson, 210,	465
Shaw v. Campbell Turnpike Road Co. (Ky. 1891), 15 S. W. Rep. 215,	1217	Shepard v. Rhodes, 7 R. I. 470,	1633
Shaw v. Carbery, 13 Allen, 462,	613	Shepard v. Rinks, 73 Ill. 183,	621
Shaw v. Chicago R. Co., 82 Iowa, 199,	209	Shepard v. Shepard, 7 Johns. Ch. (N. Y.) 57,	1736
Shaw v. Jacobs (Iowa, 1893), 55 N. Y. Rep. 333,	921	Shepard v. Weiss (Texas 1894), 28 S. W. Rep. 357, 29 S. W. Rep. 199,	2194

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Shepherd v. Busch, 154 Pa. St. 149,	466	Shober v. Dutton, 6 Phila. 185,	417
Shepherd v. Pressey, 32 N. H. 49,	668, 672	Shober v. Lancaster, etc., Association, 68	1329
Shepherd v. Shephard, 7 Johns. Ch. 57,	231	Pa. St. 429,	1329
Shepherd v. Busch, 154 Pa. St. 149,	455, 456, 568	Shoe, etc., Bank v. Wood, 142 Mass. 563,	727
Shepherd v. Gilroy, 46 Iowa, 193,	338	Shoenfeld v. Fleisher, 73 Ill. 404,	2206
Shepherd v. Kain, 5 B. & A. 250,	325	Shollenberger v. Brinton, 52 Pa. St. 9,	2118
Shepherd v. Pressey, 35 Wis. 615,	662	Shook v. Vanmater, 22 Wis. 532,	597
Shepherd v. Temple, 3 N. H. 455,	970	Shore v. Wilson, 9 Cl. & F. 355,	45, 871, 874, 882, 899
Shepherd v. Young, 8 Gray, 152,	183	Short v. Battle, 52 Ala. 546,	1744
Sheplar v. Green, 96 Cal. 218,	397	Short v. Short, 8 Q. B. 358,	488
Sheppard v. Earles, 13 Hun, 651,	362	Short v. Stotts, 53 Ind. 29,	227, 617
Sheppard v. Spates, 4 Md. 400,	767	Shortle v. Terre Haute R. Co., 131 Ind.	8
Sheppard v. Steele, 43 N. Y. 52,	470	Shotwell v. Denman, Coxe, 174,	381
Shepperson v. Shepperson, 2 Gratt. (Va.)	501,	Shoshonetz v. Campbell, 7 Utah, 46,	163
501,	1672	Shotwell v. Harrison, 22 Mich. 410,	629
Sherburne v. Fuller, 5 Mass. 342,	837, 1111	Shoup v. Willis, 2 Idaho, 108,	462
Sherburne v. Goodwin, 44 N. H. 271,	552, 558	Shover v. State, 10 Ark. 259,	2094
Sherburne v. Shaw, 1 N. H. 157,	676	Shovers v. Warrick, 152 Ill. 355,	1194
Sheredine v. Gaul, 2 Dall. 190,	391	Showers v. Robinson, 43 Mich. 502,	1794
Sherer v. Trowbridge, 135 Mass. 500,	676	Shrewsbury & B. R. Co. v. London & N.	
Sheridan Electric Light Co. v. Chatham		W. R. Co., 16 Beav. 441,	1603
Nat. Bank, Sup., 5 N. Y. Supl. 529,	1317	Shrewsbury, etc., Co. v. London, etc., Co.,	
Sheriff v. Hull, 37 Iowa, 174,	395	17 Q. B. 652,	2030
Sherk v. Endress, S. W. & S. (Pa.) 255,	182, 231, 235	Shrewsbury, etc., Railroad Co. v. London,	
Sherman v. Barrett, 1 McMullen L.		etc., R. Co., 20 L. J. Ch. 90,	2060
(S. Car.) 147,	2015	Shriner v. Keller, 25 Pa. St. 61,	456
Sherman v. Champlain Transportation		Shriver v. Garrison, 30 W. Va. 456,	801
Co., 31 Vt. 162,	234, 653	Shriver v. Shriver, 86 N. Y. 575,	417, 418, 419
Sherman v. Fitch, 98 Mass. 59,	1369	Shriver v. Sioux City, etc., R. Co., 24	1961
Sherman v. New Bedford Bank, 138 Mass.		Minn. 506,	1778
581,	251	Shropshire v. Burns, 46 Ala. 108,	215, 1778
Sherman v. Sherman, 3 Ind. 337,	559	Shropshire v. Glascock, 4 Mo. 536,	1948
Sherman v. Supervisors, 84 Mich. 1471,		Shubb v. Upton, 95 U. S. 665,	1319
Sherman v. Thompson, 11 A. & E. 1027,	301	Shuey v. United States, 92 U. S. 73,	60, 1329
Sherman v. Wright, 49 N. Y. 227,	1804	Shugart v. Pattee, 37 Iowa, 429,	380
Sherman Town Co. v. Swigert, 43 Kan.		Shuler v. Eckert, 90 Mich. 165,	127
292,	1352	Shuler v. Israel, 27 Fed. Rep. 851,	724
Sherrod v. Rhodes, 5 Ala. 683,	828	Shulters v. Searls, 48 Mich. 550,	2211, 2212
Sherry, <i>in re</i> , 25 Ch. Div. 692,	60	Shultz v. Johnson, 5 B. Monroe, 497,	288
Sherwin v. Cash Register Co., 5 Colo.		Shultz v. Mutual, etc., Insurance Co., 6	308
App. 162,	58	Fed. Rep. 672,	2108
Sherwood v. Smith, 23 Conn. 516,	556	Shuman v. Shuman, 27 Pa. St. 90,	652, 693
Sherwood v. Stone, 14 N. Y. 267,	613	Shumate v. Farlow, 125 Ind. 359,	134
Sherwood v. Whiting, 54 Conn. 330,	1175	Shupe v. Collender, 56 Conn. 489,	427
Shickle v. Chouteau, etc., Co., 10 Mo.		Shurtz v. Johnson, 28 Gratt. 657,	179
App. 241,	903	Shuster v. Bauman Jewelry Co., 79 Texas,	1683
Shields v. Casey, 155 Pa. St. 253,	1756	Shuster v. Kaiser, 111 Pa. St. 215,	1684
Shields v. Clifton, etc., Land Co., 94		Shute v. Dorr, 5 Wend. 204,	653, 692
Tenn. 123,	1374, 1375, 1398	Shute v. Johnson, 25 Ore. 59,	9
Shields v. Keys, 24 Iowa, 298,	1677	Shutts v. Fingar, 100 N. Y. 539,	8
Shields v. Ohio, 95 U. S. 319,	1456, 1581	Sibbald v. Bethlehem Iron Co., 83 N. Y. 378,	2217
Shields v. Pattee, 2 Sand. 262,	125, 145	Siboni v. Kirkman, 1 Mees. & W. 418,	190
Shiell v. McNitt, 9 Paige, 101,	756	Sibree v. Tripp, 15 M. & W. 23,	518
Shimp v. Siedel, 6 Houton (Del.), 421,	144	Sicotte v. Barber, 83 Wis. 431,	214
Shindler v. Houston, 1 N. Y. (1 Com.)		Siddall v. Clark, 89 Colo. 321,	490
261,	663	Sidley v. Rider, 54 Maine, 463,	158
Shiner v. Abbey, 77 Texas, 1,	2180	Sidney Furniture Co. v. School Dist., 158	1486
Shiner v. Jacobs, 62 Iowa, 392,		Pa. St. 35,	204
Shinkle v. Shearman, 7 Ind. App. 399,	1634	Sidwell v. Evans, 1 Penn. & W. (Pa.) 383,	544
Shinn v. Bodine, 60 Pa. St. 152,	150, 890,	Sieber v. Amunson, 73 Wis. 679,	1872
Shinn v. Roberts, 1 Spencer (N. Y.), 435,	749	Sieffer v. McLean, 7 Texas C. App. 158,	1458
Ship v. Crosskill, L. R. 10 Eq. 73,	990	Sieger v. Abbott, 61 Md. 276,	1018
Ship, etc., Building Co. v. Sloan, 21 Fed.		Siemon v. Wilson, 3 Edw. Ch. 36,	675, 685
Rep. 561,	854	Sievewright v. Archibald, 17 Q. B. 102,	685
Shipley v. Bunn, 125 Mo. 445,	1794, 1795	Sievewright v. Archibald, 6 Eng. L. &	
Shipley v. Fifty Associates, 101 Mass. 251,	275	Eq. 286,	1705
Shipley v. Reasoner, 80 Iowa, 548,	1935	Sigal v. Miller (Texas 1894), 25 S. W. Rep.	213
Shipman v. Keys, 127 Ind. 353,	1716	1012,	2117
Shipman v. Straitsville Co., 158 U. S. 356,	820	Sigsworth v. Coulter, 18 Ill. 204,	1058
Shipp v. Swann, 2 Bibb, 82,	110	Sikes v. Shows, 74 Ala. 385,	869
Shippen v. Bowen, 122 U. S. 575,	327, 353	Sikes v. Truitt, 4 Jones Eq. 361,	288
Shippy v. Eastwood, 9 Ala. 198,	1893	Silberman v. Clark, 96 N. Y. 522,	721
Shipton v. Casson, 5 B. & C. 378,	145	Siler v. Gray, 88 N. Car. 566,	987
Shireman v. Jackson, 14 Ind. 459,	664	Sill v. Worswick, 1 H. Black, 665,	640
Shirley v. Shirley, 7 Blackf. 452,	215	Silliman v. Wing, 7 Hill, 159,	
Shisler v. Baxter, 109 Pa. St. 443,	348, 352	Silsby v. Trotter, 29 N. J. Eq. 228,	153
Shively v. Bowlby, 152 U. S. 1,	35, 36	Silsby Mfg. Co. v. City of Allentown, 153	1486
Shively v. Semi-Tropic, etc., Water Co.,		Pa. St. 319,	
99 Cal. 259,	963		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Silsby Mfg. Co. v. Chico, 24 Fed. Rep. 893, 131, 132, 134	1619	Sioux City St. Ry. Co. v. Sioux City, 78 Iowa, 742,	1584
Silver v. Barnes, 6 Bing. N. Car. 180,	1619	Sioux City St. Ry. Co. v. Sioux City, 138 U. S. 98,	1582, 2132
Silver Lake Bank v. North, 4 Johns. Ch. 370,	1536	Sires v. Sires, 43 S. Car. 256,	1045
Silvernail v. Cole, 12 Barb. 685,	638	Sirk v. Ela, 163 Mass. 394,	855
Silvers v. Reynolds, 19 N. J. Eq. 275,	559	Sisson v. Donnelly, 36 N. J. Law, 432,	892
Silveus v. Porter, 74 Pa. St. 448,	1684	Sivers v. Sivers, 32 Pac. Rep. 571 (Cal.),	—
Simmonds v. Humble, 13 C. B. (N. S.) 258,	668	Sixbee v. Bowen, 91 Pa. St. 119,	1684
Simmonds v. Brooks, 159 Mass. 219,	2236	Skeate v. Beale, 11 A. & E. 983,	211
Simmons v. Green, 35 Ohio St. 104,	388, 496	Skehan v. Rummel, 124 Ind. 347,	2171
Simmons v. Law, 3 Keyes (N. Y.), 217,	916	Skelsey v. United States, 23 Ct. Cl. 61,	299
Simmons v. Putnam, 11 Wis. 193,	2197, 2288	Skelton v. Brewster, 8 John. 376,	607, 609
Simmons v. Wilmott, 3 Esp. N. P. 91,	184	Skelton v. Manchester, 12 R. I. 326,	162
Sims v. Greer, 83 Ala. 263,	1003	Skillman v. Skillman, 13 N. J. Eq. 403,	1668
Simon v. Albright, 12 S. & R. 429,	549	Skowhegan R. Co. v. Kinsman, 77 Maine, 370,	155, 1322
Simon v. Association (Ark.), 14 S. W. Rep. 1101,	1236	Skrainka v. Allen, 76 Mo. 384,	1333
Simon v. Edmundson, 10 Pa. Co. Ct. R. 315,	165	Skrainka v. Scharringhausen, 8 Mo. App. 522,	2062
Simon v. Johnson, 100 Ala. 368,	908	Slack v. Brown, 13 Wend. 390,	407
Simon v. Metivier, 1 Wm. Bl. 599,	674	Slack v. Railroad Co., 13 B. Mon. (Ky.) 1,	1537
Simonds v. Heard, 23 Pick. 120,	1491	Slade v. Swedeburz El. Co., 39 Neb. 600,	520
Simonds v. Henry, 39 Maine, 155,	796	Slade v. Van Vechten, 11 Paige, 21,	1291
Simons v. Johnson, 3 Barn. & Adol. 175,	558, 566	Slagle v. Pow, 41 Ohio St. 603,	1372
Simons v. Steele, 36 N. H. 73,	594	Slater v. Baker, 2 Wils. 359,	797
Simons v. Vulcan, etc., Mining Co., 61 Pa. St. 202,	1980	Slater v. Emerson, 19 How. 224,	746, 747
Simon v. Brown, 68 N. Y. 355,	242, 246	Slater v. Jones, L. R. 8 Ex. 186,	534
Simon v. Ingham, 2 B. & C. 65,	468, 473	Slater v. South Car. R. Co., 29 S. Car. 96,	276
Simon v. Cochran, 23 Iowa, 81,	26	Slater Woolen Co. v. Lamb, 143 Mass. 420,	1249
Simpton v. Commissioners, 84 N. Car. 158,	1516	Slator v. Neal, 61 Texas, 222,	1739
Simpton v. Crippin, L. R. 8 Q. B. 14,	150	Slaughter v. Gerson, 13 Wall. (U. S.) 379, 989,	1876
Simpton v. Eggington, 10 Ex. 845,	543, 545	Slaughter-house Cases, 10 Wall. (U. S.) 273,	2267
Simpton v. Hall, 47 Conn. 417,	2124	Slaughter-house Cases, 16 Wall. (U. S.) 36,	2055, 2134, 2160
Simpton v. Hawkins, 1 Dana, 303,	363	Slevin v. Wallace, 64 Hun, 288,	645
Simpton v. Hotel Co., 8 H. L. Cas. 712,	1254	Slawson v. Loring, 5 Allen (Mass.), 340,	1745
Simpton v. King, 1 Ired. Eq. 11,	1083	Slaymaker v. Gundacker, 10 S. & R. 75,	458
Simpton v. Margitson, 11 Q. B. 23, 768, 902,	903	Slead v. Brett, 1 Pick. 401,	385
Simpton v. Montgomery, 25 Ark. 365,	1052	Sleeper v. Wood, 60 Fed. Rep. 888,	329
Simpton v. Moore, 6 Baxter, 371,	543	Slegel v. Lauer, 148 Pa. St. 236,	1551
Simpton v. Nanco, 1 Spears (S. C.), 4,	614	Slemmer's Appeal, 58 Pa. St. 155,	234, 1135
Simpton v. Nicholls, 3 M. & W. 240,	2111	Slingerland v. Morse, 8 John. 474,	406
Simpton v. Potts, Oliphant on the Law of Horses, 224,	332	Slingerland v. Morse, 7 John. 463,	608
Simpton v. Simpson's Ex'rs, 94 Ky. 586,	1715	Slingerland v. Slingerland, 39 Minn. 197, 839,	848
Simpton v. Vaughan, 2 Atk. 31, 810, 821, 822, 823	1787	Slipper v. Tottenham R. Co., L. R. 4 Eq. 112,	280
Sims v. Bardoner, 86 Ind. 87,	1497	Sloan v. Frothingham, 72 Ala. 589,	1768
Sims v. Hines, 121 Ind. 534,	1107	Sloan v. Herrick, 49 Vt. 327,	542
Sims v. Lide, 94 Ga. 553,	1774, 1787, 1788, 1789, 1794	Sloan v. Walls, 14 N. J. Law, 584,	1549
Sims v. Everhardt, 102 U. S. 300,	1296	Slocum v. Fairchild, 7 Hill, 252,	816
Sims v. Street R. Co., 37 Ohio St. 556,	533,	Slocum v. Hooker, 13 Barb. (N. Y.) 536,	1773
Sims v. United States Trust Co., 35 Hun, 533,	2246	Slocum v. Seymour, 36 N. J. Law, 138,	638
Simrall v. Covington (Ky. 1895), 29 S. W. Rep. 820,	15-9	Slocum v. Wooley, 13 N. J. Eq. 451,	1041
Sinard v. Patterson, 3 Blackf. 353,	12	Sloman v. Great Western R. Co., 67 N. Y. 208,	—
Sinclair v. Hicks, 116 N. Car. 606,	856	Small v. Franklin Mining Co., 99 Mass. 277,	447
Sinclair v. Tallmadge, 35 Bard. 602,	131	Small v. Jones, 1 Watts & Serg. (Pa.) 129,	2000
Singer Co. v. Treadway, 4 Bradw. (Ill.) 57,	165	Small v. Older, 57 Iowa, 326,	573
Singer Mfg. Co. v. Forsyth, 108 Ind. 324,	898	Small v. Williams, 37 Ga. 681,	2012
Singer Manufacturing Co. v. Lamb, 81 Mo. 221,	17-9, 1795	Smalley v. Greene, 52 Iowa, 241, 655, 2030, 2039,	2044
Singer Sewing, etc., Co. v. Union Button- Hole Co., 1 Holmes, 253,	11-2	Smallwood v. Hatton, 4 Md. Ch. 95,	110
Singerly v. Thayer, 108 Pa. St. 291, 131, 132, 133	2015	Smallwood v. Newbern, 90 N. Car. 36,	1516
Singleton v. Bremer, Harp. L. (S. Car.) 201,	1728	Smart v. Guardians of the Poor, 36 E. L. & E. 496,	784
Sinclair v. Tindal, 10 S. Car. 504,	1728	Smart v. Jones, 15 C. B. (N. S.) 717,	640
Singstack's Ex'rs v. Harding, 4 Har. & J. 183,	682	Smoad v. Railroad Co., 11 Ind. 104,	1226
Sinking Fund Cases, 99 U. S. 700,	2119, 2132	Smee v. Smee, L. R. 5 P. D. 84,	1812
Sinnett v. Moler, 38 Iowa, 23,	1543	Smiley v. McDonald, 42 Neb. 5,	1478, 1479, 2055
Sinsheimer v. Kahn, 6 Texas Civil App. 143,	1682	Smith's Appeal, 69 Pa. St. 474,	1147
Sinton v. Carter Co., 23 Fed. Rep. 535,	2142	Smith's Appeal, 104 Pa. 581,	724
		Smith's Appeal, 113 Pa. St. 579,	2047, 2261
		Smith's Appeal, 117 Pa. 30,	724

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Smith's Case, L. R. 2 Ch. App. 604,	1319	Smith v. Gould, 84 Hun, 325,	261
Smith, <i>In re</i> , 95 N. Y. 522,	1018	Smith v. Grable, 14 Iowa, 429,	525
Smith's Estate, <i>In re</i> , 144 Pa. St. 428,		Smith v. Green, 45 L. J. (N. S.) C. P. 28,	333
Smith, <i>Ex parte</i> , 17 W. R. 401,	260	Smith v. Greer, 3 Humph. (Tenn.) 118,	620
Smith v. Alger, 1 B. & Ad. 603,	212	Smith v. Hale, 153 Mass. 178,	347
Smith v. Alker, 102 N. Y. 87,	127, 131	Smith v. Hatch, 46 N. H. 146,	2257
Smith v. Allen, 1 N. J. Eq. 43,	1058	Smith v. Hightower, 76 Ga. 629,	1705
Smith v. Allen, 5 Allen, 454,	222, 224	Smith v. Hilton (Sup.), 2 N. Y. Supl. 820,	2180
Smith v. Allen (Ala. 1894), 14 So. Rep.	760,	Smith v. Holland, 61 N. Y. 635,	956
Smith v. Anders, 21 Ala. 782,	1069	Smith v. Hudson, 6 B. & S. 431,	662, 664
Smith v. Applegate, 23 N. J. Law, 352,	395	Smith v. Hughes, L. R. 6 Q. B. 697,	2
	1853, 1884	Smith v. Ide, 3 Vt. 290,	683
Smith v. Arnold, 5 Mas. C. C. 414,	674	Smith v. Ijams, 70 Hun, 155,	561
Smith v. Arthur, 110 N. Car. 400,	122	Smith v. Iliffe, L. R. 20 Eq. 666,	253
Smith v. Aykwell, 3 Atk. 466,	1873	Smith v. Jeffries, 15 Mees. & W. 561,	901
Smith v. Aylesworth, 40 Barb. 104,	385	Smith v. Jewett, 40 N. H. 530,	433
Smith v. Baker, L. R. 8 C. P. 350,	7-1	Smith v. Johnson, 45 Iowa, 308,	24
Smith v. Barrie, 56 Mich. 314,	2077	Smith v. Jones (Ky. App.), 31 S. W. Rep.	362
Smith v. Bartholomew, 1 Metc. (Mass.),	276,	Smith v. Jordan, 13 Minn. 264,	2198
	540, 562, 573	Smith v. Keith, 36 Mo. App. 567,	144
Smith v. Bean, 15 N. H. 577,	2103	Smith v. Kerr, 108 N. Y. 31,	853, 873
Smith v. Berry, 18 Maine, 122,	2230	Smith v. Kerr, 33 Hun, 567,	12
Smith v. Bettger, 68 Ind. 254,	536	Smith v. Kidd, 68 N. Y. 130,	478
Smith v. Bibber, 82 Maine, 34,	201	Smith v. Kimball, 153 Ill. 368,	1217
Smith v. Bickmore, 4 Taunt. 474,	1870	Smith v. King, L. R. (1892), 2 Q. B. 543,	1806
Smith v. Black, 9 S. & R. 142,	832, 833	Smith v. Lansing, 22 N. Y. 520,	1296
Smith v. Boquet, 27 Texas, 507,	1662, 1733	Smith v. Leavensworth, 1 Root (Conn.),	209,
Smith v. Boruff, 75 Ind. 412,	43, 211, 212		2197
Smith v. Boston, etc., R. Co., 36 N. H. 458,	2223, 2224	Smith v. Lewis, 24 Conn. 624,	496, 498, 2222
	1930	Smith v. Lewis, 26 Conn. 110,	115, 378, 496
Smith v. Bouvier, 70 Pa. St. 325,	485,	Smith v. Lewis, 40 Ind. 518,	305
Smith v. Bradley, 6 Smedes & M. (Miss.)	1779	Smith v. Los Angeles, etc., Association,	78 Cal. 289,
Smith v. Brady, 17 N. Y. 173,	131, 146, 148, 503, 2194		1292, 1293
Smith v. Bromley, 2 Doug. 696,	1870	Smith v. Luse, 30 Ill. App. 37,	32
Smith v. Bryan, 5 Md. 141,	640	Smith v. Lynes, 5 N. Y. 41,	166
Smith v. Burnham, 3 Sum. 435,	644	Smith v. Mapleback, 1 T. R. 441,	568, 569
Smith v. Butler, 25 N. H. 521,	21	Smith v. Mariner, 5 Wis. 551,	896
Smith v. Caldwell, 15 Rich. 365,	196	Smith v. Martin, 80 Ind. 260,	2046
Smith v. Case, 2 Ore. 190,	2109	Smith v. Mason, 44 Neb. 610,	443, 572
Smith v. Chadwick, L. R. 20 Ch. Div. 27,	875	Smith v. Matthews, 3 De Gex, F. & J. 139,	681
Smith v. Cherrill, L. R. 4 Eq. Ca. 390,	224	Smith v. Mawhood, 14 Mees. & W. 452,	1886, 1891
Smith v. Chicago, etc., R. Co., 83 Wis.	2097		2277
	271,	Smith v. McCann, 24 How. (U. S.) 398,	1556
Smith v. City of Albany, 61 N. Y. 444,	1590	Smith v. McDowell, 148 Ill. 51,	726
Smith v. City of Newburgh, 77 N. Y. 130,	1508	Smith v. Mead, 3 Conn. 253,	793
Smith v. Clews, 144 N. Y. 190,	42, 915, 2179, 2246	Smith v. Melligan, 43 Pa. St. 107,	120, 161
	1176	Smith v. Mollen, 74 Hun, 606,	893
Smith v. Clifford, 99 Ind. 113,	153	Smith v. Moore, 5 Rawle, 348,	1174, 1175
Smith v. Collins, 94 Ala. 394,	506	Smith v. Moore, 11 N. H. 55,	699
Smith v. Condry, 1 How. 28,		Smith v. Moore, 4 N. J. Eq. 485,	1713
Smith v. Co-operative Association, 12	1350	Smith v. Morrill, 64 Maine, 48,	39, 40
Daly, 304,	1029	Smith v. Morrison, 22 Pick. (Mass.) 430,	2158
Smith v. Cuddy, 96 Mich. 562,	863	Smith v. Myers, 19 Mo. 433,	789
Smith v. Davenport, 31 Maine, 520,	1519	Smith v. Myers, 109 Ind. 1,	2126
Smith v. Dedham, 144 Mass. 177,	616, 1899	Smith v. Neale, 2 C. B. (N. S.) 67,	655
Smith v. Delaney, 64 Conn. 264,	794	Smith v. Negbauer, 42 N. J. Law, 305,	425
Smith v. Denman, 48 Ind. 65,	761	Smith v. N. Central R. Co., 4 Keyes,	180,
Smith v. Dickenson, 3 Bos. & Pul. 630,	374		658
Smith v. Dicky, 74 Texas, 61,	1854	Smith v. Occidental, etc., Steamship Co.,	99 Cal. 462,
Smith v. Dinkelspiel, 91 Ala. 528,			581
Smith v. Eastern, etc., Loan Assn., 116	2173	Smith v. Ostermyer, 68 Ind. 432,	29
N. Car. 102,	608	Smith v. Owens, 21 Cal. 11,	447
Smith v. Estate of Rogers, 35 Vt. 140,	110, 424	Smith v. Pettie, 70 N. Y. 13,	388
Smith v. Evans, 6 Binn. 102,	89	Smith v. Phillips, 77 Va. 548,	190
Smith v. Farmers', etc., Insurance Co., 89	319	Smith v. Phipps, 65 Conn. 302,	912, 913
Pa. St. 464,	209, 211	Smith v. Provident Assurance Society, 65	Fed. R. 765,
Smith v. Farra, 21 Ore. 395,	903		938
Smith v. Faulkner, 12 Gray, 251,		Smith v. Rodfield, 27 Maine, 145,	804
Smith v. First Congregational Meeting-	139	Smith v. Rice, 56 Ala. 417,	907, 932
house, 8 Pick. 178,	897	Smith v. Richards, 13 Pet. 26,	990, 1000, 1876
Smith v. Flanders, 129 Mass. 322,	110	Smith v. Rochester, 92 N. Y. 463,	35
Smith v. Fly, 24 Texas, 345,	2006	Smith v. Rockwell, 2 Hill, 482,	399, 400
Smith v. Foster, 41 N. H. 215,	1642	Smith v. Rollins, 11 R. I. 464,	2097
Smith v. Garden, 23 Wis. 685,	1620	Smith v. Sayward, 5 Maine, 504,	596, 614
Smith v. Garth, 32 Ala. 368,	543	Smith v. Schulenberg, 34 Wis. 41,	520, 2248
Smith v. Gayle, 58 Ala. 600,	699, 708, 709, 1903	Smith v. Scott, 20 Conn. 312,	139
Smith v. Godfrey, 28 N. H. 379,	2273	Smith v. Shell, 82 Mo. 215,	676
		Smith v. Sherman, 4 Cush. 408,	2170
Smith v. Goodknight, 121 Ind. 312,		Smith v. Sipperley, 9 Utah, 267,	1646
		Smith v. Skeary, 47 Conn. 47,	1393, 1406

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Smith v. Smith, 80 Cal. 323,	422	Snow v. Ware, 13 Metc. 42,	146
Smith v. Smith, 13 C. B. (N. S.) 233,	—	Snow v. Warner, 10 Metc. 132,	669
Smith v. Smith, 2 Crompt. & M. 230,	427	Snowden v. Preston, 73 Md. 261,	28
Smith v. Smith, 62 Ill. 493,	1270	Snowden v. Wilas, 19 Ind. 10,	643
Smith v. Smith, 2 Hill (N. Y.), 350,	405	Snyder v. Kirtley, 35 Mo. 423,	826
Smith v. Smith, 2 John. 235,	606, 711	Snyder v. Martin, 17 W. Va. 276,	1179
Smith v. Smith, 50 Mo. 282,	2287	Snyder v. Murdock, 51 Mo. 175,	167
Smith v. Smith, 27 N. H. 244,	458	Snyder v. Pharo, 25 Fed. Rep. 398,	543
Smith v. Smith, 43 N. H. 536,	781	Snyder v. Robinson, 35 Ind. 311,	1184
Smith v. Smith's Admr., 30 N. J. Eq. 564,	793	Snyder v. Snyder, 142 Ill. 60,	1810
Smith v. Smith, 125 N. Y. 224,	434, 435	Snyder v. Studebaker, 19 Ind. 462,	1337
Smith v. Smith, 136 N. Y. 313,	1647	Snyder v. Warren, 2 Cov. 518,	763
Smith v. Smith, 1 Rich. Eq. 130,	843	Soberanes v. Soberanes, 106 Cal. 1,	1027
Smith v. Smith, 4 Wend. (N. Y.) 468,	2039	Sobieski v. St. Paul, etc., Railroad Co.,	—
Smith v. Smith, 34 Wis. 320,	490, 491	41 Minn. 169,	—
Smith v. Sparrow, 4 Bing. 34,	2095, 2107	Societe, etc., v. Old Jordan Mining Co.,	—
Smith v. Spaulding, 40 Neb. 339,	1723	9 Utah. 483,	70
Smith v. State, 66 Md. 215,	1185	Society Perun v. Cleveland, 43 Ohio St.	—
Smith v. St. Paul R. Co. (Minn. 1895), 62	547	481,	1335
N. W. Rep. 392,	547	Soderberg v. Crockett, 17 Nev. 400,	439
Smith v. Stevens, 81 Texas. 461,	474	Soell v. Hadden, 85 Texas. 182,	414
Smith v. Stoller, 26 Wis. 671,	665, 671	Soffe v. Gallagher, 3 E. D. Smith, 507,	456
Smith v. Surman, 9 Barn. & Cres. 561,	638, 663	Sohier v. Lohring, 6 Cush. 537,	673
Smith v. Tallahassee, etc., Co., 30 Ala.	650,	Sohn v. Gantner, 134 Ind. 31,	1693
155	—	Sohn v. Watson, 17 Wall. (U. S.) 596,	2153
Smith v. Taylor, 82 Cal. 533,	41	Soles v. Hickman, 20 Pa. St. 1-0,	689
Smith v. Tebbitt, L. R. 1 P. & D. 398,	1812, 2278	Solinger v. Earle, 83 N. Y. 393,	1636
Smith v. Theobald, 86 Ky. 141,	632	Solly v. Forbes, 2 Brod. & Bing. 38,	566, 819
Smith v. Townsend, 109 Mass. 500,	2001	Solomon v. Hopkins, 61 Conn. 47,	811
Smith v. Tracy, 36 N. Y. 79,	1278	Solomons v. United States, 137 U. S. 342,	1135
Smith v. Trowsdale, 3 E. & B. 83,	515	Solon, Town of, v. Williamsburgh Savings	—
Smith's Trusts, 25 L. R. Ir. 439,	1407	Bank, 114 N. Y. 122,	21, 1064
Smith v. Tyler, 51 Ind. 512,	198, 511	Somerby v. Buntin, 118 Mass. 279, 646, 652,	661
Smith v. Ullman, 5 Md. 183,	2000	Somers v. Pumphrey, 24 Ind. 231,	15
Smith, Administrator, v. Wainwright, 24	—	Somerville's Case, L. R. 6 Ch. 266,	63
Vt. 97,	757	Sondheim v. Gilbert, 117 Ind. 71,	1930
Smith v. Walton, 5 Houst. 141,	380	Soper v. Gabe, 55 Kan. 646,	1144, 1148
Smith v. Warden, 86 Mo. 382,	1311	Soper v. Guernsey, 71 Pa. St. 219,	490
Smith v. Ware, 13 Johns. 258,	183, 268	Souch v. Strawbridge, 2 C. B. 808,	652
Smith v. Warren, 19 Pa. St. 424,	2009	Souder v. Columbia Nat. Bank, 156 Pa.	—
Smith v. Washington Gas Co., 154 U. S.	559,	St. 374,	1755
1093	—	Souffrain v. McDonald, 27 Ind. 269,	1108
Smith v. Watson, 14 Vt. 332,	788	Soulden v. Van Rensselaer, 9 Wend. 293,	196
Smith v. Weaver, 90 Ill. 392,	57	Sourwine v. Truscott, 17 Hun (N. Y.), 432,	2245
Smith v. Weguelin, 8 Eq. 198,	698	Souter v. Drake, 5 Barn. & Adol. 992,	368
Smith v. Western R. Co., 91 Ala. 455,	276	South Boulder, etc., R. C. Ditch Co. v.	—
Smith v. Westall, 1 Lord Ray. 316,	616	Marfell, 15 Colo. 302,	104
Smith v. Whildin, 10 Pa. St. 39,	18	Southgate v. Atlantic, etc., R. Co., 61 Mo.	89,
Smith v. Wilmington Coal Co., 83 Ill. 498,	288	1318	—
Smith v. Wilcox, 24 N. Y. 353,	2005	Southard v. Benner, 72 N. Y. 424,	1646
Smith v. Wilson, 3 Barn. & Adol. 728,	918	Southard v. Boyd, 51 N. Y. 177,	1987, 1993
Smith v. Wood, 42 N. J. Eq. 563,	1019	Southard v. Pope, 9 B. Mon. 261,	401
Smith v. Wright, 1 Caines. 43,	912	South, etc., Ala. R. Co. v. Highland Ave.	—
Smith, etc., Purifier Co. v. McGroarty,	136 U. S. 237,	R. Co., 98 Ala. 400,	1110, 1121, 1130
1396	—	South Bend Iron Works v. Cottrell, 31	—
Smith's Lessee v. Hunt, 13 Ohio, 260,	1612	Fed. Rep. 254,	891, 892
Smithwick v. Ward, 7 Jones' Law, 64,	550	South Joplin Land Co. v. Case, 104 Mo.	572,
Smoot's Case, 15 Wall. 36,	278, 496, 497,	1980	—
Smout v. Ilbery, 10 M. & W. 1,	288	South Mo. Land Co. v. Rhodes, 54 Mo.	App. 129,
Smyley v. Reese, 53 Ala. 89,	1017	714	—
Smyrl v. Niolin, 2 Bail. L. 421,	275	South Wales R. Co. v. Redmond, 10 C. B.	(N. S.) 675,
Smyth v. Fitzsimmons, 97 Ala. 451,	1728	1421	—
Smyth v. Spalding, 13 Mo. 529,	355	South Wales R. Co. v. Wythes, 1 Kay & J.	186,
Snell v. Rogers, 70 Hun, 462,	597	2271	—
Snell v. Stone, 23 Ore. 327,	1759	Southerin v. Mendum, 5 N. H. 420,	626
Snell v. Trustees, 53 Ill. 290,	257	Southerland v. Southerland, 5 Bush. 591,	223
Snevily v. Read, 9 Watts, 396,	183, 1638	Southern California Assn. v. Bustamente,	52 Cal. 192,
Snider v. Adams Express Co., 77 Mo. 523,	1063	1276	—
Snider v. Adams Express Co., 63 Mo. 376,	117	Southern Development Co. v. Silva, 125	U. S. 247,
Snider's Sons Co. v. Troy, 91 Ala. 224,	1337, 1407	982, 989, 1876	—
2222	—	Southern Express Co. v. Caperton, 44 Ala.	101,
Snith v. Lewis, 26 Conn. 110,	165	1968	—
Snock v. Raglan, 59 Ga. 251,	166	Southern Express Co. v. Duffey, 48 Ga.	358,
Snook v. Raglan, 89 Ga. 251,	164, 166	1832	—
Snow v. Allen, 144 Mass. 546,	970, 2288	Southern Express Co. v. Hess, 53 Ala. 19,	738
Snow v. Chandler, 10 N. H. 92,	540	Southern Ins. Co. v. White, 58 Ark. 277,	310
Snow v. Franklin, 1 Lutw. 358,	515	Southern, etc., Loan Association v. Har-	ris (Ky. 1895), 32 S. W. Rep. 261,
Snow v. Perry, 9 Pick. 539,	393	1622	—
Snow v. Prescott, 12 N. H. 535,	2257	Southern Building & Loan Association v.	Anniston Loan and Trust Co., 101 Ala.
Snow v. Schomacker Manufacturing Co.,	69 Ala. 111,	582,	1607, 1609

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Southern Pacific R. Co. v. Johnson (Texas), 15 S. W. Rep. 121,	296	Spoor v. Newell, 3 Hill, 307,	—
Southern Pacific R. Co. v. United States, 28 Ct. Cl. 71,	2119	Spoor v. Phillips, 27 Ala. 193,	415
Southern R. Co. v. Maddox, 75 Texas, 300,	1968	Spott's Estate, <i>In re</i> , 156 Pa. St. 281,	1751
Southern, etc., Trust Co. v. Lanier, 5 Fla. 110,	996	Spragins v. White, 108 N. Car. 449,	905
Southsea, etc., Co. v. London, etc., R. Co., 2 Nev. & McN. (Ry. Cas.) 341,	2054	Sprague v. Blake, 20 Wend. 61,	504, 662
Southwell v. Beezley, 5 Ore. 458,	887	Sprague v. Cochran, 144 N. Y. 104,	434, 2274
Southwestern Cotton Press Co. v. Stanard, 44 Mo. 71,	123	Sprague v. Missouri Pac. R. Co., 34 Kan. 347,	1967
Southwestern Stage Co. v. Peck, 17 Kan. 271,	499	Sprague v. Railway, 34 Kan. 347,	1432
Southwick v. First Nat. Bank, 84 N. Y. 420,	798	Sprague v. Rooney, 104 Mo. 346,	189
Soutier v. Kellerman, 18 Mo. 509,	930	Sprague v. Rosenbaum, 38 Fed. Rep. 386,	355
Sower's Admr. v. Weaver, 64 Pa. St. 262,	632	Sprague v. Waldo, 38 Vt. 139,	791
Sowles v. Soule, 59 Vt. 131,	804	Sprague v. Warren, 26 Neb. 326,	1920
Sowles v. Welden Nat. Bank, 61 Vt. 375,	1871	Sparker v. Jenners, 140 Ind. 688,	1139
Spadoue v. Reed, 7 Bush, 455,	615	Sprayberry v. Merk, 30 Ga. 81,	1697
Spahr v. Hollingshead, 8 Blackf. 415,	211	Spring v. Ansonia Clock Co., 24 Hun, 175,	130, 133
Spaids v. Barrett, 57 Ill. 289,	440, 22-3	Sprigg v. Bank of Mt. Pleasant, 14 Pet. (U. S.) 201,	2184
Spalding v. Couzelman, 30 Mo. 177,	846	Sprung v. Sandford, 7 Paige (N. Y.), 550,	1141
Spalding v. Ewing, 149 Pa. St. 375,	1989, 1992	Spring Co. v. Knowlton, 103 U. S. 49, 1870,	1912
Spalding v. Preston, 21 Vt. 9,	1905	Sprung Valley Waterworks v. Schottler, 110 U. S. 347,	1560
Spalding v. Rosa, 71 N. Y. 40,	283, 889, 948	Springer v. Borden, 151 Ill. 668,	1093
Spann v. Baltzell, 1 Fla. 30,	11	Springfield v. Edwards, 84 Ill. 626,	1519, 1520, 1521
Spann v. Stearns, 18 Texas, 556,	1126	Springfield v. Green, 7 Baxt. 301,	448
Sparks v. Clapper, 30 Ind. 204,	1496	Springfield Bank v. Merrick, 14 Mass. 324,	1265
Sparks v. Despatch Transfer Co., 104 Mo. 531,	1271, 1287	Springfield Co. v. Allen, 46 Ark. 217,	452
Sparks v. Pittsburgh Co., 159 Pa. St. 295,	70	Springfield, etc., Co. v. Van Brunt, 77 Iowa, 82,	544
Sparman v. Keim, 83 N. Y. 245,	1771, 1773, 1785, 2165	Springfield, etc., Ins. Co. v. Hull, 51 Ohio St. 270,	2013
Sparrow v. Evansville, etc., R. Co., 7 Ind. 369,	1462	Springfield R. Co. v. Sleeper, 121 Mass. 29,	157
Sparta School Tp. v. Mendell, 138 Ind. 188,	1075	Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551,	2074
Spartanburg R. Co. v. DeGraffenreid, 12 Rich. L. 675,	157	Springsteen v. Samson, 32 N. Y. 703,	873
Spaulding v. City of Lowell, 23 Pick. (Mass.) 71,	1499, 1500	Sprosser v. Keuti, 17 N. Y. Supl. 839,	31
Spaulding v. Putnam, 128 Mass. 363,	40	Sprott v. Reid, 3 Greene (Iowa), 489,	2149
Speake v. United States, 9 Cranch, 28,	953	Spurck v. Lincoln, etc., R. Co., 14 Neb. 233,	1543
Spear v. Crawford, 14 Wend. 20,	259, 260, 1463	Spurgeon v. Collier, 1 Eden, 55,	1711
Spear v. Farmers', etc., Bank, 156 Ill. 555,	607	Spurgeon v. McElwain, 6 Ohio, 442,	1894
Spear v. Orendorf, 26 Md. 37,	1147	Spurlock v. Brown, 91 Tenn. 241,	1714
Spearman v. City of Texarkana, 58 Ark. 348,	1505	Spurlock v. Mainer, 1 La. Ann. 301,	1675
Spearman v. Ward, 114 Pa. St. 634,	1746	Spurr v. North Hudson R. Co., 56 N. J. Law, 346,	575
Specht v. Commonwealth, 8 Pa. St. 312,	2094	Spurr v. Scoville, 3 Cush. (Mass.) 578,	1172
Speck v. Dausman, 7 Mo. App. 165,	2007	Spurrier v. Hancock, 4 Vesey, 667,	423
Speier v. Opfer, 73 Mich. 35,	1746	Spybey v. Hide, 1 Camp. 181,	383
Spellman v. Bannigan, 36 Hun (N. Y.), 174,	2170	Squire v. Cartwright, 22 N. Y. Supl. 899,	1561
Spelman v. Aldrich, 126 Mass. 113,	1669	Squire v. New York, etc., Railroad Co., 98 Mass. 239,	1967
Spence v. Geilfuss, 89 Wis. 499,	980	St. David's Church v. Wood, 24 Ore. 396,	1132
Spence v. Healey, 8 Exch. 668,	515, 516	St. George's Church Society v. Branch, 120 Mo. 226,	1875
Spencer v. Hales, 30 Vt. 314,	666	St. John v. American, etc., Ins. Co., 13 N. Y. 31,	895
Spencer v. Reese, 165 Pa. St. 158,	1067	St. John v. St. John, 11 Ves. 526,	2007
Spencer v. Reynolds, 9 Pa. Co. Ct. 249,	27	St. John's Manfg. Co. v. Munger (Mich. 1895), 64 N. W. Rep. 3,	1324
Spencer v. Spencer, 3 Jones' Eq. (N. Car.) 404,	1727	St. Joseph, City of, v. Hamilton, etc., Railroad Co., 39 Mo. 476,	2140
Spencer v. Williams, 2 Vt. 209,	540	St. Joseph's Orphan Society v. Wolpert, 80 Ky. 86,	1848
Sperry's Appeal, 71 Pa. St. 11,	1446	St. Joseph, etc., Railroad Co. v. Ryan, 11 Kan. 602,	1970, 1976
Sperry v. Miller, 2 Barb. Ch. (N. Y.) 632,	2189	St. Jude's Church v. VanDenberg, 31 Mich. 287,	784
Speyer v. Desjardins, 144 Ill. 641,	644	St. Lawrence Steamboat Co., <i>In re</i> , 44 N. J. Law, 529,	1460
Spicer v. Hoop, 51 Ind. 365,	2044	St. Louis, City of, v. Alexander, 23 Mo. 483,	1390
Spicer v. Lambdin, 45 Ga. 319,	2044	St. Louis, City of, v. Bell Tel. Co., 96 Mo. 623,	1580
Spiller v. Paris Skating Rink Co., L. R. 7 Ch. Div. 368,	1310, 1314	St. Louis, City of, v. Schoenbusch, 95 Mo. 618,	1472
Spilman v. Mendenhall (1894), 57 N. W. Rep. 468,	1374	St. Louis, City of, v. Shields, 62 Mo. 247, 234,	1434, 1452
Spilman v. City of Parkersburgh, 35 W. Va. 605,	1519, 1521	St. Louis, City of, v. Western Union Tel. Co., 148 U. S. 92,	1582
Spitze v. Baltimore, 75 Md. 162,	587		
Spitzer v. Village of Blanchard, 82 Mich. 234,	1507		
Spitzmiller v. Fisher, 77 Iowa, 289,	793		
Spooner v. Reynolds, 50 Vt. 437,	1689		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

St. Louis, City of, v. Western Union Tel. Co. (1893), 13 Sup. Ct. Rep. 485,	1556	Stanley v. Chester, etc., R. Co., 3 Mylne & C. 773,	1316
St. Louis Association v. Hennessy, 11 Mo. App. 555,	1337	Stanley v. Jones, 7 Bing. 369,	1998, 1999
St. Louis, etc., Coal and Mining Co. v. Sandoval, etc., Coal and Mining Co., 111 Ill. 32,	1391	Stanley v. National, etc., Bank, 115 N. Y. 122,	1664
St. Louis Gas Light Co. v. St. Louis, 46 Mo. 121,	875	Stanley v. Smith, 15 Ore. 505,	179
St. Louis Ins. Co. v. Kyle, 11 Mo. 278,	761	Stanley v. Valentine, 79 Ill. 544,	13
St. Louis, Iron Mountain, etc., Railway v. Berry, 113 U. S. 465,	1456	Stanley v. Western Ins. Co., L. R. 3 Ex. 71,	869
St. Louis & S. C. & M. Co. v. Sandoval C. & M. Co., 116 Ill. 170,	1391	Stanley Rule, etc., Co. v. Bailey, 45 Conn. 464,	798
St. Louis, etc., Mining Co. v. Edwards, 103 Ill. 472,	1391	Stanton v. Allen, 5 Denio, 434,	1426, 1983, 2020, 2037, 2060, 2069
St. Louis, etc., R. Co. v. Berry, 113 U. S. 465,	2140	Stanton v. Maynard, 7 Allen, 335,	453
St. Louis, etc., R. Co. v. Chenault, 36 Kan. 57,	1290	Stanton v. New York, etc., R. Co., 59 Conn. 272,	1308
St. Louis, etc., R. Co. v. Clark, 10 U. S. App. 66,	544	Stanton v. Percival, 5 N. L. Cas. 257,	1209
St. Louis, etc., R. Co. v. Indianapolis, etc., R. Co., 9 Biss. 144,	1453	Stanton v. Railroad Co., 59 Conn. 272,	1313
St. Louis, etc., R. Co. v. Kerr, 153 Ill. 1-2,	2250	Stanton v. Small, 3 Sand. 230,	1921
St. Louis, etc., R. Co. v. Kirkpatrick, 52 Kan. 104,	1317	Stanton v. Tattersall, 1 Sm. & G. 529,	423
St. Louis, etc., R. Co. v. Mathers, 71 Ill. 532,	2083	Stanton v. Wilson, 2 Hill, 153,	259, 260
St. Louis R. Co. v. Eakins, 30 Iowa, 279,	157	Staple v. Spring, 10 Mass. 72,	575
St. Louis R. Co. v. Hopkins, 54 Ark. 269,	275	Staples v. Franklin Bank, 1 Metc. (Mass.) 43,	3-5
St. Mary's Church v. Stockton, 8 N. J. Eq. 520,	1095	Staples v. Nott, 128 N. Y. 403,	727
St. Paul, City of, v. Colter, 12 Minn. 41,	1478	Staples v. Wellington, 55 Maine, 453, 1811, 1812	
St. Paul, etc., R. v. Blackmar, 44 Minn. 514,	877	Stapleton, <i>Ex parte</i> , L. R. 10 Ch. Div. 586,	492, 2222, 2235
St. Paul R. Co. v. Bradbury, 42 Minn. 222,	128	Star Cash Car Co. v. Reinhardt (Com. Pl. N. Y.), 20 N. Y. Supl. 872,	2168
St. Paul R. Co. v. Robbins, 23 Minn. 439,	260	Stark v. Coffin, 105 Mass. 328,	1296
St. Strian Stone Co. v. Denver, etc., R. Co., 1 Colo. 211,	957	Stark v. Parker, 2 Pick. 267,	148
Stack v. Cavanaugh (N. H.), 30 Atl. Rep. 350,	1785, 1790, 1801	Stark v. Thompson, 3 T. B. Mon. 296,	445
Stackhouse v. Barnston, 40 Ver. Jr. 453,	555	Stark Bank v. United States Pottery Co., 34 Vt. 144,	1278
Stackpole v. Robbins, 47 Barb. 12,	466	Starkey v. Starkey, 136 Ind. 349,	1192, 1195
Stacy v. Foss, 19 Maine, 335,	1870, 1941, 1947	Starnes v. Hill, 112 N. Car. 1,	1185
Stacy v. Kemp, 97 Mass. 166,	313	Starr v. Earle, 43 Ind. 478,	594
Stadfeld v. Huntsman, 92 Pa. St. 53,	163	Starr v. Stiles, — Ariz. —, 19 Pac. Rep. 225,	576
Stafford v. Azbell, 26 N. Y. Supl. 41,	1165	Starr v. Wright, 20 Ohio St. 97,	1791
Stafford v. Bacon, 1 Hill (N. Y.), 532,	1035	Starr Glass Co. v. Morey, 108 Mass. 570,	150
Stafford v. Fellers, 55 Iowa, 484,	1085	Startup v. McDonald, 6 C. B. 593,	124, 373, 380, 387, 388, 405
Stafford v. Nutt, 51 Ind. 535,	835	State v. Allen, 43 Ill. 456,	1539
Stafford v. Roof, 9 Cow. (N. Y.) 626, 1771,	1795	State v. American Cotton Oil Trust, 40 La. Ann. 8,	2058
Stafford v. Shortreed, 62 Iowa, 524,	2039	State v. Atwood, 11 Wis. 422,	2120
Stagg v. Alexander, 1 Hill, 519,	537	State v. Auditor, 30 Mo. 287,	2121
Staines v. Wainwright, 6 Bing. N. C. 174,	1882	State v. Baltimore & L. R. Co., 81 Md. 222,	1458
Staley v. Hamilton, 19 Fla. 275,	1700	State v. Baltimore & O. R. Co., 36 Fed. Rep. 655,	585, 586
Stallings v. Finch, 25 Ala. 518,	557	State v. Birkhauser, 37 Neb. 521,	1555
Stallings v. Johnson, 27 Ga. 564,	207	State v. Board, 24 Wis. 683,	1544
Stambaugh v. Smith, 23 Ohio St. 584,	368	State v. Board of Chosen Freeholders, etc., 37 N. J. Law, 254,	1551
Stamm v. Kuhlmann, 1 Mo. App. 226,	354	State v. Board of Chosen Freeholders, 39 N. J. Law, 632,	1438
Stamp v. Franklin, 144 N. Y. 604,	1687	State v. Board of Education, 24 Wis. 683,	1546, 2263, 2267
Standard Milling Co. v. Flower, 46 La. Ann. 315,	1921	State v. Board of Police Comrs. of Camden, 56 N. J. Law, 258,	1549
Standard Gas Co. v. Wood, 61 Fed. Rep. 74,	137, 747	State v. Board of Street Comrs., 55 N. J. Law, 230,	1467
Standard Implement Co. v. Parlin & Oendorff Co., 51 Kan. 632,	1859	State v. Burke, 33 La. Ann. 498,	2092
Standard L. & Acc. Ins. Co. v. Lauderdale, 94 Tenn. 635,	308	State v. Chicago, etc., R. Co., 90 Iowa, 594,	1423
Standard Oil Co. v. Schofield, 16 Abb. N. Cas. (N. Y.) 372,	872	State v. Churchill, 48 Ark. 426,	2258
Standard Sugar Refinery v. Castano, 43 Fed. Rep. 279,	126	State v. Cincinnati Gas Light and Coke Co., 18 Ohio St. 262,	1504
Standish v. Ross, 3 Exch. 527,	181	State v. City of Bayonne, 55 N. J. Law, 241,	1523
Stannard v. Burns, 63 Vt. 214,	1843	State v. City of Bayonne, 56 N. J. 268,	1551
Stanley v. Barnes, 1 Hagg. 221,	549	State v. City of Hiawatha, 53 Kan. 477,	1564
		State v. City of Hamilton, 47 Ohio St. 52,	1564
		State v. Clarke, 33 N. H. 329,	1057
		State v. Clinton, 27 La. Ann. 429,	2092
		State v. Collier, 72 Mo. 13,	1996
		State v. Commissioners of Haskell County, 40 Kan. 65,	1529

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

State v. Commissioners of Nemaha Co., 10 Kan. 569,	1543	State v. Plaisted, 43 N. H. 413,	1789, 1795
State v. Comrs. of Shelby Co., 36 Ohio St. 326,	1546	State v. Prime, 54 Ind. 450,	360, 361
State v. Commissioners of Railroad Taxa- tion, 37 N. J. Law, 228,	2132	State v. Roggen, 22 Neb. 118,	1543
State v. Corrigan Consol St. Ry. Co., 85 Mo. 263,	1532	State v. Silver, 9 Neb. 85,	1512
State v. Cross, 33 Kan. 696,	1934	State v. Smith, 58 Minn. 35,	2147
State v. Council, 30 N. J. Law, 365,	1554	State v. Smith, 33 Conn. 397,	2120
State v. Dulle, 48 Mo. 282,	2140	State v. South Orange, 55 N. J. Law, 254,	2142
State v. Dunbar Estate, 99 Mich. 99,	1850	State v. Standard Oil Co., 49 Ohio St. 137,	1983
State v. Emery, 98 N. Car. 768,	1516	State v. Thompson, 64 Texas, 690,	2037
State v. Ferguson, 62 Mo. 77,	2120	State v. Tombeckbee Bank, 2 Stew. (Ala.) 30,	2132
State v. Findley, 10 Ohio, 51,	1894	State v. Town of Harrison, 39 N. J. Law, 51,	1733
State v. Fire Creek Coal, etc., Co., 33 W. Va. 188,	2161	State v. Trenton (Feb. 7, 1895), 31 Atl. Rep. 631,	1551
State v. Fort, 24 S. Car. 510,	902	State v. Trenton City Board (N. J. 1894), 29 Atl. Rep. 153,	1488
State v. Frank, 51 Mo. 98,	1058	State v. Tumej, 81 Ind. 559,	1932
State v. Furguson, 31 N. J. Law, 123,	1236	State v. Tutty, 41 Fed. Rep. 753,	2122
State v. Garibaldi, 44 La. 809,	1466	State v. Walbridge, 119 Mo. 333,	1472
State v. Gas Co., 37 Ohio St. 45,	1487, 1530	State v. Worthington, 7 Ohio, 171,	300
State v. Gilman, 33 W. Va. 146,	2148	State v. Young, 23 Minn. 551,	2107
State v. Goodman, 33 W. Va. 179,	2160, 2161	State v. Mullis, 92 N. Car. 623,	893
State v. Green, 112 Ind. 462,	1910	Staver v. Mussimer (Wash. 1893), 32 Pac. Rep. 995,	2239
State v. Hannibal, etc., R. Co., 60 Mo. 143,	2140	Stavers v. Curling, 3 Bing. (N. C.) 355,	113, 117
State v. Hartford & N. H. R. Co., 29 Conn. 538,	1439, 2054, 2060	State Bank v. Bryne, 97 Mich. 178,	449
State v. Hastings, 15 Wis. 75,	2085	State Bank v. Evans, 15 N. J. Law, 155,	177
State v. Hauser, 63 Ind. 155,	1532	State, etc., v. Michigan City, 138 Ind. 455,	1490
State v. Hipp, 38 Ohio St. 199,	2128	State, etc., Bank v. Scott, 10 Neb. 83,	1652, 1723, 1746
State v. Hornbacker, 42 N. J. Law, 635,	1610	State, etc., Bank v. Thompson, 42 N. H. 69,	2113
State v. Hoshaw, 98 Mo. 358,	898	State, <i>ex rel.</i> , etc., v. Murphy, 130 Mo. 10,	1503
State v. Hoskins, 25 Lawyers' Rep. Ann. 759,	2147	State, <i>ex rel.</i> Folsom Bros., v. Mayor, 32 La. Ann. 709,	2149
State v. Intoxicating Liquors, 73 Maine, 278,	925	State, <i>ex rel.</i> Shaw, v. Trenton, 49 N. J. Law, 339,	1548
State v. Iowa Central R. Co., 83 Iowa, 720,	1439	State Ins. Co. v. Hughes, 10 Lea, 461,	895
State v. Jacksonville St. R. Co., 29 Fla. 590,	1584	State Mut. Ins. Co. v. Brinkley, etc., Co. (Ark. 1895), 31 S. W. Rep. 157,	698
State v. Jersey City Board, 56 N. J. Law, 273,	1549	State Nat. Bank v. Bennett, 8 Ind. App. 679,	1855
State v. Johnson, 52 Ind. 197,	1883, 1995	State Nat. Bank v. Flathers, 45 La. Ann. 75,	1742, 1743
State v. Judge, 39 La. Ann. 132,	2094	State Steamship Co., <i>In re</i> , 60 Fed. Rep. 1018,	741
State v. Jumel, 38 La. Ann. 337,	2092	State Tonnage Tax Cases, 12 Wall. 204,	806
State v. Kansas City, etc., R. Co., 32 Fed. Rep. 722,	2148	State Treasurer v. Cross, 9 Vt. 289,	256
State v. Kearney Township (N. J. 1895), 31 Atl. Rep. 454,	1550, 1570	Stead v. Dawber, 10 Ad. & El. 57,	690, 951
State v. Lanier, 47 La. Ann. 110,	2092	Stead v. Dawber, 2 Per. & Dav. 447,	690, 691
State v. Lefavre, 53 Mo. 470,	902	Stead v. Nelson, 2 Beav. 245,	1699
State v. Loomis, 115 Mo. 307,	2161	Stead v. Poyer, 1 C. B. 7-2,	517
State v. Lowery, 49 N. J. Law, 391,	1479	Steadham v. Parrish, 93 Ala. 465,	631
State v. Manchester L. R. Co., 52 N. H. 528,	937	Steadman v. Wilbur, 7 R. I. 481,	1665
State v. Mayor, 109 U. S. 285,	2150	Steamboat v. Hammond, 9 Mo. 64,	452
State v. Mayor, 32 La. Ann. 709,	2122	Steamboat Keystone v. Moies, 28 Mo. 243,	932
State v. Mayor, etc., 30 N. J. Law, 225,	1584	Steamship Co. v. Joliffe, 2 Wall. 450, 774, 2121	
State v. Mayor, etc., of City of Bayonne, 55 N. J. Law, 241,	1562	Steam Stoker Co., <i>In re</i> , L. R. 19 Eq. 416,	394
State v. Mayor, etc., of Jersey City, 29 N. J. Law, 441,	1498	Stearns v. Barrett, 1 Pick. (Mass.) 443,	2033, 2049
State v. McCauley, 15 Cal. 429,	1519	Stearns v. Hall, 9 Cush. 31,	344, 689, 690, 951, 954
State v. McGrath, 91 Mo. 386,	1544, 1546	Stearns v. Sopris, 5 Colo. App. 191,	1321
State v. Mead, 71 Mo. 266,	1473	Stearns v. Sweet, 78 Ill. 446,	868
State v. Mill, 11 Biss. 197,	884	Stearns v. Tappin, 5 Duer, 294,	552, 558
State v. Milligan, 3 Wash. St. 144,	1545, 1546	Stearns v. Washburn, 7 Gray, 187,	638
State v. Mueller, 10 Mo. App. 87,	1645	Stebbins v. Eddy, 4 Mason, 414,	109, 110, 424
State v. Murphy, 130 Mo. 10,	1504	Stebbins v. Jennings, 10 Pick. 172,	1473
State v. Nebraska Distilling Co., 29 Neb. 700,	2053, 2054, 2056, 2057, 1829	Stebbins v. Palmer, 1 Pick. (Mass.) 71,	2170
State v. Nelson, 41 Minn. 85,	1829	Stebbins v. Smith, 4 Pick. 97,	593
State v. Noyes, 47 Maine, 189,	2135	Stedeker v. Bernard, 102 N. Y. 327,	831
State v. Paul, 5 R. I. 185,	2147	Steads v. Steeds, L. R. 22 Q. B. D. 537,	515
State v. Payssan, 47 La. Ann. 1029,	1477	Steel v. Jennings, Cheves (S. Car.), 183, 1750,	1751
State v. Pepper, 31 Ind. 76,	2132	Steele v. Branch, 40 Cal. 3,	751
State v. Person, 32 N. J. Law, 134,	2128	Steele v. Buck, 61 Ill. 343,	2237
State v. Phalen, 3 Harr. (Del.) 441,	32	Steele v. Curle, 4 Dana (Ky.), 381,	1502
State v. Pickett, 46 La. Ann. 7,	2143	Steele v. McTyer, 31 Ala. 667,	932
State v. Pilsbury, 31 La. Ann. 1,		Stechman, The D. B., 48 Fed. Rep. 580,	470

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Steenrod's Admr. v. Railroad Co., 27 W.		Stewart v. Gould, 8 Wash. 367,	1401
Va. 1,	1179	Stewart v. Great Western R. Co., 2 D. J. &	
Steers v. Lashley, 6 T. R. 61,	1929	S. 319,	463
Steers v. Liverpool, etc., Steamship Co.,		Stewart v. Huntington, 124 N. Y. 127,	501
57 N. Y. 1,	1963	Stewart v. Keteltas, 36 N. Y. 388,	298, 956
Steers v. Leonard, 20 Minn. 494,	290, 897	Stewart v. Lang, 37 Pa. St. 201,	863, 872
Steever v. Illinois Railway Co., 62 Iowa,		Stewart v. McFarland, 84 Iowa, 55,	194
371,	1935	Stewart v. Otoe Co., 2 Neb. 177,	702
Steffen v. Smith, 159 Pa. St. 207,		Stewart v. Parnell, 147 Pa. St. 523,	1918
1654, 1688, 1704		Stewart v. Petree, 55 N. Y. 621,	1047
Steffens v. Earl, 40 N. J. Law, 128,	2097	Stewart v. Stewart, 3 Watts, 253,	850
Stegman v. Hollingsworth, 14 N. Y. Supl.		Stewart v. Stone, 127 N. Y. 500,	294
465,	182	Stewart v. Superior Court, 100 Cal. 543,	2267
Steifel v. Clark, 9 Baxt. (Tenn.) 466,	1698	Stewart v. Trustees Hamilton College, 2	
Stein v. Bienville Water Supply Co., 141		Denio, 403,	254
U. S. 67,	1240, 1241	Stewart v. Welsh, 41 Ohio St. 483,	2005
Stein v. City of LaFayette, 6 Ind. App.		Stewart Manufacturing Co. v. Rau, 92 Ga.	
214,	575	511,	452, 1395
Steiner v. Trantum, 98 Ala. 315, 1702, 1743, 1744		Stewarts v. Lisenard, 26 Wend. (N. Y.)	
Steinhardt v. Buel (Com. Pl. 1892), 20 N. Y.		303,	1818
Supl. 706,	2245	Sticker v. Overpeck, 127 Pa. St. 446,	370
Steinman v. Magnus, 11 East, 390,		Stickler v. Giles, 9 Wash. 147,	107, 205
534, 535, 1631		Stickney v. Goudy, 132 Ill. 213,	32
Steinspring v. Bennett, 16 La. Ann. 201,	872	Stickney v. Stickney, 131 U. S. 227,	1666
Steinweg v. Erie R. Co., 43 N. Y. 123,	1963	Stillwell v. Hubbard, 20 Wend. 14,	90, 91
Stelz v. Shreck, 123 N. Y. 263,	1768	Stimpson v. Achorn, 158 Mass. 342,	1669
Stem v. Nysonger, 69 Iowa, 512,	843	Stimpson v. Poole, 141 Mass. 502,	543
Stengel v. Preston, 49 Ky. 616,	514	Stimpson v. Sprague, 6 Greenl. (Me.) 470,	797
Stenton v. Jerome, 54 N. Y. 480,	2283	Stinchfield v. Little, 1 Greenl. 231,	1234
Stephani v. Catholic Bishop, 2 Ill. App.		Stines v. Dorman, 25 Ohio St. 580,	2044
249,	869	Stirling v. Maitland, 5 B. & S. 840,	488
Stephens v. Capital Ins. Co., 87 Iowa,		Stitt v. Huidekopers, 17 Wall. 384,	56
283,	1088	Stock v. City of Boston, 149 Mass. 410,	1375
Stephens v. Gifford, 137 Pa. St. 219,	163	Stock v. Stoltz, 137 Ill. 349,	792
Stephens v. Pell, 2 C. & M. 710,	608, 610	Stock v. Stoltz, 34 Ill. App. 645,	234, 235
Stephenson v. Boody, 139 Ind. 60,	2207	Stockbridge Iron Co. v. Hudson Iron Co.,	
Stephenson v. Cady, 117 Mass. 6,	150	102 Mass. 45,	1066
Stephenson v. Elliott, 53 Kan. 550,	1067	Stockbridge Iron Co. v. Hudson Iron Co.,	
Sterling v. Baldwin, 42 Vt. 306,	638	107 Mass. 280,	1153
Sterling v. Sinnickson, 5 N. J. Law, 756,	1883	Stockdale v. School District, 47 Mich.	
Sterling v. Sterling, 12 Ga. 201,	2009	226,	1539
Sterling Wrench Co. v. Amstutz, 50 Ohio		Stockett v. Watkins, 2 Gil. & J. (Md.) 326,	2168
St. 184,	107	Stockham v. Stockham, 32 Md. 196,	76
Sternberg v. O'Brien, 48 N. J. Eq. 370,	2045	Stocking v. Sage, 1 Conn. 519,	617
Sternberger v. McGovern, 56 N. Y. 12,	1158	Stockdale v. Schuyler, 8 N. Y. Supl. 813,	150
Sternburg v. Callanan, 14 Iowa, 251,	595	Stockton v. Central R. Co., 50 N. J. Eq.	
Sterry v. Arden, 1 Johns. Ch. 261,	221, 224	52,	1411, 1431
Stettauer v. Hamlin, 97 Ill. 312,	863	Stockton v. Railroad Co., 24 Atl. Rep.	
Steuben Co. Bank v. Mathewson, 5 Hill		964,	1250
(N. Y.), 249,	1363	Stockton, etc., R. Co. v. Stockton, 51 Cal.	
Stevens v. Adams, 45 Maine, 611,	2198	323,	132
Stevens v. Benning, 1 Kay & J. 168,	889	Stockton v. Turner, 7 J. J. Marsh. 192,	860
Stevens v. Catlin, 44 Ill. App. 114,	821	Stockwell v. Baird (Del. 1895), 31 Atl.	
Stevens v. Cooper, 1 John. Ch. 425,	689, 690	Rep. 811,	671
Stevens v. Corbitt, 33 Mich. 458,	157	Stockwell v. State, 101 Ind. 1,	1176
Stevens v. Norris, 30 N. H. 466,	699	Stodalka v. Novotny, 144 Ill. 125,	1060, 1061
Stevens v. Parsons, 80 Maine, 351,	40	Stoddard v. Ham, 129 Mass. 383,	239
Stevens v. Philadelphia Ball Club, 142		Stoddard v. Hart, 23 N. Y. 556,	1059
Pa. St. 52,	182	Stoddard v. Nelson, 17 Ore. 417,	855
Stevens v. Webb, 7 C. & P. 60,	300	Stoddard v. Smith, 5 Bin. (Pa.) 355,	426
Stevens v. Witter, 88 Iowa, 636,	2177	Stofflet v. Stofflet, 160 Pa. St. 529,	2261
Stevenson v. Craig, 12 Neb. 461,	1723, 1741	Stofflet v. Strome, 101 Mich. 197,	1361
Stevenson v. Maxwell, 2 N. Y. 408,	1126	Stokell v. Kimball, 59 N. H. 13,	1722
Stevenson v. McLean, L. R. 5 Q. B. D. 346,		Stokes v. Cox, 1 H. & N. 533,	897
57, 62		Stokes v. New Jersey Pottery Co., 46 N. J.	
Stevenson v. Michigan Log-Towing Co.		Law, 237,	1271, 1281, 1284
(Mich. 1894), 61 N. W. Rep. 536,	904	Stokes v. Lewis, 1 T. R. 20,	186
Stevenson v. Watson, L. R. 4 C. P. Div.		Stone v. Bishop, 4 Cliff. 593,	251
148,	1131	Stone v. Browning, 51 N. Y. 211,	662
Stevor v. Torrent, 99 Mich. 68,	1190	Stone v. Browning, 68 N. Y. 593,	671
Stewart v. Ahrenfeldt, 4 Denio, 189,	212, 213	Stone v. Chisholm, 113 U. S. 302,	1388
Stewart v. Arnel, 62 Ind. 593,	48	Stone v. City, etc., Bank, L. R. 3 C. P.	
Stewart v. Babbs, 120 Ind. 568,	1721	Div. 283,	1319
Stewart v. Brown, 48 Mich. 383,	403	Stone v. Clark, 1 Metc. (Mass.) 378,	876
Stewart v. Buard, 23 La. Ann. 411,	814	Stone v. Dickinson, 5 Allen, 29,	543
Stewart v. Campbell, 58 Maine, 439,	594, 604	Stone v. Farmers', etc., Co., 116 U. S. 307,	2133
Stewart v. Cauty, 8 M. & W. 160,	498	Stone v. French, 37 Kan. 145,	15
Stewart v. Chicago, etc., R. Co., 141 Ind.		Stone v. Hackett, 12 Gray, 227,	250
65,	18, 547	Stone v. Hale, 17 Ala. 557,	1062
Stewart v. Erie, etc., Transportation Co.,		Strondt v. Hine, 45 Pa. St. 30,	597
17 Minn. 372,	2054, 2060	Stone v. Jenks, 142 Mass. 519,	383
Stewart v. Gordan, 65 Texas, 344,	1199	Stone v. Lewman, 23 Ind. 97,	198

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Stone v. Lidderdale, 2 Anstr. 533,	2084	Stringfield v. Vivian, 63 Mich. 681,	935
Stone v. Mississippi, 101 U. S. 814,	2130	Strodger v. Stone, etc., Granite Co. (Ga. 1894), 19 S. E. Rep. 1022,	544
Stone v. Pointer, 5 Munf. 287,	356	Strohen v. Franklin, etc., Association, 115 Pa. St. 273,	1599
Stone v. Porter, 4 Dana, 207,	443	Strohmaier v. Zeppenfeld, 3 Mo. App. 429,	1094
Stone v. Sledge, 87 Texas, 49,	1738	Strong v. Barnes, 11 Vt. 221,	567
Stone v. Waite, 88 Ala. 599,	296	Strong v. Birchard, 5 Conn. 357,	768
Stone v. Werts, 3 Bush (Ky.), 486,	1748	Strong v. Bird, L. R. 13 Eq. Cas. 315,	561
Stone v. Wilbern, 83 Ill. 105,	1026	Strong v. Blake, 46 Barb. 227,	389, 390, 398
Stoneham, etc., Railroad v. Gould, 2 Gray, 277,	155	Strong v. Cromer, 48 Minn. 66,	518
Stoops v. Smith, 100 Mass. 63,	692, 2225	Strong v. Dean, 55 Barb. 337,	551
Storer v. Freeman, 6 Mass. 435,	901	Strong v. Dods, 47 Vt. 348,	666
Storer v. Gordon, 3 M. & S. 303,	550	Strong v. Sheffield, 144 N. Y. 392,	9
Storer v. Railway Co., 2 Younge & C. Ch. 48,	1097, 1101	Strodger v. Southern Granite Co. (1894), 19 S. E. Rep. 1022,	970
Storer v. Taber, 83 Maine, 387,	343, 344	Stropes v. Board, 72 Ind. 42,	2084
Storey v. Brennan, 15 N. Y. 524,	1941	Stroud v. Smith, 4 Houst. (Del.) 448,	2080
Storey v. Krewson, 55 Ind. 397,	400, 401, 409	Strusguth v. Pollard, 62 Vt. 157,	379
Storm v. United States, 94 U. S. 76,	74, 179	Stryker v. Vanderbilt, 25 N. J. Law, 482,	955
Storrs & Bement Co. v. Wingate (N. H. 1892), 29 Atl. Rep. 413,	1722	Stuart v. Baker, 17 Texas, 417,	621, 1773
Story v. Livingston, 13 Pet. 359,	475	Stuart v. Blum, 28 Pa. St. 225,	1632
Story v. Marshall, 24 Texas, 305,	1662, 1733	Stuart v. Cambridge, 125 Mass. 102,	897, 1492
Story v. Salmon, 11 Hun, 471,	1935	Stuart v. Presbyterian Church, 84 Pa. St. 388,	258
Story v. Salomon, 71 N. Y. 420,	1914, 1921	Stuart v. Railway Co., 15 Beav. 513,	1103
Story v. Story, 1 Ind. App. 284,	794	Stuart v. Rector, 1 Mo. 361,	19
Stotesbury v. Smith, 2 Burrow, 924,	188	Stuart v. Valley R. Co., 32 Gratt. 146,	260
Stoudenmire v. Harper, 81 Ala. 242,	2250	Stubbings v. Dockery, 80 Wis. 618,	2248
Stout v. City, etc., Insurance Co., 12 Iowa, 371,	312	Stubbins v. Mitchell, 82 Ky. 535,	443
Stout v. Commercial Union Assurance Co., 12 Fed. Rep. 554,	895	Stubblefield v. Borders, 92 Ill. 279,	1033
Stout v. Hyatt, 13 Kan. 232,	463	Stubbs v. Holywell Railway Co., L. R. 2 Ex. 3311,	2228
Stout v. Whitney, 12 Ill. 218,	854, 864	Stuber v. McEntee, 19 N. Y. Supl. 900,	544
Stout v. Zulick, 48 N. J. Law, 599,	1335, 1337, 1434	Stuber v. McEntee, 142 N. Y. 200,	514
Stoutenburg v. Lybrand, 13 Ohio St. 228,	2007	Stuckey v. Keefe, 20 Pa. St. 397,	1764
Stoutenburgh v. Tompkins, 9 N. J. Eq. 332,	955	Stuckey v. Mathes (1881), 24 Hun, 461,	1822, 1839
Stovall v. Border, etc., Bank, 78 Va. 188,	828	Studabaker v. White, 31 Ind. 211,	2044
Stovell v. Eade, 4 Bing. 154,	469	Studds v. Watson, 28 Ch. Div. 305,	684
Stow v. Russell, 38 Ill. 13,	749	Studer v. Bleistein, 115 N. Y. 316,	340, 504
Stow v. Wyse, 7 Conn. 214,	1236	Studwell v. Shapter, 54 N. Y. 249,	1785, 1801
Stowell v. Jackson Co., 57 Mich. 31,	1471	Stuebben v. Granger, 63 Mich. 306,	855
Stowell v. Robinson, 3 Bing. (N. C.) 928,	689, 690, 743, 951	Stull v. Hurt, 9 Gill, 446,	110
Stowell v. Stowell, 45 Mich. 364,	483	Stults v. Newhall, 118 Mass. 98,	954
Stowers v. Hollis, 83 Ky. 544,	1802	Sturbridge, Town of, v. Franklin, 160 Mass. 149,	1660
Stracy v. Bank, 6 Bing. 754,	210, 2240	Sturdy v. Henderson, 4 B. & Ald. 592,	765
Strafford v. Welch, 59 N. H. 46,	401	Sturges v. Burton, 8 Ohio St. 215,	195, 196
Straight v. Wight (Minn. 1895), 63 N. W. Rep. 105,	595	Sturges v. Crownshield, 4 Wheat. 122,	2, 2125, 2158
Strait v. National Harrow Co., 18 N. Y. Supl. 224,	1886	Sturges v. Fourth Nat. Bank, 75 Ill. 595,	612
Strang v. Holmes, 7 Cow. 224,	538	Sturlyn v. Albany, Cro. Eliz. 67,	221
Strange v. Crowley, 91 Mo. 289,	1118, 1129	Sturm v. Boker, 150 U. S. 312,	885, 886, 905
Strasburg R. Co. v. Echternacht, 21 Pa. St. 220,	259, 1329	Sturtevant v. Randall, 53 Maine, 149,	39, 40
Straton v. Rastall, 2 T. R. 366,	463	Stuyvesant v. Hall, 2 Barb. Ch. 151,	549
Stratton v. Allen, 16 N. J. Eq. 229,	1296, 1406	Suau v. Caffé, 122 N. Y. 308,	1754
Stratton v. Rogers, 11 La. Ann. 380,	1713	Succession of Dumestre (45 La. 1892), 12 So. Rep. 123,	1762
Straus v. Eagle Ins. Co., 5 Ohio St. 59,	1259	Succession of Forstall, 39 La. Ann. 1052,	1742
Strauss v. Carolina, etc., Association (N. Car. 1895), 23 S. E. Rep. 450,	1622	Succession of Lewis, 45 La. Ann. 833,	1692
Strauton v. Wood, 16 Q. B. 638,	769	Succession v. Latchford, 42 La. Ann. 529,	1618
Strayer v. Leonard, 13 Mont. 435,	1686	Sudlow v. Mead, 109 N. Y. 643,	5-1
Streetfield v. Halliday, 3 T. R. 779,	831	Suffolk Bank v. Kidder, 12 Vt. 464,	715
Streeter v. Streeter, 43 Ill. 155,	854	Suffolk Bank v. Worcester Bank, 5 Pick. 106,	407
Streeter v. Western, etc., Society, 65 Mich. 199,	118	Sugar River Bank v. Fairbank, 49 N. H. 131,	2289
Streeter v. Williams, 43 Pa. St. 450,	760	Suggett v. Cason, 26 Mo. 221,	631
Streeter v. Robinson, 102 Cal. 542,	1318	Sullings v. Goodyear, etc., Co., 36 Mich. 813,	496
Strehl v. D'Evers, 66 Ill. 77,	957	Sullivan v. Collins, 18 Iowa, 228,	212
Streight v. Junk, 8 Fed. Rep. 321,	1447	Sullivan v. Ferguson, 40 Mo. 79,	110
Streppone v. Lennon, 143 N. Y. 626,	880	Sullivan v. Jackson Loan Association, 70 Miss. 94,	1608, 1618
Stricker v. Tinkham, 35 Ga. 176,	711	Sullivan v. Latimer, 43 S. C. 262,	1082
Strickland v. Hardie, 82 Ala. 412,	477	Sullivan v. O'Neal, 66 Texas, 433,	839
Strickland v. Harger, 81 N. Y. 623,	1631	Sullivan v. Sullivan, 99 Cal. 187,	187
Stringer v. Northwestern Insurance Co., 82 Ind. 100,	1787, 1788	Suman v. Inman, 6 Mo. App. 384,	613
Stringfellow v. Ivie, 73 Ala. 209,	479		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Suman v. Springate, 67 Ind. 115,	842	Sweed Iron Works v. Jefferson (Ky.), 30	
Sumner v. Cottey, 71 Mo. 121,	162	S. W. Rep. 883,	265
Sumner v. Woods, 67 Ala. 139,	164	Sweeney v. El Paso, etc., Association	
Summerlin v. Livingston, 15 La. Ann.	2016	(Texas Civ. App.), 26 S. W. Rep. 290,	1601, 1605
519,			
Summerson v. Hicks, 142 Pa. St. 344,	415	Sweeney v. Owsley, 14 B. Mon. 413,	296
Summerson v. Hicks, 134 Pa. St. 566,	163, 165, 169	Sweeney v. St. John, 28 Hun. 634,	643
Sumner v. Jones, 24 Vt. 317,	2110	Sweet v. Colleton, 96 Mich. 391,	599
Sumner v. Marcy, 3 Woodb. & M. 105,	1249, 1259	Sweet v. Harding, 19 Vt. 587,	387
Sumner v. Powell, 2 Mer. 30,	823	Sweet v. Lee, 3 Man. & Gr. 452,	682, 683
Sumner v. Sumners, 54 Mo. 340,	1894	Sweet v. Morrison, 116 N. Y. 19,	128
Sumner v. Williams, 8 Mass. 162,	95	Sweeting v. Turner, L. R. 7 Q. B. 310,	54
Sumter, etc., Loan Assn. v. Winn (S. Car.	1895), 23 S. E. Rep. 29,	Sweetman v. Prince, 62 Barb. 256,	358
Supervisors v. Morgan, 4 Abb. App.	1623	Sweetman v. Prince, 26 N. Y. 224,	358
(N. Y.) 335,	1550	Sweigart v. Berk, 8 S. & R. 308,	829
Supervisors v. Schenck, 5 Wall. 772, 1342, 1429		Sweny v. Smith, L. R. 7 Eq. Cas. 324,	405
Supervisors of Chenango v. Birdsall, 4	210, 1473	Swett v. Colgate, 20 Johns. 196,	324
Wend. 453,		Swift v. City of Poughkeepsie, 37 N. Y.	
Supervisors of Orleans Co. v. Bowen, 4	1473	511,	462
Lans. 24,		Swift v. Holdridge, 10 Ohio, 230,	1042
Supreme Council v. Curd, 111 Ill. 284, 869, 895		Swift v. Pacific Mail Steamship Co., 106	
Surcome v. Pinniger, 3 De G., M. & G. 571,	619, 850	N. Y. 206,	735
Susong v. Vaiden, 10 S. Car. 247,	824	Swift v. Shepard, 64 Cal. 423,	2267
Susquehanna, etc., Ins. Co. v. Cusick, 109	319	Swift v. Swift, 46 Cal. 266,	651
Pa. St. 157,	8	Swires v. Parsons, 5 W. & S. 357,	786
Sussdorf v. Schmidt, 55 N. Y. 319,	319	Swisher v. Williams, Wright (Ohio), 754,	2107
Sussex R. Co. v. Morris & E. R. Co., 19	1603	Switzer v. Kee, 146 Ill. 577,	51
N. J. Eq. 13,		Switzer v. Pinconning Co., 59 Mich. 488,	269
Sutcliffe v. Atlantic Mills, 13 R. I. 480,	652	Swofford, Matter of, 6 M. & S. 226,	384
Suter v. Sheeler, 22 Pa. St. 284,	196	Swope v. Bier, 10 Ind. App. 613,	511
Sutherland v. Sutherland, 5 Bush, 591,	619	Swope v. Jefferson Fire Ins. Co., 93 Pa.	
Sutliff v. Commissioners, 147 U. S. 230,	1526, 1527, 1530, 1539	St. 251,	2011
Sutphen v. Fowler, 9 Paige (N. Y.), 280,	1173	Swope v. Leffingwell, 72 Mo. 348,	197
Sutphen v. Sutphen, 30 Kan. 510,	647	Sword v. Keith, 31 Mich. 247,	654
Sutro v. Rhodes, 92 Cal. 117,	361	Sykes v. Beadon, L. R. 11 Ch. Div. 170,	1905
Sutro Tunnel Co. v. Mining Co., 19 Nev.	1225	Sykes v. Chadwick, 18 Wall. 141,	232
121,		Sykes v. City of St. Cloud (Minn. 1895), 62	
Sutton v. Hayden, 62 Mo. 101,	848, 1210	N. W. Rep. 613,	1579
Sutton v. Morgan, 158 Pa. St. 204,	1011	Sylar, Lessee of, v. Eckhart, 1 Binney, 378,	850
Sutton v. Tatham, 10 Ad. & El. 27,	940	Symmes v. Union Trust Co., 60 Fed. Rep.	
Sutton v. The Albatross, 2 Wall., Jr. 327,	465	830,	1445, 1447
Sutton Manufacturing Co. v. Hutchinson,	1302	Syms v. Mayor, 105 N. Y. 153,	875
63 Fed. Rep. 496,		Synge v. Synge, L. R. (1894) 1 Q. B. 466,	228
Sutton's Ex. v. Hollowell, 2 Dev. 155,	559	Sypert v. Harrison, 88 Ky. 461,	1724, 1754
Suydam v. Clark, 2 Sandf. 133,	685	Syracuse Water Co. v. City of Syracuse,	
Suydam v. Duntun, 84 Hun. 506,	115	116 N. Y. 167,	1240, 1241
Suydam v. Jones, 10 Wend. 181,	952		
Swain v. Russell, 10 Ind. 438,	1955, 1957		
Swain v. Seamen, 9 Wall. 254,	690, 846		
Swales v. Jackson, 126 Ind. 282,	629, 637, 846, 1193		
Swallow v. Bain (N. M.), 32 Pac. Rep.	501		
501,			
Swallow v. Emery, 111 Mass. 355,	167		
Swan v. Arkansas City, 61 Fed. Rep. 478,	1531		
Swan v. Drury, 22 Pick. 485,	115		
Swan v. Nosmith, 7 Pick. 220,	613		
Swan v. North British Australasian Co.,	1833		
7 Hurl. & N. 602,	2062		
Swan v. Scott, 11 Serg. & R. (Pa.) 155,	2062		
Swan v. Watertown, etc., Insurance Co.,	319		
96 Pa. St. 37,	138		
Swank v. Nichols, 20 Ind. 198,	133		
Swann v. Buck, 40 Miss. 268,	2127		
Swann v. Swann, 21 Fed. Rep. 299	1954		
Swartwout v. Michigan, etc., R. Co., 24	1335, 1452		
Mich. 389,	155		
Swatara R. Co. v. Brune, 6 Gill, 41,	29, 422		
Swatts v. Bowen, 141 Ind. 322,	421		
Swayne v. Lyon, 67 Pa. St. 436,	—		
Sweany v. Hunter, 1 Murphey (N. C.), 187,	—		
Swearingen v. Buckley, 1 Texas Unrep.	454		
Cas. 421,	1063		
Swearingen v. Reed, 2 Texas Civ. App.			
362,			

T

Taber v. Ferguson, 109 Ind. 227,	1489
Taff Vale Ry. Co. v. Macnabb, 22 W. R.	
65,	2030
Taft v. Pike, 14 Vt. 405,	1772
Taft v. Sergeant, 18 Barb. 320,	1773
Tagiasco v. Molinari, 9 La. 512,	12
Taggart v. Tevanny, 1 Ind. App. 339,	2172
Targus v. Puget, 2 Ves. Sr. 194,	95
Talbot v. National Bank of the Common-	
wealth, 129 Mass. 67,	798
Talbot Paving Co. v. Common Council of	
City of Detroit, 91 Mich. 282,	2266
Talbot Paving Co. v. Gorman (Mich.), 61	
N. W. Rep. 655,	350
Talbot v. Merchants' Transportation Co.,	
41 Iowa, 247,	734
Talbutt v. Berkshire Life Ins. Co., 80 Ind.	
434,	246
Talcott v. Harder, 119 N. Y. 536,	1664
Talcott v. Olcott Manufacturing Co., 11	
Wkly. Dig. 141,	1316
Taliaferro v. Cundiff, 33 Texas, 415,	904
Tallinger v. Mandeville, 113 N. Y. 427,	1736
Tallis v. Tallis, 1 El. & Bl. 391,	2044, 2047
Tallmadge v. East River Bank, 26 N. Y.	
105,	2077
Talmadge v. Arrowhead Reservoir Co.,	
101 Cal. 367,	2216
Talmadge v. Oliver, 14 S. Car. 522,	162
Talmadge v. Wallis, 25 Wend. 107,	181, 1132
Tallman v. Cooke, 39 Iowa, 402,	15

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Tallman v. Earle, 13 N. Y. Supl. 805,	944	Taylor v. Jones, L. R. 1 C. P. D. 87,	87
Tallman v. Franklin, 14 N. Y. 584,	863, 1174	Taylor v. Longworth, 14 Pet. 172,	751
Taloe v. Merchants' Ins. Co., 9 How. 390,	76, 83	Taylor v. Lyon, 2 Dana, 276,	363
	756	Taylor v. Manners, L. R. 1 Ch. 48,	515, 554
Taloe v. Sandiford, 7 Wheat. 13,	665	Taylor v. McClure, 28 Ind. 39,	15
Talver v. West, Holt (N. P.), 178,		Taylor v. McLain, 64 Cal. 513,	422
Tampa, City of, v. Salomonson, 35 Fla. 446,	1479, 1480, 1521	Taylor v. McNutt, 58 Texas, 71,	1925
	2107	Taylor v. Mueller, 30 Minn. 343,	671
Tamsen v. Schaefer, 108 N. Y. 604,	411	Taylor v. National Bank (S. D. 1895), 62 N. W. Rep. 99,	996, 2288, 2289
Tanner v. Smith, 10 Sim. 410,	998	Taylor v.etherwood (Va. 1895), 20 S. E. Rep. 888,	750
Tanner v. Valentine, 75 Ill. 624,	641	Taylor v. Penquite, 35 Mo. App. 389,	1856, 1923
Tanneret v. Marshall, 21 La. Ann. 619,	2021		459
Tansley v. Turner, 2 Bing. N. C. 151,	669	Taylor v. Plumer, 3 M. & S. 562,	2279
Tantum v. Green, 21 N. J. Eq. 364,	1661, 1662	Taylor v. Preston, 79 Pa. St. 436,	605
Tapley v. Tapley, 10 Minn. 448,	1832	Taylor v. Rhea, 10 Miner (Ala.), 414,	378
Tappan v. Albany Brewing Co., 80 Cal. 570,	1996	Taylor v. Savage, 12 Mass. 98,	599
Tappan v. Brown, 9 Wend. (N. Y.) 175,	2089	Taylor v. Shelton, 30 Conn. 122,	1695
Tappan v. Poor, 15 Mass. 419,	708	Taylor v. Short, 107 Mo. 384,	976
Tappenden v. Randall, 2 Bos. & Pul. 467, 1870		Taylor v. Smith, 116 N. Car. 531,	856
Tarbell v. The Central Pacific, 34 Cal. 616, 1313		Taylor v. Smith (1893), L. R. 2 Q. B. 65,	664, 666
Tarkington v. Purvis, 128 Ind. 182,	381, 2282, 2289		2156
Tarleton v. Baker, 18 Vt. 9,	1947, 1948	Taylor v. Stockwell, 66 Ind. 505,	
Tarling v. Baxter, 6 B. & C. 360,	685	Taylor v. Taylor, 64 Ind. 356,	
Tarner v. Walker, L. R. 2 Q. B. 301,	54, 60	Taylor v. Taylor, 8 How. 183,	1021
Terrell, City of, v. Dessaint, 71 Texas, 770,	1522	Taylor v. Taylor, 144 Ill. 436,	1714
Tar River Nav. Co. v. Neal, 3 Hawks (N. C.), 520,	1323, 1434	Taylor v. Van Buren Association, 56 Ark. 340,	1619
Tascott v. Grace, 12 Ill. App. 639,	778, 784	Taylor v. Waters, 7 Taunt. 374,	641
Tasker v. Bartlett, 5 Cush. 359,	405	Taylor v. West, etc., Wheel Co., 9 Am. Law Rec. 28,	1373
Tassell v. Lewis, 1 Lord Ray. 743,	767	Taylor v. Williams, 45 Mo. 80,	1118
Tate v. Citizens' Mutual Fire Ins. Co., 13 Gray, 79,	829	Taylor v. Williams, 6 Wis. 363,	144, 146
Tate v. Jones, 16 Fla. 216,	846	Taylor v. Ypsilanti, 105 U. S. 60,	2207
Tate v. Williamson, L. R. 1 Eq. 528,	1024	Teague v. Irwin, 127 Mass. 217,	1875
Tate v. Williamson, L. R. 2 Ch. App. 55,	1024	Teague v. Williams, 6 Texas App. 468,	1038
Tatlock v. Smith, 6 Bing. 339,	2240	Teal v. Auty, 2 Brod. & Bing. 99,	638
Tatum v. Strader, 23 Ill. 493,	1946, 1948	Teal v. Walker, 111 U. S. 242,	2082
Tatum v. Kelley, 25 Ark. 208,	1128, 1902, 2023	Teall v. Consolidated Co., 119 N. Y. 654,	501
Taul v. Campbell, 7 Yerg. 319,	1763	Teasdale v. McPike, 25 Mo. App. 341,	1916, 1924
Taunton, City of, v. Wareham, 153 Mass. 192,	1849		
Tauziade v. Jumel, 133 N. Y. 614,	30	Teats v. Flanders, 118 Mo. 660,	1133
Taylor v. Merchants' Fire Ins. Co., 9 How. 390,	57, 698	Tebo v. Robinson, 100 N. Y. 27,	2199
Taylor v. Sandiford, 7 Wheat. 13,	748	Teegarden v. Lewis (Ind. 1893), 35 N. E. Rep. 24,	1817, 1826
Taylor v. Adair, 22 Iowa, 279,	237	Teel v. Yost, 128 N. Y. 387,	28
Taylor v. Allen, 40 Minn. 433,	676	Teirnan v. Roland, 15 Pa. St. 429,	397
Taylor v. Beck, 3 Rand. (Va.) 316,	1944	Telegraph Dispatch Co. v. McLean, L. R. 8 Ch. 658,	300
Taylor v. Beech, 1 Ves. Sen. 297,	619	Telford v. Frost, 76 Wis. 172,	1182
Taylor v. Blackman (Miss.). 12 So. Rep. 458,	545	Tempest v. Fitzgerald, 3 B. & Ald. 680,	663
Taylor v. Blair (Sup.), 13 N. Y. Supl. 154,	2182	Tempest v. Fitzgerald, 3 B. & Ald. 321,	672
Taylor v. Blanchard, 13 Allen (Mass.), 370,	2026, 2032, 2046, 2049, 2051	Tempest v. Kilner, 3 C. B. 249,	660
Taylor v. Board of Health, 31 Pa. St. 73,	460, 803, 805, 1829	Temple v. Johnson, 71 Ill. 13,	842
Taylor v. Bowker, 111 U. S. 110,	1400	Temple v. Lemon, 112 Ill. 51,	154, 259, 1321
Taylor v. Brewer, 1 Maule & Selw. 290,	132, 133	Templeton v. Brown, 86 Tenn. 50,	1680
Taylor v. Brooklyn R. Co., 119 N. Y. 561,	406, 407	Templeton v. Green (Texas C. App. 1894), 25 S. W. Rep. 1073,	970
Taylor v. Caldwell, 113 E. C. L. 826,	270, 283, 291, 292, 846	Ten Eyck v. Manning, 52 N. J. Eq. 47,	1104, 1189
Taylor v. Carpenter, 11 Paige, 232,	1987	Ten Eyck v. Vanderpoel, 8 John. 120,	593
Taylor v. Chester, L. R. 4 Q. B. 303,	1042	Tennant v. Crocker, 85 Mich. 328,	1522
Taylor v. Corporation of St. Helens, L. R. 6 Ch. D. 264,	884	Tennessee v. Sneed, 96 U. S. 69,	1496, 2153
Taylor v. Davis, 82 Wis. 455,	2244, 2248	Tennessee v. Whitworth, 117 U. S. 129,	853, 1456, 1457
Taylor v. Fox, 16 Mo. App. 527,	117, 897	Tennessee R. Co. v. Danforth, 99 Ala. 331,	2250
Taylor v. Fulk (Ky. 1895), 29 S. W. Rep. 349,	997	Tennessee River, etc., Co. v. Kavanaugh,	93 Ala. 324,
Taylor v. Galland, 3 Greene (Iowa), 1,	572	Tennessee River Trans. Co. v. Kavanaugh,	101 Ala. 1,
Taylor v. Glaser, 2 Serg. & R. 502,	19	Tenney v. Foote, 95 Ill. 99,	1272
Taylor v. Henry, 48 Md. 550,	251	Tenney v. Lumber Co., 43 N. H. 343,	1930
Taylor v. Hoey, 4 J. & S. 402,	466	Tenny v. Mulvaney, 8 Ore. 129,	1231
Taylor v. Horst, 52 Minn. 300,	565	Terhune v. Oldis, 41 N. J. Eq. 146,	890
Taylor v. Jaques, 106 Mass. 291,	1830, 1832	Terre Haute, etc., R. Co. v. McMurray, 98 Ind. 358,	1911
		Terrell, <i>In re</i> , 51 Fed. Rep. 213,	1982

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Terrell, City of, v. Dessaint, 71 Texas, 770, 1533, 1586,	1587	The Delaware Railroad Tax, 18 Wall. (U. S.) 206,	2131
Terrell v. Frazier, 79 Ind. 473,	638	The Eddy, 5 Wall. 481,	124
Terrell v. Weymouth, 32 Fla. 255,	996	The Energia, 56 Fed. Rep. 124,	741
Terrett v. Sharon, 34 Conn. 105,	1521	The Enos B. Phillips, 53 Fed. Rep. 153,	396
Terrett v. Taylor, 9 Cranch (U. S.), 43,	2124	The Floyd Acceptance, 7 Wall. 666,	1342, 1430
Terrill v. Auchauer, 14 Ohio St. 85,	178	The Gaetano & Maria, L. R. 7 P. D. 137,	740
Territory v. Carson, 7 Mont. 417,	1512	The Gazette, 128 U. S. 474,	917
Territory v. City of Oklahoma (Okla. 1894), 37 Pac. Rep. 1094,	1567	The Harbinger, 50 Fed. Rep. 941,	936
Terry v. Anderson, 95 U. S. 628,	2158	The Highlands Chemical Co. v. Mat- thews, 76 N. Y. 145,	305
Terry v. Bale, 1 Den. (N. Y.) 452,	788	The Jagger Iron Co. v. Walker, 76 N. Y. 521,	552
Terry v. Duntze, 2 H. Bl. 389,	114	The Karnak, L. R. 2 P. C. 505,	740
Terry v. Life Ins. Co., 1 Dillon, 403,	119	The Kimball, 3 Wall. 37,	452, 1929
Terry v. Little, 101 U. S. 216,	1381, 1384	The Lake Ontario Co. v. Curtiss, 80 N. Y. 219,	242
Terry v. Munger, 121 N. Y. 161,	781, 2168, 2169, 2275	The Lively, 1 Gall. 315,	506
Terry v. Rosell, 32 Ark. 478,	2167	The Monte Allegre, 9 Wheat. 516,	356
Terry v. Shively, 64 Ind. 106,	902	The Omaha Bridge Cases, 10 U. S. App. 98,	189, 1499
Terry v. Tubman, 92 U. S. 156,	1382	The Oregon v. Pittsburgh Iron Co., 55 Fed. Rep. 666,	917
Teschner v. Merea, 118 Ind. 586,	1355	The Queen v. Justices of Shropshire, 8 Ad. & E. 173,	764
Tessier v. Roussel, 41 La. Ann. 474,	1675	The Reeside, 2 Sumn. 567,	926
Tetley v. Wanless, L. R. 2 Ex. 275,	564	The Resolution, 2 Dall. (U. S.) 10,	2020
Texas, etc., Association v. Kerr (Texas Sup.), 13 S. W. Rep. 1020,	175	The Schooner Rapid, 1 Gall (U. S. C. C.), 295,	2020
Texas, etc., Co. v. Robards, 60 Texas, 545,	2073	The Ship Francis, 1 Gall (U. S. C. C.), 445,	2020
Texas, etc., Oil Co. v. Adoue, 83 Texas, 650,	2037, 2058	The Tom Lyle, 48 Fed. Rep. 690,	470
Texas, etc., Ry. Co. v. Rust, 19 Fed. Rep. 239,	753	The Tybee, 1 Wood. 358,	124
Texas, etc., R. Co. v. Marshall, 136 U. S. 393,	375, 1974, 1977	The Woodland, 14 Blatchford, 499,	740
Texas & P. Ry. Co. v. City of Marshall, 136 U. S. 393,	860	Theoford v. McClintock, 47 Ala. 647,	1906
Texas & P. Ry. Co. v. Southern Pac. Ry. Co., 41 La. Ann. 970,	1983	Theiss v. Weiss, 66 Pa. St. 9,	856
Texas Railway Co. v. Southern Pac. R. Co., 41 La. Ann. 970,	1424	Theus v. Dugger, 93 Tenn. 41,	1750
Teucher v. Hiatt, 23 Iowa, 527,	763	Thiemann v. Heinze, 120 Mo. 630,	1039
Teutonia Ins. Co. v. Mund, 102 Pa. St. 89,	896	Thigpen v. Mississippi R. Co., 32 Miss. 347,	259, 260
Tewkesbury v. Bennett, 31 Iowa, 83,	323	Thimble v. Reis, 37 Pa. St. 448,	1764
Tewksbury v. Hayes, 41 Maine, 123,	2210	Thimbleby v. Barron, 3 M. & W. 210,	569
Tewksbury v. Howard, 138 Ind. 103,	959, 1176	Thing v. Libbey, 16 Me. 55,	1777
Tewksbury Tp., Overseer of Poor of, v. Overseer of Poor of Branchburg Tp., 44 N. J. Law, 595,	1548	Third Nat. Bank v. Harrison, 10 Fed. Rep. 243,	1923
Thacher v. Churchill, 118 Mass. 108,	1707	Third Nat. Bank v. Humphreys, 66 Fed. Rep. 872,	530
Thacker v. Booth (Ky.), 6 S. W. Rep. 460,	417	Third Nat. Bank v. Marine Lumber Co., 44 Minn. 65,	1352
Thacker v. Thacker, 125 Ind. 489,	1725	Thomas v. Barnes, 156 Mass. 581,	344
Thackrah v. Illas, 119 U. S. 499,	974	Thomas v. Brownville, etc., R. Co., 109 U. S. 522,	1304, 1306
Thalimer v. Brinkerhoff, 20 Johns. (N.Y.) 386,	1865	Thomas v. Caldwell, 50 Ill. 138,	2255
Thalhimer v. Brinkerhoff, 6 Cow. 90,	466	Thomas v. Caulkett, 57 Mich. 392,	1999
Thatcher v. Dinsmore, 5 Mass. 299,	1189	Thomas v. City of Richmond, 12 Wall. (U. S.) 349,	1912
Thatcher v. Dudley, 2 Root, 169,	531	Thomas v. Cook, 8 Barn. & Cres. 728, 596, 599, 613, 615, 616, 617	488
Thatcher v. England, 3 C. B. 254,	54	Thomas v. Corey, 74 Mich. 216,	2014
Thatcher v. Humble, 67 Ind. 444,	2256	Thomas v. Cronise, 16 Ohio, 54,	2174
Thatcher v. Morris, 11 N. Y. 437,	1956	Thomas v. Dale, 86 Ind. 435,	836
Thatcher v. Omans, 3 Pick. 521,	1672	Thomas v. Dickinson, 14 Barb. 90,	1883
Thatcher v. Wardens, etc., 37 Mich. 264,	15, 67	Thomas v. Edwards, 2 Mees. & W. 215,	388, 389
Thaxton v. Edwards, 1 Stew. (Ala.) 524,	2197	Thomas v. Evans, 10 East, 101,	127, 2225
Thayer v. Brackett, 12 Mass. 450,	393	Thomas v. Fleury, 26 N. Y. 26,	647
Thayer v. Meeker, 86 Ill. 470,	382, 384	Thomas v. Hammond, 47 Texas, 42,	465
Thayer v. Richards, 19 Pick. 398,	490	Thomas v. McDaniel, 14 Johns. 185,	2047
Thayer v. Seavey, 11 Maine, 284,	2150	Thomas v. Miles' Admr., 3 Ohio St. 274,	110
Thayer v. Seep, 163 Pa. St. 414,	1064	Thomas v. Perry, Pet. C. C. 49,	1774
The Ætna Iron Works Co. v. Kossuth County, 79 Iowa, 40,	135	Thomas v. Pullis, 56 Mo. 211,	1774
The Amiable Nancy, 3 Wheat. 546,	506	Thomas v. Railroad Co., 101 U. S. 71, 1226, 1227, 1248, 1252, 1412, 1429, 1431, 1576, 1970	41, 2179
The Anna Maria, 2 Wheat. 327,	506	Thomas v. Scutt, 127 N. Y. 133,	384, 1870
The Bark Charlotte, 9 Ben. 1,	276	Thomas v. Shoemaker, 6 Watts & S. 179, 384,	1870
The Barque Iddo Kimball, 8 Ben. 297,	124	Thomas v. Simpson, 80 N. Car. 4,	345
The Barque Woodland, 7 Ben. 110,	740	Thomas v. Sorrell, Vaughan, 330,	643
The Blair, etc., Co. v. Walker, 39 Iowa, 406,	647	Thomas v. Stewart, 132 N. Y. 580,	127, 476
The Cargo of Ship Emulous, Gall (U. S. C. C.), 562,	2020	Thomas v. Walnut Land, etc., Co., 43 Mo. App. 653,	786
The City of Rome, 49 Fed. Rep. 392,	31	Thomas v. Weaver, 52 N. J. Eq. 580,	1722
The Confederate Note Case, 19 Wall. 543,	899	Thomas v. Williams, 10 B. & C. 664,	608
The D. B. Steelman, 48 Fed. 580,	470		
The David Pratt, 1 Ware, 509,	552		
The Delaware, 14 Wall. 579,	334		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Thomas Mufg. Co. v. Watson, 85 Maine, 300,	2218	Thormaehlen v. Kaepfel, 86 Wis. 378,	
Thomason v. Capital Ins. Co. (Iowa 1894), 61 N. W. Rep. 843,	1080, 1081	Thorn v. Deas, 4 Johns. (N. Y.) 84,	1786, 1793
Thomason v. De Greayer (Cal. 1892), 31 Pac. Rep. 567,	2216	Thorn v. Pinkham, 84 Maine, 101,	1828
Thomason v. Dill, 30 Ala. 444,	550	Thornborow v. Whitacre, 2 Ld. Raym. 1164,	270
Thomasson v. Boyd, 13 Ala. 419,	1778	Thornburg v. Harris, 3 Cold. (Tenn.) 157,	1854
Thompson v. Abbott, 61 Mo. 176,	1456	Thornburg v. Masten, 88 N. C. 293,	683
Thompson v. Andrus, 73 Mich. 551,	878	Thornburg v. Wiggins, 135 Ind. 178,	1765
Thompson v. Ashton, 14 Johns. 316,	167	Thorne v. Barwick, 18 Up. Can. C. P. 369,	83
Thompson v. Bertrand, 23 Ark. 730,	332	Thornhill v. Neats, 8 C. B. N. S. 831,	299
Thompson v. Board of Supervisors, 40 Ill. 879,	257	Thorington v. Smith, 8 Wall. 1,	882, 899, 2225
Thompson v. Brannin, 94 Ky. 490,	927	Thornton v. Jenyns, 1 Man. & G. 166,	192
Thompson v. Brown, 1 Moody & M. 40,	472	Thornton v. Railway Co., 81 N. Y. 462,	1447
Thompson v. City of Sumner, 9 Wash. 810,	1561	Thornton v. Sheffield, etc., R., 84 Ala. 109,	885
Thompson v. Cohen, 127 Mo. 215,	996	Thorp v. Keokuk Coal Co., 48 N. Y. 253,	237
Thompson v. Cummings & Co., 68 Ga. 124,	1926	Thorp v. Pettit, 16 N. J. Eq. 488,	1125
Thompson v. Davies, 13 Johns. (N. Y.) 112,	2000	Thorp v. Stewart, 44 Hun. 232,	652
Thompson v. Ela, 58 N. H. 419,	1721	Thorp v. Rutland, etc., Co., 27 Vt. 140,	2133, 2147
Thompson v. Faussat, Pet. C. C. 182,	579	Thorpe v. Thorpe, 1 L. Raym. 662,	114
Thompson v. First Nat. Bank, 111 U. S. 529,	1385	Thorpe v. Thorpe, 1 Ld. Raym. 235,	862, 892
Thompson v. Foerstel, 10 Mo. App. 87,	1645	Thouvenin v. Lea, 26 Texas, 612,	635
Thompson v. Gordon, 3 Strobb. Law (S. Car.), 196,	654, 2210	Thrall v. Newell, 19 Vt. 202,	872
Thompson v. Gregory, 4 John. 81,	643	Thrasher v. Doig, 18 Fla. 809,	1737
Thompson v. Gould, 20 Pick. 134,	167, 168, 836, 837	Thrasher v. Pike County R. Co., 25 Ill. 393,	255, 260
Thompson v. Hamilton, 12 Pick. 426,	910	Thrift v. Payne, 71 Ill. 408,	148
Thompson v. Hanson, 28 Minn. 484,	201	Throop v. Hatch Lithographic Co., 125 N. Y. 530,	1353
Thompson v. Harrison, 2 Bro. C. C. 164,	564	Thrupp v. Fielder, 2 Esp. 628,	1777
Thompson v. Irwin, 42 Mo. App. 403,	354, 355, 357	Thurber v. La Roque, 105 N. Car. 301,	1741
Thompson v. Johnson, 40 N. J. Law, 220,	822	Thurber v. Sprague, 17 R. I. 634,	544
Thompson v. Ketcham, 4 John. 285,	711	Thurman v. Wild, 39 E. C. L. 252,	445
Thompson v. Lack, 3 M. G. & S. 540,	568	Thurston v. Blaisdell, 8 N. H. 367,	402
Thompson v. Lay, 4 Pick. (Mass.) 48,	1776, 1777	Thurston v. Rosenfield, 42 Mo. 474,	724
Thompson v. Leslie, 14 N. Y. Supl. 472,	123	Thygesen v. Newfelder, 9 Wash. 455,	1760
Thompson v. Libby, 35 Minn. 443,	351	Thynne v. Earl of Glengall, 2 H. L. Cas. 131,	843
Thompson v. Libby, 34 Minn. 374,	334	Tibbals v. Jacobs, 31 Conn. 428,	90, 91
Thompson v. Longan, 42 Mo. App. 146,	197	Tibbetts v. Gerrish, 25 N. H. 41,	1777
Thompson v. Macaroni, 3 B. & C. 1,	672	Tibbetts v. Cartwell (N. H. 1898), 29 Atl. Rep. 411,	946
Thompson v. Means, 11 Sm. & M. (Miss.) 2039,	—	Ticonic R. Co. v. Lang, 63 Maine, 480,	155
Thompson v. Munger, 15 Texas, 523,	2214	Tiddy v. Harris, 101 N. Car. 589,	451, 545
Thompson v. Nigley, 53 Kan. 664,	1831	Tielens v. Hooper, 5 Exch. 830,	869
Thompson v. Paige, 1 Metc. 565,	217, 256	Tier v. Lampson, 35 Vt. 179,	1759
Thompson v. Percival, 5 B. & Adol. 925,	192, 537	Tiernan v. Binns, 92 Pa. St. 248,	1714
Thompson v. Phoenix Ins. Co., 136 U. S. 287,	1088	Tiernan v. Granger, 65 Ill. 351,	651
Thompson v. Powles, 2 Simons, 194,	729	Tiernan v. Poor, 1 Gill & J. 216,	1186
Thompson v. Prouty, 27 Vt. 14,	876, 878, 879	Tiffany v. Glasgow, 83 Minn. 266,	456
Thompson v. Purcell, 10 Allen, 426,	146	Tiffany v. St. John, 65 N. Y. 314,	410
Thompson v. Reno, etc., Bank, 19 Nev. 171,	1375	Tift v. Quaker City Nat. Bank, 141 Pa. St. 550,	1314
Thompson v. Reno, etc., Bank, 19 Nev. 103,	1375	Tighe v. Morrison, 116 N. Y. 263,	596, 603, 615
Thompson v. Riggs, 5 Wall. 663,	920	Tightmeyer v. Mongold, 20 Kan. 90,	781
Thompson v. St. Nicholas Bank, 113 N. Y. 325,	470, 478	Tilden v. Blair, 21 Wall. 241,	728
Thompson v. Stevens, 71 Pa. St. 161,	786	Tilden v. Rosenthal, 41 Ill. 385,	109
Thompson v. Thompson, 4 Ohio St. 333,	244	Tillett v. Charing Cross Bridge Co., 26 Beav. 419,	1212
Thompson v. Thompson, 9 Ind. 323,	48	Tilley v. American B. & L. Assn., 52 Fed. Rep. 618,	1619
Thompson v. Western Tel. Co., 32 Mo. App. 191,	2105	Tilley v. County of Cook, 103 U. S. 155, 891, 920, 923	749
Thompson v. Western Union Telegraph Co., 64 Wis. 531,	1961	Tilley v. Thomas, L. R. 3 Ch. App. 61,	1748
Thompson v. Williams, 58 N. H. 248,	2102	Tillman v. Shackleton, 15 Mich. 447,	1076
Thompson, etc., Light Co. v. Henderson, etc., Light Co. (N. Car.), 21 S. E. Rep. 951,	1399, 1406	Tillis v. Smith (Ala. 1896), 19 So. Rep. 374,	31
Thomson v. Advocate General, 12 C. & F. 1,	721	Tillison v. Tillison, 63 Vt. 411,	526
Thomson v. Gortner, 73 Md. 474,	95	Tilton v. Alcott, 16 Barb. 598,	1544
Thomson v. Lee Co., 3 Wall. 327,	1499	Times Publishing Co. v. City of Everett, 9 Wash. 518,	2089
Thomson v. Thomson, 7 Ves. 470,	1864	Timmerman v. Dever, 62 Mich. 34,	1497
		Tindley v. City of Salem, 137 Mass. 171,	1279
		Tingley v. Bellingham Bay Boom Co., 5 Wash. 644,	950
		Tingley v. Fairhaven Land Co., 9 Wash. 34,	459
		Tingue v. The Village of Port Chester, 101 N. Y. 294,	941
		Tinkham v. Heyworth, 31 Ill. 519,	192
		Tipper v. Bicknell, 3 Bing. (N. C.) 710,	

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Tippin v. Brockwell, 89 Ga. 467,	483	Tooley v. Windham, Cro. Eliz. (1 Croke)	206,	192, 214
Tipton, County of, v. Locomotive Works,	1461	Tootle v. First National Bank, 6 Wash.	181,	1274
103 U. S. 523,	11	Tootle v. Jenkins, 82 Texas, 29,		474
Tischler v. Kurtz, 35 Fla. 323,	1727	Topeka Bridge Co. v. Cummings, 3 Kan.	55,	155
Tisdale v. Bailey, 6 Ired. Eq. (N. Car.)	690	Topliff v. Topliff, 122 U. S. 121,		875
487,	13	Toppan v. Cleveland, etc., R. Co., 1 Flip.		1430
Tisdale v. Harris, 20 Pick. 9,	457	(U. S.) 74,		1176
Tisher v. Beckwith, 30 Wis. 55,	792	Torr v. Torr, 20 Ind. 118,		239
Titcomb v. McAllister, 81 Maine, 399,		Torrens v. Campbell, 74 Pa. St. 235,		708, 2120
Titman v. Titman, 64 Pa. 480,		Torrey v. Corliss, 33 Maine, 553,		
Titus v. Cairo, etc., R. Co., 37 N. J. Law,	1344	Torrey v. Dustin Monument Association,		1358
98,	353	5 Allen (Mass.), 327,		553
Titus v. Poole, 145 N. Y. 414,	1351	Toucey v. Bowen, 1 Biss. 81,		1382
Titus v. President, etc., 5 Lans. 250,		Touche v. Metropolitan Warehousing Co.,		1308
Titus v. President, etc., of Turnpike Road,	1305	L. R. 6 Ch. App. 671,		201
61 N. Y. 237,	986	Tousey v. Moore, 79 Mich. 574,		201
Titus v. Rochester German Ins. Co. (Ky.		Towanda Bridge Co., <i>In re</i> , 91 Pa. St. 216,		2146
1895), 31 S. W. Rep. 127,	447, 455, 465	Towell v. Gatewood, 2 Scam. (Ill.) 22,		348
Tobey v. Barber, 5 Johns. 68,	1246	Tower v. Tudhope, 37 U. C. Q. B. 200,		666
Tobey v. Robinson, 99 Ill. 222,	1771	Towers v. Moor, 2 Vern. 98,		821, 223
Tobey v. Wood, 123 Mass. 88,	777	Towers of Osborne, 1 Stra. 506,		656
Tobias v. Rogers, 13 N. Y. 59,		Towers, etc., Ginning Co. v. Inman, 96 Ga.		1266
Tod v. Kentucky, etc., Land Co., 57 Fed.	1342	Towle v. American Bldg. and Loan Assn.		1617, 1624
Rep. 47,	2150	61 Fed. Rep. 446,		1617, 1624
Todd v. Crumb, 5 McLean (U. S.) 172,	30	Towle v. Larrabee, 26 Maine, 464,		2101
Todd v. Maxfield, 6 B. & C. 105,	401	Towles v. Fisher, 77 N. Car. 437,		1740
Todd v. Parker, 1 N. J. Law, 45,	1208	Towne v. Rice, 122 Mass. 67,		1885
Todd v. Taft, 7 Allen, 371,	607	Towne v. Wiley, 23 Vt. 355,		1802
Todd v. Tobey, 29 Maine, 219,	182	Town v. Bank, 2 Doug. (Mich.) 530,		1404
Todd v. Union Dime Co., 118 N. Y. 337,	416, 419	Town v. Trow, 24 Pick. 168,		382
Todd v. Union Dime Co., 128 N. Y. 636,	231, 238	Town Council of Cahaba v. Burnett, 34		804, 805, 1835
	1672	Ala. 400,		489
Tode v. Gross, 127 N. Y. 480,	1268, 1981, 2027, 2074	Towner v. Tickner, 112 Ill. 217,		1534
Todhunter v. Des Moines, etc., R. Co., 58	1256	Town of Andes v. Ely, 158 U. S. 312,		1835
Iowa, 205,	141	Town of Cahaba v. Burnett, 34 Ala. 400,		1058
Toher v. Lappine, 60 N. Y. St. Rep. 853,	253	Town of Colchester v. Culver, 29 Vt. 111,		1524, 1525, 1529, 1530
Toker v. Toker, 31 Beav. 629,	781	Town of Coloma v. Eaves, 92 U. S. 484,		2125
Toledo, etc., R. Co. v. Chew, 67 Ill. 378,	157	Town of Danville v. Pace, 25 Gratt. (Va.)		1
Toledo R. Co. v. Johnson, 49 Mich. 148,	949	1,		2125
Toledo, etc., R. Co. v. Levy, 127 Ind. 168,	1911	Town of Douglasville v. Johns, 62 Geo.		458, 459
Toledo, etc., R. Co. v. Mylott, 6 Ind. App.	1212	423,		1508
438,	2284	Town of Durango v. Pennington, 8 Colo.		1585
Toledo, etc., R. Co. v. Pennsylvania Co.,	7	257,		2143
54 Fed. Rep. 746,	483	Town of Eagle v. Kohn, 84 Ill. 292,		1461
Toledo Sav. Bank v. Johnston (Iowa 1895),	2016	Town of East Hartford v. Hartford Bridge		1473, 1566
62 N. W. Rep. 748,	1794	Co., 10 How. (U. S.) 511,		450,
Tolhurst v. Powers, 133 N. Y. 460,	1761	Town of East Lincoln v. Davenport, 94		968
Toledo, etc., R. Co. v. Johnson, 55 Mich.	1721	U. S. 801,		101
456,	628	Town of Essex v. New York, etc., R. Co.,		1545
Toley v. Armstrong, 4 Wash. (C. C.) 297,	782	8 Hun (N. Y.), 361,		2147
Toll v. Wright, 37 Mich. 93,		Town of Fowler v. Austin Mfg. Co., 5 Ind.		804
Tolman v. Smith, 55 Cal. 280,		App. 489,		2142
Tombler v. Reitz, 134 Ind. 9,		Town of Glastenbury v. McDonald, 44 Vt.		193,
Tomlin v. Hilyard, 43 Ill. 300,		450,		210, 1473
Tomlinson v. Bentall, 5 Barn. & Cress.		Town of Hamden v. Merwin, 54 Conn. 418,		1058
738,		Town of Hamilton v. Chopard, 9 Wash.		1828, 1832
Tomlinson v. Branch, 15 Wall. (U. S.) 460,		352,		21, 1084
	610	Town of Lake View v. Rose Hill Cemetery		1660
Tomlinson v. Gell, 6 Ad. & E. 564,	608	Co., 70 Ill. 191,		395, 398
Tomlinson v. Gill, Ambler, 330,	2140	Town of Ligonier v. Ackerman, 46 Ind.		1502
Tomlinson v. Jessup, 15 Wall. (U. S.) 454,	398	552,		
Tompkins v. Batio, 11 Neb. 147,	1906	Town of Marietta v. Fearing, 4 Ohio, 427,		
Tompkins v. Clay St. R. Co., 66 Cal. 163,	2227	Town of Petersburg v. Mappin, 14 Ill.		
Tompkins v. Compton, 93 Ga. 520,	1664	193,		
Tompkins v. Dudley, 25 N. Y. 272,	1647	Town of Princeton v. Vierling, 40 Ind. 340,		
Tompkins v. Hunter, 21 N. Y. Supl. 8,	954	Town of Rutland v. Paige, 24 Vt. 181,		
Tompkins v. Hunter, 20 N. Y. Supl. 355,		Town of Sharon v. Gager, 46 Conn. 189,		
Tompkins v. Tompkins, 21 N. J. Eq. 338,				
Tompkinson v. South Eastern R. Co., L.				
R. 35 Ch. Div. 675,	1421			
Toner v. Fulkerson, 125 Ind. 224,	1382			
Toof v. Martin, 13 Wall. 40,	152			
Toohy v. Comstock, 45 Mich. 603,	239			
Tool Co. v. Norris, 2 Wall. 45,				
1304, 1591, 1853, 1885, 1992, 1995, 2079, 2081,	2082			
Tooley v. Bacon, 70 N. Y. 168,	2246			
Toole v. Baer, 91 Ga. 113,	2176			
Tooley v. Chase, 26 Ore. 600,	1057			

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Town of Woodstock v. Town of Barnard, 67 Vt. 97,	1849	Triplett v. Graham, 58 Iowa, 135,	1686
Townsend v. Fenton, 32 Minn. 482,	842	Trist v. Child, 21 Wall. (U. S.) 441,	1884, 1891, 1992, 1994, 2053
Townsend v. Fisher, 2 Hilt. (N. Y.) 37,	214	Troewert v. Decker, 29 Ark. 386,	2103
Townsend v. Hargraves, 118 Mass. 325,	296, 591, 593	Troewert v. Decker, 51 Wis. 46,	2100, 2106
Townsend v. Houston, 1 Harr. 532,	843	Trotter v. Heckscher, 40 N. J. Eq. 612,	1049
Townsend v. Jemison, 9 How. 407,	717	Troup's Case, 29 Beav. 353,	1253
Townsend v. Long, 77 Pa. St. 143,	605	Troutman v. Lucas, 63 Geo. 466,	519, 524
Townsend v. Pepperell, 99 Mass. 40,	1812	Trovinger v. McBurney, 5 Cow. (N. Y.)	253,
Townsend v. Stearns, 32 N. Y. 209,	1641		2016
Townsend v. Townsend, 6 Metc. (Mass.)	319,	Trow v. Shannon, 78 N. Y. 446,	559
	1111	Trowbridge v. Dean, 40 Mich. 687,	869
Townshend v. Goodfellow, 40 Minn. 312,	418	Troy Academy v. Nelson, 24 Vt. 194,	217, 256
Township of Midland v. County Board Gage County, 37 Neb. 532,	1543	Troy, Bank of, v. Topping, 9 Wend. 273,	593
Township of Union v. Smith, 39 Iowa, 9,	2237	Troy Fertilizer Co. v. Logan, 96 Ala. 619,	103, 106
Townslay v. Chapin, 12 Allen, 476,	1186	Troy Laundry Machine Co. v. Henry, 23 Ore. 232,	330
Townslay v. Sumrall, 2 Pet. 169,	594, 597	Troy R. Co. v. Newton, 8 Gray, 596,	155
Towslee v. Healey, 39 Vt. 522,	510, 512, 522	Troy R. Co. v. Tibbits, 18 Barb. 297,	155
Towson v. Havre de Grace Bank, 6 H. & J. 47,	394	Truman v. Truman, 79 Iowa, 506,	—
Trabant v. Rummell, 14 Ore. 17,	1734	Trumball v. Tilton, 21 N. H. 128,	1633
Trabue v. Short, 18 La. Ann. 257,	728	Trumbo v. Lockridge, 4 Bush, 415,	363
Tracy v. Chicago, 24 Ill. 500,	854, 863	Trundie v. Riley, 17 B. Mon. (Ky.) 396,	2090
Tracy v. Colby, 55 Cal. 67,	1304	Truscott v. King, 6 N. Y. 147,	470
Tracy v. Jenks, 15 Pick. 465,	2107	Trust Co. v. Cole, 4 Fla. 359,	1163
Tracy v. Strong, 2 Conn. 659,	394	Trustees v. Lynch, 70 N. Y. 440,	2077
Tracy v. Talmage, 14 N. Y. 162,	1895, 1901, 1903, 1912, 1972	Trustees v. McCaughy, 2 Ohio St. 152,	2120
Tracy v. Tracy's Heirs, 14 W. Va. 243,	1179	Trustees v. Ripley, 6 Maine, 442,	256
Traders' Bank v. Parker, 130 N. Y. 415,	200, 204	Trustees v. Stetson, 5 Pick. 506,	256, 257
	990	Trustees v. Thacher, 87 N. Y. 311,	2271
Trail v. Baring, 4 De Gex, J. & S. 318,	724	Trustees United Brethren, etc., v. Rausch,	122 Ind. 167,
Train v. Kendall, 137 Mass. 366,	777, 1801		1497
Trainer v. Trumbull, 141 Mass. 527,	578	Trustees, etc., v. Hohn, 82 Ky. 1,	1518
Trambly v. Ricard, 130 Mass. 259,	644	Trustees of Dartmouth College v. Wood- ward, 4 Wheat. 518,	1583, 2122, 2127, 2130, 2142
Traphagen v. Burt, 67 N. Y. 30,	244, 553	Trustees of First Baptist Church v. Brook- lyn Fire Ins. Co., 19 N. Y. 305, 28 N. Y.	153,
Traphagen's Ex'r v. Voorhees, 44 N. J.	1677, 1678, 1691, 1692		653
Trapnell v. Conklyn, 37 W. Va. 242,	1054, 1064	Trustees of Grammar School v. Burt, 11 Vt. 632,	2124
Trapp v. Moore, 21 Ala. 693,	708, 715	Trustees of Ky. Baptist Society v. Carter,	72 Ill. 247,
Trasher v. Everhart, 3 Gill & J. (Md.)	495		257
234,	453	Trustees of Presbyterian Church v. Na- tional State Bank (N. J. 1894), 29 Atl.	Rep. 320,
Traver v. Halsted, 23 Wend. 66,	409, 410, 975		2239
Traver v. Stevens, 11 Cush. 167,	1088	Trustees of Schools v. Otis, 85 Ill. 179,	1059
Travelers' Ins. Co. v. Redfield (Colo. App.), 40 Pac. Rep. 195,	1866	Trustees of Schools v. Tatman, 13 Ill. 27,	2142
Travis v. Insurance Co., 23 W. Va. 583,	1260	Tryon v. Hart, 2 Conn. 120,	573
Treadwell v. Davis, 34 Cal. 601,	912	Tryon v. Jennings, 22 How. Pr. 421,	189
Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.), 37,	1494	Tryon v. White & Corbin Co., 62 Conn.	161,
Treadwell v. Union Insurance Co., 6 Cow.	1208		1317
270,	645	Tscheider v. Biddle, 4 Dillon, 55,	1212
Treanor v. Houghton, 103 Cal. 53,	1899	Tuche v. Metropolitan, etc., Warehousing Co., L. R. 6 Ch. App. 671,	1314
Treasurer v. Commercial Mining Co., 23 Cal. 390,	2038	Tuckahoe Canal Co. v. Tuckahoe R., 11 Leigh (Va.), 42,	2135
Treat v. Hiles, 68 Wis. 344,	239, 475	Tucker v. Baldwin, 13 Conn. 136,	588
Treat v. Jones, 28 Conn. 334,	394	Tucker v. Bartle, 85 Mo. 114,	8
Treat v. Shoninger Melodeon Co., 35 Conn.	1712	Tucker v. Edwards, 7 Colo. 209,	526
543,	2073	Tucker v. Ferguson, 22 Wall. (U. S.) 527,	2139, 2140
Treat v. Stanton, 14 Conn. 445,	1725		434, 1477
Trebilcock v. Wilson, 12 Wall. 687,	389,	Tucker v. Justice, 13 Ired. (N. Car.) 434,	1477
Treleaven v. Dixon, 119 Ill. 548,	2073	Tucker v. Grand Rapids (Mich. 1895), 62 N. W. Rep. 1013,	1470
Trenor v. Jackson, 46 How. Pr. (N. Y.)	1725	Tucker v. Madden, 44 Maine, 206,	1066
389,	2237	Tucker v. McKee, 1 Bailey L. (S. Car.)	344,
Trentman v. Eldridge, 98 Ind. 525,	1508, 1509		1841
Trenton, School Trustees of City of, v. Bennett, 27 N. J. Law, 513,	2279	Tucker v. Meeks, 2 Sweeny, 736,	860, 886
Trester v. City of Sheboygan, 87 Wis.	336	Tucker v. Mowrey, 12 Mich. 378,	2104
496,	66, 82, 83	Tucker v. Murray, 2 Pa. Dist. Rep. 497,	517, 519
Trevelyan v. White, 1 Beav. 588,	696, 726		212
Trevidick v. Mumford, 31 Mich. 467,	415	Tucker v. Ronk, 43 Iowa, 80,	212
Trevor v. Wood, 36 N. Y. 207,	452,	Tucker v. Tucker, 24 Mich. 425,	490, 1712
Trimbey v. Vignier, 1 Bing. N. Car. 151,	461	Tuckpr v. West, 29 Ark. 386,	2103, 2109
	—	Tucker v. Woods, 12 Johns. (N. Y.) 190,	92, 214
Trimble v. Strother, 25 Ohio St. 378,	—		—
243, 246, 247, 962,	—	Tuckerman v. Hinkley, 9 Allen (Mass.)	2111
Trimble v. Williamson, 49 Ala. 525,	—		—
Tripler v. City of New York, 17 N. Y. Supl. 750,	—	Tuckerman v. Newhall, 17 Mass. 581,	540, 561, 572, 573, 818

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Tuckett v. Herdic, 5 Texas Civ. App. 690,	1937	U	
Tufnell v. Constable, 8 Simon, 69,	556	Udall v. Metcalf, 5 N. H. 396,	1904
Tufts v. Atlantic Tel. Co., 157 Mass. 269,	488	Ufford v. Wilkins, 33 Iowa, 110,	424
Tufts v. Copen, 16 S. E. Rep. 793,	1696	Uhlendorf v. Kaufman, 41 Ill. App. 373,	28
Tufts v. D'Arcambal, 85 Mich. 185,	164, 165	Uhlig v. Barnum, 43 Neb. 584,	858
Tufts v. Grever, 83 Maine, 407,	2230	Ullmann v. Jasper, 70 Texas, 446,	1681, 1682
Tufts v. Griffin, 107 N. C. 47,	167, 169	Ulman v. Jaeger, 67 Fed. Rep. 980,	968
Tufts v. Larned, 27 Iowa, 330,	1065	Ulrich v. Ulrich, 136 N. Y. 120,	794
Tufts v. Plymouth, etc., Co., 14 Allen, 407,	675	Ulsch v. Muller, 143 Mass. 379,	437
Tufts v. Thompson, 22 Mo. App. 564,	1644	Unckles v. Colgate, 148 N. Y. 529,	1863
Tufts v. Wynne, 45 Mo. App. 42,	167, 168	Underhill v. Van Cortlandt, 2 Johns. Ch. 339,	1131
Tugman v. National Steamship Co., 76 N. Y. 207,	2168	Underwood v. Brockman, 4 Dana, 309,	986
Tulane v. Clifton, 47 N. J. Eq. 351,	208, 376	Underwood v. Lilly, 10 Serg. & R. (Pa.) 97,	2119
Tuller v. Arnold, 98 Cal. 522,	1283	Underwood v. Scott, 43 Kan. 714,	1908
Tullis v. Jason (L. R. 1892), 3 Ch. 441,	1131	Underwood v. Smith, 19 N. Y. Supl. 380,	2041
Tunison v. Chamblin, 88 Ill. 378,	1789	Underwood v. Tew, 7 Wash. 297,	1143, 1144
Tunno v. Trezevant, 2 Des. 264,	223	Underwood v. Waldron, 12 Mich. 73,	255
Tupper v. Cadwell, 12 Metc. (Mass.) 559,	1799	Unger v. Boas, 13 Pa. St. 601,	1946
Turley v. Edwards, 18 Mo. App. 676,	1038	Ungericht v. State, 119 Ind. 379,	2100
Turnbull v. Brock, 31 Ohio St. 649,	189	Ungley v. Ungley, L. R. 4 C. D. 73,	227, 847, 849, 850
Turnbull v. Farnsworth, 1 Wash. Ter. 444,	1887	Union, Township of, v. Smith, 39 Iowa, 9,	2237
Turner v. Carpenter, 83 Mo. 333,	13	Union Bank v. Call, 5 Fla. 409,	550
Turner v. Chillicothe, etc., R. Co., 51 Mo. 501,	1318	Union Bank v. Carr, 15 Fed. Rep. 438,	1925
Turner v. Comer, 6 Gray (Mass.), 530,	1632	Union Bank v. Geary, 5 Pet. 99,	210, 1474
Turner v. Gaither, 83 N. Car. 357,	1777, 1778, 1798	Union Bank v. Kansas City Bank, 136 U. S. 223,	1391
Turner v. Johnson, 7 Dana (Ky.), 435,	2032	Union Bank v. Mayor, etc., of New York, 51 Barb. 159,	805
Turner v. Jones, 1 Lans. 147,	772	Union Bank v. State, 9 Yerg. (Tenn.) 489,	2136
Turner v. Kelly, 70 Ala. 85,	1069	Union Bridge Co. v. Troy and Lansingburgh R. Co., 7 Lansing, 240,	1412
Turner v. Mason, 65 Mich. 662,	658	Union B. Assn. v. Chicago, 61 Ill. 439,	1546
Turner v. Rusk, 53 Md. 65,	2278	Union, etc., Co. v. Erie, etc., 37 N. J. Law, 23,	210
Turner v. Turner, L. R. 14 Ch. Div. 829,	566	Union Cent. Life Ins. Co. v. Howell, 101 Mich. 332,	2252
Turner v. Turner, 44 Mo. 535,	1020	Union Central Insurance Co. v. Huyck, 5 Ind. App. 474,	1037
Turner v. Warren, 160 Pa. 336,	1711	Union Central Life Insurance Co. v. Woods, 11 Ind. App. 335,	1757
Turner v. Whidden, 22 Maine, 121,	109	Union Gold Min. Co. v. Rocky Mt. Nat. Bank, 2 Colo. 248,	1348
Turnpen v. Board, 7 Ind. 172,	1512	Union Hardware Co. v. Plume & Atwood Mfg. Co., 58 Conn. 219,	1317
Turnpike Co. v. Davidson County, 91 Tenn. 291,	2135	Union Hotel Co. v. Hersee, 79 N. Y. 454,	155
Turnpike Co. v. State, 3 Wall. (U. S.) 210,	2135	Union Insurance Co. v. McGookney, 33 Ohio, 555,	161
Turney v. Town of Bridgeport, 55 Conn. 412,	1489, 1491	Union Mut. Life Ins. Co. v. Frear Stone Manfg. Co., 97 Ill. 537,	1371
Tuthill v. Morris, 81 N. Y. 94,	408, 409	Union Nat. Bank v. Carr, 15 Fed. Rep. 433,	1919
Tuthill Spring Co. v. Smith, 90 Iowa, 331,	1374	Union Nat. Bank v. Hunt, 76 Mo. 439,	1602
Tuttle v. Gilbert Manufacturing Co., 145 Mass. 169,	2170	Union Nat. Bank v. Mayor, etc., 51 N. Y. 638,	805
Tuttle v. Everett, 51 Miss. 27,	458, 805	Union, etc., R. Co. v. McAlpine, 129 U. S. 305,	417, 847
Tuttle v. Swett, 31 Maine, 555,	652	Union Pacific Ry. Co. v. Chicago, R. I. & P. Ry. Co., 2 C. C. A. 174, 51 Fed. Rep. 309,	1123
Tuttle v. Tuttle, 12 Metc. 551,	525	Union Pacific R. Co. v. De Busk, 12 Colo. 294,	2133
Tweddle v. Atkinson, 1 B. & S. 393,	240	Union Pacific R. Co. v. Hall, 91 U. S. 343,	1439
Twenty-third Street Church v. Cornell, 117 N. Y. 601,	258, 268	Union Pac. R. Co. v. Harris, 158 U. S. 326,	578
Twin Creek, etc., Co. v. Lancaster, 79 Ky. 552,	260	Union Pac. R. Co. v. United States, 99 U. S. 700,	2119, 2132
Twin-Lick Oil Co. v. Marbury, 91 U. S. 587,	998, 1169, 1293, 1295, 1296, 1300, 1306, 1334, 1359, 1446, 1448	Union Ry. Co. v. Skinner, 9 Mo. App. 189,	805, 1174
Twiss v. George, 33 Mich. 253,	848	Union Stock Yard Co. v. Mallory, etc., Co., 157 Ill. 554,	913
Twiss v. Port Huron, 63 Mich. 528,	1555	Union Stone Works v. Breidenstein, 50 Kan. 53,	561
Twitchell v. Shaw, 10 Cush. 46,	513, 525	Union Turnpike Co. v. Jenkins, 1 Caines, 381,	290
Twyford v. Wareup, Finch, 310,	1101	Union Water Co. v. Murphy's Flat Flum-ing Co., 22 Cal. 620,	1499, 1514, 1603
Tyler v. Ames, 6 Lans. (N. Y.) 280,	131, 133, 160		
Tyler v. Burrington, 39 Wis. 136,	792		
Tyler v. Carlisle, 79 Maine, 210,	709, 1933		
Tyler v. Gallop's Estate, 68 Mich. 185,	1771, 1794		
Tyler v. Hall, 106 Mo. 313,	13, 14		
Tyler v. McCordle, 9 Smedes & M. 230,	1125		
Tyler v. Onzts, 93 Ky. 331,	680		
Tyrell, etc., Assn. v. Haley, 163 Pa. St. 301,	1606		
Tyrell, etc., Assn. v. Haley, 139 Pa. St. 476,	1605		
Tysen v. Somerville, 35 Fla. 219,	962		
Tyson v. Chestnut, 100 Ala. 571,	1066, 1069		
Tyson v. Hardesty, 29 Md. 305,	110		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Van Brunt v. Day, 81 N. Y. 251,	46	Van Schaick v. Van Buren, 70 Hun, 575,	98
Van Buskirk v. Day, 32 Ill. 260,	980	Van Schoeyck v. Backus, 9 Hun, 68,	652
Van Buskirk v. Hartford Fire Ins. Co., 14 Conn. 583,	721	Van Sickle v. Belknap, 129 Ind. 553,	1494
Vance v. Bloomer, 20 Wend. 196,	500	Van Syckel v. Dalrymple, 32 N. J. Eq. 233,	691
Vance v. Fore, 24 Cal. 436,	884	Van Syckel v. O'Hearn, 50 N. J. Eq. 173,	954, 955
Vance v. Hartzell (Tex. App.), 18 S. W. Rep. 88,	501	Van Tine v. Van Tine (N. J. Eq.), 15 Atl. Rep. 249,	1212
Vance v. Lukenbill, 9 B. Mon. 249,	518	Van Valkenburg v. Gregg, 45 Neb. 654,	96
Vanceleave v. Clark, 113 Ind. 61,	236, 244	Van Valkenburgh v. Torrey, 7 Cow. (N. Y.) 252,	1944
Van Clief v. Van Vechten, 130 N. Y. 571,	139, 140	Van Valkinburgh v. Watson, 13 John. 480,	778
Vandall v. Dock Co., 40 Cal. 83,	1227	Van Winkle v. Wilkins, 81 Ga. 93,	323
Vandebeck v. City of Rochester, 46 Hun, 87,	461	Van Woert v. Albany, etc., R. Co., 67 N. Y. 538,	646
Vandekarr v. Vandekarr, 11 Johns. 122,	779	Van Wyck v. Read, 43 Fed. Rep. 716,	724
Van Demark v. Barons, 52 Kan. 779,	1332	Van Zant v. Van Zant, 23 Ill. 435,	1061
Vanderbeck v. City of Rochester, 122 N. Y. 235,	804, 987	Varian v. Johnston, 108 N. Y. 645,	131
Vanderbeck v. Vanderbeck, 30 N. J. Eq. 265,	559, 562	Varick's Executor v. Crane, 4 N. J. Eq. 128,	697
Vanderbilt v. Eagle Iron Works, 25 Wend. 665,	786	Varner v. Noblesborough, 2 Greenl. 121,	453
Vanderbilt v. Schreyer, 91 N. Y. 392,	187, 199, 1651	Varnum v. Camp, 13 N. J. Law, 326,	724
Vanderburgh v. Bassett, 4 Minn. 242,	543	Varnum v. Hart, 119 N. Y. 101,	1353
Vandercook v. Williams, 106 Ind. 345,	1512	Varnum v. Martin, 15 Pick. 440,	797
Vanderpool v. Gorman, 140 N. Y. 563,	724	Vary v. Shea, 36 Mich. 388,	1074
Vanderslice v. Newton, 4 N. Y. 130,	276	Vass v. Hicks, 3 Murphy (N. Car.), 493,	559
Vandervelden v. Chicago, etc., Ry. Co., 61 Fed. Rep. 54,	579, 973	Vassar v. Camp, 11 N. Y. 441,	3, 76, 82, 84
Vandervoort v. Dewey, 42 Hun, 68,	901	Vassault v. Edwards, 43 Cal. 458,	688
Vandesande v. Chapman, 48 Maine, 262,	385	Vaugh v. Smith, 65 Iowa, 579,	604
Van Deusen v. Sweet, 51 N. Y. 378,	1813, 1814, 1823, 1825	Vaughan v. Porter, 16 Vt. 266,	869
Vandever v. Clark, 16 Ark. 331,	540, 572	Vaughan v. Smith, 58 Iowa, 553,	686
Vandine, <i>In re</i> , 6 Pick. (Mass.) 187,	1479	Vaughn v. Godman, 103 Ind. 499,	15
Van Doren v. Robinson, 16 N. J. Eq. 256,	1102, 1105, 1111	Vaughn v. Hopson, 10 Bush, 337,	162
Vandoren v. Todd, 3 N. J. Eq. 397,	429	Vaughn v. Parr, 20 Ark. 600,	215
Van Duzer's Estate, Matter of, 51 How. Pr. 410,	472	Vaughn v. Powell, 65 Miss. 401,	468
Van Duzor v. Allen, 90 Ill. 499,	162	Vaughn v. Village of Port Chester, 60 Hun, 401,	461
Van Duyn v. Vreeland, 122 N. J. Eq. 142,	7, 1212	Vaughn v. Village of Port Chester, 135 N. Y. 460,	459
Van Dyke v. Wilder, 66 Vt. 579,	509	Vaupell v. Woodward, 2 Sandf. Ch. 143,	693
Van Dyne v. Vreeland, 11 N. J. Eq. 371,	7, 1128, 1212	Vautrain v. St. Louis, etc., Railroad, 8 Mo. App. 538,	588
Van Epps v. Harrison, 5 Hill (N. Y.), 63,	982	Vawter v. Griffin, 40 Ind. 593,	661
Van Epps v. Van Epps, 9 Paige, 237,	1293, 1308	Veazie v. Bangor, 51 Maine, 509,	146
Van Eften v. Newton, 134 N. Y. 143,	2172	Veazie v. Hosmer, 11 Gray, 396,	146
Van Fleet v. Sledge, 45 Fed. Rep. 743,	1068	Veazie Bank v. Winn, 40 Maine, 62,	385
Van Hoesen v. Cameron, 51 Mich. 609,	932	Vedder v. Vedder, 1 Denio, 257,	465, 531
Vanhorn v. Des Moines, 4 Am. & Eng. Corp. Cas. 339,	1514	Venner v. Railroad Co., 28 Fed. Rep. 581,	1452
Van Horne v. Clark, 126 Pa. St. 411,	900	Vereycken v. Vandenbrooks, 102 Mich. 119,	76, 1829
Van Houten v. Van Winkle, 1 Dick. Ch. 380,	1009, 1019	Verges v. Forshee, 9 La. Ann. 294,	2033
Van Hoven v. Irish, 3 McCrary (U. S.), 443,	2109	Vermont, etc., R. Co. v. Vermont, etc., R. Co., 34 Vt. 1,	875, 878
Van Husan v. Kanouse, 13 Mich. 302,	410, 411	Vermont State Bank v. Porter, 5 Day, 316,	720
Van Keren v. McLaughlin, 21 N. J. Eq. 163,	1215	Vermont, etc., Trust Co. v. Whited, 2 N. Dak. 82,	1600
Van Keuren v. McLaughlin, 19 N. J. Eq. 187,	621	Vermont St. M. E. Church v. Brose, 104 Ill. 206,	876
Van Kirk v. Skillman, 34 N. J. Law, 109,	1746	Vernede v. Weber, 1 H. & N. 311,	125
Vannerson v. Cheatham, 41 S. Car. 337,	1749	Vernon v. Keys, 12 East, 632,	967
Van Ness v. Corkins, 12 Wis. 186,	835	Vernon v. Upson, 60 Wis. 418,	1646
Van Order v. Van Order, 8 Hun (N. Y.), 315,	2008	Verona, Appeal of Borough of, 108 Pa. St. 83,	1577
Van Ostrand v. Reed, 1 Wend. 424,	41, 336	Verplank v. Sterry, 12 Johns. 536,	224
Van Pelt v. Homo, etc., Assn., 79 Ga. 439,	1625	Verrill v. Parker, 65 Maine, 578,	1709
Van Reimsdyk v. Kane, 1 Gall. (U. S.) 371,	717	Vestry of Bermondsloy v. Ramsey, L. R. 6 C. P. 247,	833
Van Rensselaer v. Aikin, 44 N. Y. 126,	186	Viany v. Ferran, 54 Barb. 529,	1094
Van Rensselaer v. Kearney, 11 How. (U. S.) 297,	1833	Vicary v. Moore, 2 Watts (Pa.), 451,	953
Van Rensselaer v. Van Rensselaer, 113 N. Y. 207,	—	Vick v. Gower, 92 Tenn. 391,	1731
Van Santvoord v. St. John, 6 Hill, 157,	738	Vickers v. Sisson, 10 W. Va. 12,	1179
Van Schaick v. Third Ave. R. Co., 38 N. Y. 346,	237	Vickery v. Welch, 19 Pick. (Mass.) 523,	2046
		Vicknair v. Trosclair (La. 1893), 45 La. Ann. 373,	1731, 1742
		Vicksburg, City of, v. Butler, 56 Miss. 72,	805
		Vicksburg, etc., Co. v. Gorman, 70 Miss. 360,	270
		Vicksburg R. Co. v. Elmore, 46 La. Ann. 1237,	1442
		Vicksburgh, etc., R. Co. v. Dennis, 116 U. S. 665,	2136

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Victoria, etc., Mining Co. v. Fraser, 2 Colo. App. 14,	1350	Wabash, etc., Railway Co. v. Ham, 114 U. S. 537,	1396
Vidal v. Girard's Exrs., 2 How. 127,	1954	Wabash Western R. Co. v. Brow, 65 Fed. Rep. 941,	547
Vidal v. Thompson, 11 Mart. (La.) 23,	731	Wabunsee County, Commissioners of, v. Walker, 8 Kan. 431,	806
Viele v. Judson, 82 N. Y. 32,	988, 2186	Wachendorf v. Lancaster, 61 Iowa, 509,	1065
Vierling v. Horton, 27 Ill. App. 263,	258	Wack v. Sorber, 2 Wharton, 387,	847, 851
Vilas v. Page, 106 N. Y. 439,	1417	Waco Water and Light Co. v. City of Waco (Texas 1894), 27 S. W. Rep. 675,	1566, 1567
Viles v. City of Waltham, 157 Mass. 542,	1661	Waddell v. Lanier, 62 Ala. 347,	1014
Villa Rica Lumber Co. v. Paratani, 92 Ga. 370,	1724	Wade's Case, 5 Co. 114,	395
Village of Hyde Park v. Carton, 132 Ill. 100,	1546	Wade v. Chicago, etc., R. Co., 149 U. S. 327,	1435
Village of Hyde Park v. Oakwoods Cemetery Assn., 119 Ill. 141,	2146	Wade v. Kalbfleisch, 53 N. Y. 282,	2122, 2170
Village of Oneida v. Madison County, 136 N. Y. 269,	1533	Wade v. Oakmont Borough, 165 Pa. St. 479,	1568
Vilmar v. Schall, 61 N. Y. 564,	2165	Wade v. Ringo, 122 Mo. 322,	982
Vincennes v. Citizens' Gas Light Co., 132 Ind. 114,	873, 876, 1488, 1564, 1566	Wade v. Simeon, 2 C. B. 543,	212, 214
Vincent v. Cornell, 13 Pick. 294,	167	Wadesboro Mills Co. v. Burns, 114 N. Car. 353,	1323
Vincent v. Walker, 66 Ala. 333,	1065	Wadhams v. Innes, 4 Ill. App. 642,	362
Vining v. Gilbreth, 39 Maine, 496,	667	Wadham v. Marlowe, 8 East, 314,	281
Vinton v. Beamer, 55 Mich. 559,	1764	Wadhams v. Page, 1 Wash. 420,	187
Vinton v. Peck, 14 Mich. 287,	2114	Wadhams v. Swan, 109 Ill. 46,	362
Violet v. Patton, 5 Cranch, 142,	178, 683	Wadleigh v. Buckingham, 80 Wis. 230,	162, 163, 167
Viret v. Viret, 50 L. J. C. 69,	226	Wadlinger v. Washington German Loan Assn., 153 Pa. St. 622,	1606, 1615
Virginia Coupon Cases, 114 U. S. 269,	32, 2159	Wadsworth v. Sharpsteen, 8 N. Y. 388,	1814
Virginia, <i>Ex parte</i> , 100 U. S. 339,	2160	Wadsworth v. Sherman, 14 Barb. (N. Y.) 169,	1822
Virginia, etc., Ins. Co. v. Morgan (Va.), 18 S. E. Rep. 191,	311	Wadsworth v. Smith, 43 Iowa, 439,	855
Virginia Land Co. v. Haupt (Va. 1894), 19 S. E. Rep. 168,	1331	Wadsworth v. Smith, L. R. 6 Q. B. 332,	128
Virginia R. Co. v. County Commissioners, 6 Nev. 68,	139	Wadsworth v. Thomas, 7 Barb. 445,	196
Visalia Gas & Electric Co. v. Sims, 104 Cal. 328,	1252	Wadsworth v. Thompson, 3 Gilm. (Ill.) 423,	954
Vischer v. Yates, 11 Johns. (N. Y.) 23,	1941, 1942	Wadsworth v. Wendell, 5 Johns. Ch. 224,	1058
Viser v. Bertrand, 14 Ark. 267,	2007	Wagenblast v. McKean, 2 Grant's Cases, 393,	398
Visscher v. Greenback, etc., Co., 11 Hun, 159,	145	Wagner v. Harriott, 20 Abb. N. Cas. (N. Y.) 233,	1822
Vitervo v. Friedlander, 120 U. S. 707,	812	Wager v. Hall, 16 Wall. 584,	153
Vittum v. Gilman, 48 N. H. 416,	2170	Waggner v. Bells, 4 T. B. Mon. 8,	611
Vogel v. Leichner, 102 Ind. 55,	1720, 1725	Waggner v. First Nat. Bank, 43 Neb. 84,	2252
Vogel v. Melms, 31 Wis. 306,	614, 616	Wagner v. Cheney, 16 Neb. 202,	1059
Vogel v. Pekoe, 157 Ill. 339,	92	Wagner v. Ladd, 38 Neb. 161,	514
Voiers v. Stout, 4 Bush, 572,	802	Wagner v. Lewis, 38 Neb. 329,	999
Von Brandenstein v. Ebensberger, 71 Texas, 267,	200, 206	Wagner v. Union Stock Yards Co., 41 Ill. App. 408,	537
Von Hoffman v. Quincy, 4 Wall. (U. S.) 535,	2153	Wagoner v. Snyder, 7 Watts. (Pa.) 343,	1946
Von Schmidt v. Widmer, 105 Cal. 151,	1474, 1475	Wahl v. Barnum, 116 N. Y. 87,	209, 651, 438
Von Trotha v. Bamberger, 15 Colo. 1,	839	Wailles v. Howison, 93 Ala. 375,	1112
Vooght v. Winch, 2 B. & Ald. 662,	30	Wain v. Warlters, 5 East, 10,	590, 682, 683
Voorheis v. Eiting (Ky. 1893), 22 S. W. Rep. 80,	675	Wait v. Maxwell, 5 Pick. (Mass.) 217,	1822, 2276
Voorhis v. Childs, 17 N. Y. 354,	825, 832	Wait v. Nashua, etc., Association (N. H.), 23 Atl. 77,	1344
Vorbeck v. Roe, 50 Barb. 302,	639	Wait v. Wait, 28 Vt. 350,	262, 608
Voris v. Harshbarger (Ind. 1895), 39 N. E. Rep. 521,	1816	Waite, Matter of Accounting of, 99 N. Y. 433,	726
Vossburgh v. Diefendorf, 119 N. Y. 357,	2281	Waite v. Bartlett, 53 Mo. App. 378,	1893
Voss v. McGuire, 26 Mo. App. 452,	407	Waite v. Leggett, 8 Cow. 195,	798
Vought v. Vought (N. J. 1884), 27 Atl. Rep. 489,	1668, 1733	Waite v. Merrill, 4 Greenl. 102,	780
Vought v. Williams, 120 N. Y. 253,	1159	Wakefield v. Brown, 9 Ad. & El. (N. S.) 209,	814
Vreeland v. Bramhall, 39 N. J. Law, 1,	2120	Wakefield v. Orient Ins. Co. of Hartford, 50 Wis. 532,	896
Vreeland v. Vreeland, 48 N. J. Eq. 56,	14, 17	Waldo v. Martin, 4 B. & Cress. 319,	1853, 2001
Vroom v. Van Horne, 10 Paige Ch. 549,	543	Walon v. Kerby, 99 Mass. 1,	524
Vrooman v. Phelps, 2 Johns. 177,	179	Walden v. Carr, 83 Ill. 49,	609
Vrooman v. Turner, 69 N. Y. 280,	231, 242, 245	Walden v. Eldred, 58 Hun. 605,	149
Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510,	1953, 2029	Waldron v. Hall, 14 Mass. 486,	368
Vyne v. Glenn, 41 Mich. 112,	440	Waldron v. Alexander, 136 Ill. 550,	194
Vyse v. Wakefield, 6 M. & W. 442,	160, 270	Waldron v. McComb, 3 Hill. 361,	1369
		Walcott v. Watson, 53 Fed. Rep. 429,	1129
		Wales v. Coffin, 13 Allen (Mass.), 213,	1766
		Wales v. Lawrence, 36 N. J. Eq. 207,	821, 2188
		Wales v. Mellen, 1 Gray, 512,	490
		Wales v. Newbould, 9 Mich. 45,	1671
Wabash, City of, v. Carver, 129 Ind. 552,	1585		
Wabash, etc., R. Co. v. Black, 11 Ill. App. 465,	1968		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Walker v. Boulton, 3 U. C. Q. B. (O. S.) 252,	668	Wallis v. Bardwell, 126 Mass.	386,	1799
Walker v. Brooks, 99 N. Car. 207,	1741	Wallis v. Harrison, 4 Mees. & W.	538,	641
Walker v. Brown, 28 Ill. 378,	779	Wallis v. Smith, L. R. 21 Ch. Div.	243,	766
Walker v. Butterick, 105 Mass. 237,	906	Walls v. Bailey, 49 N. Y. 464,		
Walker v. Carrington, 74 Ill. 446,	2289	48, 892, 915, 918, 927, 928, 935,	2246	
Walker v. Chicago, 62 Ill. 286,	1546	Walls v. State, 140 Ind. 16,	1081	
Walker v. Cincinnati, 21 Ohio St. 14,	1540, 1541	Walmesley v. Cooper, 11 A. & E.	216,	568
Walker v. City of Cincinnati, 21 Ohio St. 14,	1540	Wain v. Wain (N. J.), 22 Atl. Rep.	203,	182
Walker v. Conant, 65 Mich. 194,	800	Walpole v. Lord Orford, 3 Ves.	402, 1013,	1197
Walker v. Cronin, 107 Mass. 555,	2177	Walrath v. Abbott, 75 Hun. 445,		1844
Walker v. Douglas, 70 Ill. 445,	854, 872	Walrath v. Redfield, 18 N. Y. 457,		26
Walker v. Duncan, 68 Wis. 624,	781	Walsh v. Barton, 24 Ohio St. 28,		417
Walker v. Gregory, 36 Ala. 180,	2015	Walsh v. Fussell, 6 Bing. 163,		1952
Walker v. Henry, 36 W. Va. 100,	192, 194	Walsh v. Hall, 66 N. Car. 233,		1880
Walker v. Herring, 21 Gratt. (Va.) 678,	644	Walsh v. Powers, 43 N. Y. 23,	1773,	1798
Walker v. Hoisington, 43 Vt. 608,	332	Walsh v. Sisson, 49 Mich. 423,		543
Walker v. Irwin (Iowa), 62 N. W. Rep. 785,	265, 595	Walsh v. St. Louis Exposition, 101 Mo. 534,		394
Walker v. Jameson, 140 Ind. 591,	1479	Walsh v. Taylor, 39 Md. 592,		162
Walker v. Jeffreys, 1 Hare, 341,	1165	Walsh v. Trevanion, 15 Ad. & El. N. S. 733,		592
Walker v. Johnson, 96 U. S. 424,	646	Walsh v. Young, 110 Mass. 396,	1781,	1797
Walker v. Locke, 5 Cush. 90,	622	Walter v. Everrard (1891), 2 Q. B. 369,		1808
Walker v. Lovell, 28 N. H. 138,	454, 1901	Walter v. Lacy, 1 M. & G. 53,		473
Walker v. Marseilles, 70 Miss. 283,	1667	Walter A. Wood Harvester Co. v. Rob-		1319
Walker v. Mayo, 143 Mass. 42,	1632	bins, 56 Minn. 48,		716
Walker v. McCullough, 4 Maine, 421,	540, 541, 573, 574	Waltermire v. Westover, 14 N. H. 16,		1096
Walker v. Metropolitan Ins. Co., 56 Maine, 371,	654	Walters v. Bank, 76 Va. 12,		922
Walker v. Miller, 11 Ala. 1067,	1644	Walters v. Brooks, 115 Mo. 534,		186
Walker v. Mock, 39 Ala. 568,	798	Walters v. Kraft, 23 S. Car. 578,		871
Walker v. Nevill, 3 H. & C. 403,	568	Walters v. McGuigan, 72 Wis. 155,		432
Walker v. Nussey, 16 M. & W. 302,	673	Walters v. Meyer, 39 Ark. 580,		853
Walker v. Owen, 79 Mo. 569,	167	Walters v. Morrow, 1 Houst. (Del.) 527,		2185
Walker v. Penniman, 8 Gray, 233,	609	Walters v. Northern Coal Mining Co., 5 De G., M. & G. 629,		922
Walker v. Rostrom, 9 M. & W. 411,	240	Walters v. Seuf, 115 Mo. 524,		1623
Walker v. Sauer (Mich. 1893), 56 N. W. Rep. 855,	1662	Walters v. Texas Building Assn. (Texas Civ. App.), 29 S. W. Rep. 51,		1628
Walker v. Sherman, 11 Metc. 170,	204, 206	Walters v. Whitlock, 9 Fla. 86,	708, 715,	1768
Walker v. Stringfellow, 30 Texas, 570,	1739	Walthall v. Goree, 36 Ala. 728,		1849
Walker v. Taylor, 6 C. & P. 752,	608, 609, 610	Waltham, Inhabitants of, v. Brookline, 119 Mass. 479,		452
Walker v. Tucker, 70 Ill. 527,	293, 853, 854, 864, 2227	Walton v. Bemiss, 16 La. 140,		813
Walker v. Tupper, 152 Pa. St. 1,	456	Walton v. Lizardi, 15 La. 588,		98
Walker's Ex'rs v. United States, 106 U. S. 413,	1862	Walton v. Mather, 4 Misc. R. 261,		2237
Walker v. Walker, 13 Ired. 335,	182, 231, 235	Walworth v. Waterhouse, 3 Sound, 420,		2009
Walker v. Whitehead, 16 Wall. (U. S.) 314,	891, 2152	Walworth v. Abel, 52 Pa. St. 370,		1344
Walker v. Wilmington, etc., R. Co., 26 S. Car. 80,	653	Walworth County Bank v. Farmers' Loan and Trust Co., 14 Wis. 825,		1615
Wall's Appeal, 111 Pa. St. 460,	789	Wangerien v. Aspell, 47 Ohio St. 250,		2196
Wall v. Johnson, 84 Ga. 524,	169	Wangler v. Swift, 90 N. Y. 38,		832
Wall v. Minneapolis R. Co., 86 Wis. 48,	1182, 1201	Ward v. Anderson, 111 N. Car. 115,		1778
Wall v. Schneider, 59 Wis. 352,	1918	Ward v. Beeton, 23 Weekly Rep. 533,		2044
Wallace v. Bassett, 41 Barb. (N. Y.) 92,	1758	Ward v. Byrne, 5 M. & W. 548, 2033,	2038,	2035
Wallace v. Butts (Texas App.), 31 S. W. Rep. 687,	17	Ward v. Cowdrey, 5 N. Y. Supl. 232,		238
Wallace v. Chicago R. Co., 67 Iowa, 547,	552	Ward v. Davidson, 89 Mo. 445,	1289,	1300
Wallace v. De Young, 98 Ill. 638,	2073	Ward v. Evans, 2 Ld. Raym. 928,		449
Wallace v. Finberg, 46 Texas, 35,	1657	Ward v. Gibbs (Texas App.), 30 S. W. Rep. 1125,		261
Wallace v. German-American Ins. Co., 41 F. d. Rep. 742,	896	Ward v. Grey, 26 Beav. 485,		1523
Wallace v. Glaser, 82 Mich. 190,	475	Ward v. Hogan, 11 Abb. (N. Y.) N. Cas. 478,	2030,	2044
Wallace v. Kelsall, 7 M. & W. 264,	515, 539, 548	Ward v. Hudson River Bldg. Co., 125 N. Y. 230,		758
Wallace v. Long, 105 Ind. 522,	2172	Ward v. Johnson, 13 Mass. 148,	542, 573,	832
Wallace v. Loomis, 97 U. S. 146,	1428	Ward v. Lavery, 19 Neb. 429,		1790
Wallace v. McConnell, 13 Pet. 136,	402	Ward v. Lewis, 4 Pick. 520,		15
Wallace v. McLaughlin, 57 Ill. 53,	1160	Ward v. Motter, 2 Rob. (Va.) 536,		2184
Wallace v. Rappley, 103 Ill. 229,	1191, 1194	Ward v. National Bank, L. R. 8 App. Cas. 755,		563
Wallace v. Talbot, 1 McCord, 466,	366	Ward v. Powell, 3 Harr. (Del.) 379,		787
Wallace v. Townsend, 43 Ohio St. 537,	1329	Ward v. Smith, 7 Wall. 417,	393, 402,	449
Wallace v. Wallace, 63 Mich. 326,	2256	Ward v. Sugg, 113 N. Car. 489,		1628
Walla Walla Water Co. v. City of Walla Walla, 60 Fed. Rep. 957,	1519	Ward v. Vance, 93 Pa. St. 499,		293
Wallingford Manfg. Co. v. Fox, 12 Vt. 304,	1820	Ward v. Walton, 4 Ind. 75,		949
		Ward v. Waterman, 85 Cal. 488,		1066
		Ward v. Whitney, 8 N. Y. 442,		872
		Ward v. Worsham, 78 Texas, 180,		1126
		Wardell v. McConnell, 25 Neb. 558,		542
		Wardell v. Union Pacific R. Co., 103 U. S. 651,	1292, 1304, 1305, 1307, 1979,	1986
		Warden v. Adams, 15 Mass. 233,		626

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Warden v. Eichbaum, 14 Pa. St. 121,	1845	Watertown Thermometer Co. v. Pool, 51	
Warden v. Jones, 2 DeG. & J. 76,	620, 1711	Hun, 157,	1268, 1981, 2041, 2074
Warden v. Jones, 23 Beav. 487,	1717, 1718	Water Works v. Smith, 47 N. J. Law,	473,
Warder v. Tucker, 7 Mass. 449,	212, 267	Watkins v. Crouch, 5 Leigh (Va.), 522,	1570
Warder, Bushnell & Glessner Co. v. Gibbs,		Watkins v. De Armond, 9 Ind. 553,	2196
92 Mich. 29,	1361	Watkins v. Eames, 9 Cush. 537,	777
Wardwell v. Haight, 2 Barb. (N. Y.) 549,	1759	Watkins v. Eames, 9 Cush. 537,	255, 257, 817
Ware v. Adams, 24 Maine, 177,	594	Watkins v. Maule, 2 Jac. & W. 237,	1073
Ware v. Curry, 67 Ala. 274,	1854	Watkins v. Rymill, 10 Q. B. Div. 178,	50, 64, 65
Ware v. Hayward Rubber Co., 3 Allen, 84,	918	Watkins v. Sands, 4 Ill. App. 207,	601
Ware v. Jones, 61 Ala. 288,	1906	Watkins v. Stevens, 4 Barb. 168,	196
Waring v. Manchester, etc., R. Co., 7 Hare,	482,	Watkins v. Workmen's, etc., Associa-	
482,	2271	tion, 97 Pa. St. 514,	1607, 1615
Waring v. Railway Co., 7 Hare, 482,	1104	Watrous v. Allen, 57 Mich. 362,	2077
Warfield v. Booth, 33 Md. 63,		Watrous v. Allen, L. R. 57 Mich. 362,	2047
2039, 2040, 2046, 2047		Watrous v. Blair, 32 Iowa, 58,	1890
Warfield v. Dorsey, 39 Md. 299,	674	Watson v. Ambergate, etc., Ry. Co., 3	
Warne v. Meyer, 38 Fed. Rep. 191,	1246	Eng. L. & Eq. 497,	736
Warner v. Grace, 14 Minn. 487,	188, 2090	Watson v. Baker, 71 Texas, 739,	679
Warner v. Jaffray, 96 N. Y. 248,	723, 724	Watson v. Blaine, 12 S. & R. 131,	886
Warner v. Littlefield, 89 Mich. 329,	1642	Watson v. Blaylock, 2 Const. Ct. (S. C.)	
Warner v. Mower, 11 Vt. 385,	1405	351,	186
Warner v. Smith, 8 Conn. 14,	2094	Watson v. Brightwell, 60 Ga. 212,	635
Warner v. Texas, etc., R. Co., 54 Fed. Rep.	646,	Watson v. Boylston, 5 Mass. 411,	884
922,	837	Watson v. Cambridge, 15 Mass. 286,	2210
Warner v. White, T. Jones, 95,	302	Watson v. Denton, 7 C. & P. 85,	382, 333
Warren v. Adams, 19 Colo. 515,	1169	Watson v. Harlem, etc., Co., 52 How. Pr.	
Warren v. Barber Asphalt Paving Co., 115		(N. Y.) 348,	2060
Mo. 572,	1553	Watson v. Hetherington, 1 C. & K. 36,	403
Warren v. Bean, 6 Wis. 120,	744	Watson v. Jacobs, 29 Vt. 169,	609
Warren v. Castello, 109 Mo. 338,	8	Watson v. McLaren, 19 Wend. 557,	1132
Warren v. First Nat. Bank, 149 Ill. 9,	1391	Watson v. Mercer, 3 Serg. & R. 49,	1017
Warren v. Freeman, 85 Tenn. 513,	1699	Watson v. Mercer, 8 Pet. (U. S.) 88,	2019
Warren v. Hall, 20 Colo. 508,	2188	Watson v. Miller, 82 Texas, 279,	466
Warren v. Hodge, 121 Mass. 106,	189	Watson v. Needham, 161 Mass. 404,	1575
Warren v. Leland, 2 Barb. 613,	638	Watson v. New York Central R. Co., 47	
Warren v. Mains, 7 Johns. 476,	392	N. Y. 157,	2153
Warren v. Mobile, etc., R. Co., 49 Ala.		Watson v. Poezel, 158 Pa. St. 513,	601
582,	1458	Watson v. Pugh, 51 Ark. 218,	432
Warren v. Philadelphia Coal Co., 83 Pa.		Watson v. Randall, 20 Wend. 201,	204, 205
St. 437,	321, 352	Watson v. Reid, 1 Russ. & M. 236,	1164, 1165
Warren v. Railway Co., 37 Kan. 408,	1433	Watson v. Roode, 43 Neb. 348,	40, 232
Warren v. Richmond, 53 Ill. 52,	1146	Watson v. Roode, 30 Neb. 324,	229, 330, 332, 333, 334
Warren v. Skinner, 20 Conn. 559,	519	Watson v. Rowe, 16 Vt. 525,	901
Warren v. Smith, 24 Texas, 484,	611	Watson v. Smith, 110 N. C. 6,	1185
Warren v. Tinsley, 53 Fed. Rep. 689,	376	Watson v. Sutherland, 6 Wall. (U. S.) 74,	2255
Warren v. Warren, 105 Ill. 568,	848	Watson v. Turner, Buller, Nisi Prius, 147,	197
Warren v. Whitney, 24 Maine, 561,	183	Watson v. White, 152 Ill. 364,	1163
Warren, etc., Co. v. Holbrook, 118 N. Y.		Watson Coal Co. v. Casteel, 68 Ind. 476,	2167
587,	646	Watson, etc., Mining Co. v. Casteel, 68	
Wartemberg v. Spiegel, 31 Mich. 400,	1030	Ind. 476,	969
Warwick v. Bruce, 2 M. & S. 205,	636	Watt's Appeal, 78 Pa. St. 370,	1227, 1307, 1447
Washburn v. Cuddihy, 8 Gray, 430,	332	Watt v. Wisconsin Cranberry Co., 63	
Washburn v. Dorsch, 68 Wis. 436,	2026, 2030	Iowa, 730,	675, 686
Washburn v. Franklin, 35 Barb. (N. Y.)		Watte v. Wickersham, 27 Neb. 457,	1920
599,	2121	Watts v. British, etc., Mortgage Co., 60	
Washburn v. Offutt, 19 La. Ann. 269,	2021	Fed. Rep. 483,	1037
Washburn, etc., Co. v. Salisbury, 152		Watts v. Camars, 115 U. S. 353,	695
Mass. 346,	867	Watts v. Lynch, 64 N. H. 96,	1943
Washington Bank v. Lewis, 22 Pick. 24,	1288	Watts v. Shuttleworth, 5 Hurl. & N. 233,	569
Washington Gas Co. v. Johnson, 123 Pa.		Watts v. Van Ness, 1 Hill (N. Y.), 76,	2098
St. 576,	438	Waugh v. Beck, 114 Pa. 422,	1930, 1933, 1934
Washington Mutual Fire Ins. Co. v. St.		Waugh v. Coppe, 6 M. & W. 324,	472
Mary's Seminary, 52 Mo. 480,	1271	Wauken, etc., R. Co. v. Dwyer, 49 Iowa,	
Washington University v. Rouse, 8 Wall.		121,	259
(U. S.) 439,	2138	Waverly Natl. Bank v. Hall, 150 Pa. St.	
Wason v. Rowe, 16 Vt. 525,	325, 327	466,	710
Wasserboehr v. Boulter, 84 Maine, 165,	708	Way v. Foster, 1 Allen, 408,	1043
Wasson v. Gould, 3 Blackf. 18,	475	Way v. Harriman, 126 Ill. 132,	1712
Waterman v. Andrews, 14 R. I. 589,	893	Way v. Langley, 15 Ohio St. 392,	535
Waterman v. Banks, 144 U. S. 394,	56, 57, 751	Way v. Martin, 140 Pa. St. 499,	193, 327, 328
Water Commissioners v. Brown, 32 N. J.		Way v. Russell, 33 Fed. Rep. 5,	508
Law, 504,	6	Waydell v. Luer, 5 Hill, 448,	457
Waterbury v. Fisher, 5 Colo. App. 362,	681	Waydell v. Luer, 3 Denio, 410,	543
Waterhouse v. Kendall, 11 Cush. 167,	453	Wayman v. Southard, 10 Wheat. 48,	710
Waterhouse v. Skinner, 2 B. & P. 447,	123, 378	Waymire v. Waymire, 141 Ind. 164,	1114, 1192
Waters v. Davies, 55 N. Y. Super. Ct.	39, 148	Wayne v. Lewis, 1 Monaghan (Pa.), 305,	1684
Waters v. Glendenning, 87 Wis. 250,	74	Wayne, etc., Bank v. Low, 81 N. Y. 566,	727
Waters v. Riley, 2 Har. & G. 305,	827	Wayne Township v. Cahill, 49 N. J. Law,	
Waters v. Tompkins, 2 C. M. & R. 723,	472	144,	1571
Waters v. Travis, 9 Johns. 450,	1151, 1153		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Weakly v. Hall, 13 Ohio, 167,	2005	Weighley v. Coffman, 144 Pa. St. 489,	31
Wear v. Jacksonville R. Co., 24 Ill. 594,	156	Weir v. Flowers, 109 N. Car. 212,	476
Wear Commissioners v. Adamson, L. R. 1 Q. B. D. 546,	273	Weir v. State, 46 Ohio St. 450,	165, 169
Weart v. Rose, 15 N. J. Eq. 290,	110, 425	Weir v. Mosher, 19 Wis. 311,	549
Weatherford, etc., R. Co. v. Granger, 86 Texas, 350,	1309, 1315	Weis v. Ahrenbeck, 5 Texas Civ. App. 542,	1826
Weatherford, etc., R. Co. v. Granger, (Texas Civ. App.), 22 S. W. Rep. 70,	1308	Weisiger v. Richmond, etc., Machine Co. (Va.), 20 S. E. Rep. 7361,	713
Weatherford, etc., R. Co. v. Wood (Texas 1895), 30 S. W. Rep. 859,	648	Weir v. Hill, 2 Lans. 278,	656
Weaver, <i>In re</i> , 21 Ch. D. 615,	1842	Wekett v. Raby, 2 Bro. P. C. 16,	559, 561
Weaver v. Carter, 10 Leigh, 37,	424	Welch v. Allington, 23 Cal. 322,	447
Weaver v. Jones, 24 Ala. 420,	1772	Welch v. Bagg, 12 Mich. 41,	781
Weaver v. Shipley, 127 Ind. 526,	1176, 1483	Welch v. Cook, 97 U. S. 541,	2141
Weaver v. Weaver, 109 Ill. 225,	92	Welch v. Importers' and Traders' National Bank, 122 N. Y. 177,	1296, 1301
Webb v. Buckelew, 82 N. Y. 555,	30	Welch v. Kline, 57 Pa. St. 428,	1684
Webb v. Dickinson, 11 Wend. 62,	470	Welch v. Lynch, 5 N. Y. Leg. Obs. 20,	464
Webb v. Fairmanner, 3 M. & W. 473,	384, 764	Welch v. Olmstead, 90 Mich. 492,	1785
Webb v. Fulchire, 3 Ired. L. 485,	1128	Welch v. Wadsworth, 30 Conn. 149,	2125
Webb v. Goldsmith, 2 Duer, 413,	536	Welchel v. Thompson, 39 Ga. 559,	628
Webb v. Hawkins Lumber Co., 101 Ala. 630,	607	Weld v. Barker, 153 Pa. St. 405,	763, 940
Webb v. Hewitt, 3 K. & J. 438,	515	Weld v. Lancaster, 56 Maine, 453,	2090
Webb v. Hoselton, 4 Neb. 308,	1652	Weld v. Elliott Bank, 158 Mass. 339,	396
Webb v. Kennedy, 20 Minn. 419,	2097	Welden v. Porter, 4 Houst. (Del.) 236,	688
Webb v. McCauley, 4 Bush (Ky.), 8,	2085	Welford v. Beazley, 3 Atk. 503,	675
Webb v. Moore, 25 Ind. 4,	1496, 2152, 2155	Welge v. Batty, 11 Ill. App. 461,	450
Webb v. Paternoster, Palmer, 71,	641	Weller v. Hersee, 10 Hun. 431,	180
Webb v. Spicer, 13 Q. B. 886,	568	Welles v. Cole, 6 Gratt. 645,	224
Webb v. Steele, 13 N. H. 230,	588	Wellington v. Kelly, 84 N. Y. 543,	445, 1998, 1999
Webb v. Stone, 24 N. H. 282,	150	Wellman v. Dickey, 73 Maine, 29,	1576
Webb v. Webb, 29 Ala. 583,	893	Wells v. Alexandre, 180 N. Y. 642,	1271
Webber v. Donnelly, 33 Mich. 469,	1902	Wells v. Calnan, 107 Mass. 514,	289, 489, 2226, 2227
Webber v. Lee, 9 Q. B. Div. 315,	641	Wells v. Evans, 20 Wend. 251,	577
Webber v. Williams College, 23 Pick. 302,	1358	Wells v. Foster, 8 Mees. & W. 149,	2084
Webber's Exrs. v. Blunt, 19 Wend. (N. Y.) 188,	1975, 2091	Wells v. Giles, 2 Gale, 200,	385
Weber v. Bridgman, 113 N. Y. 600,	949	Wells v. Horton, 4 Bing. 40,	650
Weber v. Crouch, 134 Mass. 26,	518	Wells v. Hughes, 89 Va. 543,	476
Weber v. Kirkendall, 39 Neb. 193,	440	Wells v. Kingston-upon-Hull, L. R. 10 C. P. 402,	640
Weber v. Kirkendall, 44 Neb. 766,	441	Wells v. Manufacturers', etc., Gas Co., 130 Pa. St. 222,	959
Weber v. Mick, 131 Ill. 520,	1641	Wells v. McGeoch, 71 Wis. 196,	990
Webster v. Atkinson, 4 N. H. 21,	901	Wells v. Monihan, 129 N. Y. 161,	694
Webster v. Brown, 67 Mich. 328,	1113	Wells v. Rodgers, 60 Mich. 925,	1451
Webster v. Clark, 60 N. H. 36,	676	Wells v. Smith, 7 Paige, 22,	752
Webster v. Clark, 34 Fla. 637,	881	Wells v. Spears, 1 McCord, 421,	343
Webster v. Dillon, 3 Jur. (N. S.) 432,	2073	Wells v. Steam Nav. Co., 8 N. Y. 375,	1963
Webster v. Drinkwater, 5 Maine, 319,	2168	Wells v. Thomas, 72 Am. Dec. 232,	738
Webster v. French, 11 Ill. 254,	397	Wells v. Thorman, 37 Conn. 318,	1695
Webster v. Helm, 93 Tenn. 322,	1698, 1725	Wells v. Wells, 35 Miss. 638,	2287
Webster v. Morris, 66 Wis. 366,	862	Wells v. Wilson, 140 Pa. St. 645,	194
Webster v. Smith, 4 Ind. App. 44,	2244	Wells, Fargo & Co. v. Vansickle, 64 Fed. Rep. 944,	706
Webster v. Upton, 91 U. S. 85,	1400	Welsh v. Bayard, 21 N. J. Eq. 186,	844
Webster v. Wyser, 1 Stew. (Ala.) 184,	445, 543	Welsh v. Gossler, 89 N. Y. 510,	956, 2192
Wechselberg v. Flour City Bank, 64 Fed. Rep. 90,	1383	Welsh v. Pittsburgh, etc., R. Co., 10 Ohio St. 65,	1961
Weed v. Black, 2 McArthur, 268,	1989, 1992	Welsh v. Solenberger, 85 Va. 441,	1678
Weed v. Bond, 21 Ga. 195,	1885	Welsh v. State, 126 Ind. 71,	1839
Weed v. Burt, 78 N. Y. 191,	30	Welman v. Welman, 15 Ch. Div. 570,	253
Weed v. Saratoga, etc., R. Co., 19 Wend. 534,	735	Welton v. Dickson, 38 Neb. 767,	—
Weed v. Snow, 3 McLean, 265,	558	Welz v. Rhodius, 87 Ind. 1,	654, 855, 900
Weekes v. Gallard, 21 Law T. (N. S.) 655,	1131	Walter v. Kirk, 14 Ill. 55,	385
Weeks v. Baker, 152 Mass. 20,	383, 414	Wendell, <i>In re</i> , 1 Johns. Ch. (N. Y.) 600,	1846
Weeks v. Barton (Tex. App.), 31 S. W. Rep. 1071,	—	Wendover v. Baker, 121 Mo. 273,	199, 1118
Weeks v. Haas, 3 Watts & S. 520,	1017	Wenham v. Switzer, 59 Fed. Rep. 942,	1129
Weeks v. McCarty, 89 N. Y. 566,	298	Wennall v. Adney, 3 B. & P. 247,	183, 184
Weeks v. O'Brien, 12 N. Y. Supl. 720,	372	Wentworth v. Wentworth, 13 Johns. 87,	536
Weeks v. O'Brien, 141 N. Y. 199,	2225, 2226	Wentworth v. Cock, 10 A. & E. 42,	283
Weeks v. Pike, 60 N. H. 447,	699	Wentworth v. Day, 3 Metc. 352,	59
Weeks v. Thrasher, 52 Miss. 142,	1013	Wentworth v. Tubb, 2 Y. & C. C. 537,	1841
Weeks v. Zimmerman, 4 N. Y. Supl. 609,	544	Wentworth v. Whittemore, 1 Mass. 471,	563
Wegener v. Butler, 22 N. Y. Supl. 692,	2252	Wentworth v. Woodside, 79 Maine, 156,	2106
Wegner v. Biering, 65 Texas, 506,	1862	Wescott v. Fargo, 61 N. Y. 542,	1967
Wehrhane v. Railroad Co., 4 N. Y. St. Rep. 541,	1226	Werner v. Humphreys, 2 M. & G. 853,	61
Wehrli v. Rehboldt, 107 Ill. 60,	500	Wesner v. Stein, 97 Pa. St. 322,	196
Weiden v. Woodruff, 38 Mich. 130,	336	Werner v. Tuck, 127 N. Y. 217,	383
Weider v. Maddox, 96 Texas, 372,	724	Wessel v. Johnson Land Co., 3 N. Dak. 160,	440, 907
		West v. Bundy, 78 Mo. 407,	850

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

West v. Camden, 135 U. S. 507,	1304, 1986	Western Union Telegraph Co. v. Pendleton, 122 U. S. 347,	2148
West v. Carter, 129 Ill. 249,	1947	Western Union Tel. Co. v. Reed, 96 Ind. 195,	2166
West v. Furbish, 67 Maine, 17,	831, 833	Western Union Telegraph Co. v. Scirclo, 103 Ind. 227,	1967
West v. Grigg's Administrator, 1 Grant Cas. 53,	1799	Western Union Telegraph Co. v. St. Joseph and Western Ry., 1 McCrary (U.S.), 565,	1412, 2052
West v. Holmes, 26 Vt. 530,	1949	Western Union Tel. Co. v. Union Pac. R. Co., 1 McCrary, 558,	1835
West v. Houston, 4 Harr. 170,	799	Western Union Tel. Co. v. Union Pac. R. Co., 3 Fed. Rep. 423,	1422
West v. Laraway, 28 Mich. 464,	1725, 1746	Western Union Tel. Co. v. Wilson, 93 Ala. 32,	2104
West v. Lee, 50 How. Pr. 313,	767	Western Union Tel. Co. v. Yopst, 118 Ind. 248,	2104, 2105
West v. Moore, 14 Vt. 447,	1802	Western Warehouse Co. v. Hayes (Ky. 1895), 29 S. W. Rep. 738,	941
West v. Murph., 3 Hill (S. Car.), 284,	2197	Western Wooden-Ware Assn. v. Starkey, 84 Mich. 76,	2069
West v. Penny, 16 Ala. 186,	1772, 1778	Westfall v. Cottrills, 24 W. Va. 763,	1179
West v. Russell, 74 Cal. 544,	1162	Westfall v. Maples, 3 Grant (Pa.) Cas. 198,	2055
West v. Stewart, 7 Pa. St. 122,	186	Westfall v. Perry (Texas Civ. App.), 23 S. W. Rep. 740,	651
West v. Van Pelt, 34 Neb. 63,	144, 148	Westfield Gas, etc., Co. v. Mendenhall, 142 Ind. 538,	1571
West v. Van Tuyl, 1 N. Y. Supl. 718,	296	West Hartford, Town of, v. Board of Water Comrs., 44 Conn. 360,	1502
West v. West (Texas App. 1895), 29 S. W. Rep. 242,	984	West Haven Water Co. v. Redfield, 58 Conn. 39,	854
West v. West, 90 Iowa, 41,	1065	Westhead v. Sproson, 6 H. & N. 728,	51
Westbrook v. Harbeson, 2 McCord Eq. 112,	1071	Westheimer v. Craig, 76 Md. 399,	831
Westbrook v. Mize, 35 Kan. 299,	821	Westlake v. Bostwick, 35 N. Y. Super. Ct. 256,	499
Westbrook Manufacturing Co. v. Grant, 60 Maine, 88,	761, 762	Westlake & Button v. St. Louis, 77 Mo. 47,	806
West Cambridge, Inhabitants of, v. Lexington, 1 Pick. 506,	708	Westminster v. Willard, 65 Vt. 266,	1492
Westchester Insurance Co. v. Earle, 33 Mich. 143,	950	Westmoreland v. Porter, 75 Ala. 452,	610
West Cornwall R. Co. v. Mowatt, 15 Q. B. 521,	156	Weston, <i>Ex parte</i> , 12 Metc. 1,	825
Wescott v. Mulvane, 58 Fed. Rep. 305,	1126, 1198	Weston v. City of Syracuse, 17 N. Y. 110,	1519
Wescott v. Thompson, 18 N. Y. 367,	854	Weston v. Davis, 24 Maine, 374,	775
Western v. Genesee Mutual Ins. Co., 12 N. Y. 258,	732	Weston v. Myers, 33 Ill. 424,	687
Western v. Macdermott, L. R. 2 Ch. App. 72,	1154	Weston v. Savage, L. R. 10 Ch. Div. 736,	751
Western Bank v. Gilstrap, 45 Mo. 419,	1318	West River Bridge Co. v. Dix, 6 How. (U. S.) 507,	2146
Western, etc., Association v. Starkey, 84 Mich. 76,	2050	West Virginia, etc., Oil Co. v. Vinal, 14 W. Va. 761,	1179
Western, etc., Co. v. Kilderhouse, 87 N. Y. 430,	727	West Va. Trans. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600,	1427, 1983, 2052, 2054, 2057
Western, etc., Manufacturing Co. v. Cousley, 72 Ill. 531,	1314	West Wisconsin R. Co. v. Board of Supervisors, 93 U. S. 595,	2140
Western, etc., R. Co. v. Exposition Cotton Mills, 81 Ga. 522,	734	Westwood v. Secretary, 11 Weekly Rep. 261,	299
Western, etc., Telegraph Co. v. Hall, 124 U. S. 444,	505	Wetherbee v. Baker, 35 N. J. Eq. 501,	1325, 1371, 1375, 1398, 1400
Western Ins. Co. v. Cropper, 32 Pa. St. 351,	896	Wetherbee v. Green, 22 Mich. 311,	502
Western Nat. Bank v. Armstrong, 152 U. S. 346,	1342	Wetherbee v. Potter, 99 Mass. 354,	692
Western Paving, etc., Co. v. Citizens' St. R. Co., 128 Ind. 525,	1481, 1584	Wetherel v. Jones, 3 B. & Ad. 221,	1874
Western R. Co. v. Babcock, 6 Metc. (Mass.) 346,	1131, 1209	Wetherell v. Thirty-first St. Building and Loan Assn., 153 Ill. 361,	1617
Western R. Co. v. Harwell, 91 Ala. 340,	1967, 1968	Wetherill v. Neilson, 20 Pa. St. 448,	325, 328
Western Sash Co. v. Young, 48 Mo. App. 505,	476	Wetherly v. Straus, 93 Cal. 283,	1234
Western Savings Society v. Philadelphia, 81 Pa. St. 175,	1584	Wetmore v. Barrett, 103 Cal. 246,	1929
Western Union, etc., Co. v. Americani Tel. Co., 9 Biss. (U. S.) 72,	2052	Wetmore v. City of Oakland, 99 Cal. 149,	1517
Western Union Tel. Co. v. American Union Tel. Co., 65 Ga. 160,	1983, 2051	Wetmore v. Jaffray, 9 Hun, 140,	2211
Western Union, etc., Co. v. Atlantic, etc., Co., 19 Fed. Rep. 172,	2052	Wetmore v. Porter, 92 N. Y. 76,	1975
Western Union, etc., Co. v. Atlantic, etc., Co., 7 Biss. (U. S.) 367,	2052	Wetmore v. White, 2 Caine's Cas. 87,	846
Western Union Tel. Co. v. Atlantic and Pacific Tel. Co., 5 Nev. 102,	2052	Wetter Mfg. Co. v. Dinkins, 70 Miss. 835,	1648
Western Union, etc., Co. v. Baltimore, etc., Co., 23 Fed. Rep. 12,	2052, 2134	Wetzel v. Richcreek (Ohio), 40 N. E. Rep. 1004,	367
Western Union, etc., Co. v. Burlington, etc., Ry. Co., 11 Fed. Rep. 1,	2051, 2052	Wetzell v. Bussard, 11 Wheat. 309,	194
Western Union, etc., Co. v. Chicago, etc., R. Co., 86 Ill. 246,	2052	Weymouth v. Boyer, 1 Ves. Jr. 416,	1013
Western Union Tel. Co. v. Eskridge, 7 Ind. App. 208,	2100	Whaley v. Hinchman, 22 Mo. App. 481,	83
Western Union Telegraph Co. v. Jones, 95 Ind. 228,	1967, 1968	Whaley Bridge, etc., Printing Co. v. Groen, 23 Wkly R. (Eng.) 351,	1980
		Wharton, <i>In re</i> , 5 De Gex, M. & G. 33,	1444
		Wharton v. Winch, 140 N. Y. 287,	507
		Whately v. Tricker, 1 Camp. 35,	561
		Whatman v. Gibson, 9 Sims, 196,	1154

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Wheat v. Cross, 31 Md. 99,	57	White v. Carlton, 52 Ind. 371,	443
Wheat v. Rice, 97 N. Y. 498,	240	White v. Cleaver, 75 Mich. 17,	267
Wheatley v. Abbott, 32 Miss. 343,	560	White v. Corlies, 46 N. Y. 467,	66
Wheaton v. East, 5 Yerg. (Tenn.) 41,	1772	White v. Davis, 17 N. Y. Supl. 548,	1827
Wheaton v. Hibbard, 20 Johns. (N. Y.) 290,	1870	White v. Demilt, 2 Hall, 405,	214
Wheaton v. Lund (Minn. 1895), 63 N. W. Rep. 251,	841	White v. Foster, 102 Mass. 375,	640
Wheaton v. Nelson, 11 Gray, 15,	437	White v. Franklin Bank, 22 Pick. (Mass.) 151,	1640, 1870, 1895
Wheaton v. Trimble, 145 Mass. 345,	1709	White v. Graves, 107 Mass. 325,	1811
Wheeler v. Baker, 59 Iowa, 86,	11	White v. Hart, 13 Wall. (U. S.) 646,	2117
Wheeler v. Bank, 23 Maine, 308,	1378	White v. Hermann, 51 Ill. 243,	101
Wheeler v. Biggs (Miss. 1894), 15 So. Rep. 118,	1708	White v. Heylman, 34 Pa. St. 142,	1829
Wheeler v. Billings, 38 N. Y. 263,	562	White v. Howard, 46 N. Y. 144,	720
Wheeler v. Collier, Moo. & M. 123,	676	White v. Hoyt, 73 N. Y. 505,	883
Wheeler v. Faurot, 37 Ohio St. 26,	1333, 1373	White v. Hunter, 23 N. H. (3 Fost.) 128,	2016
Wheeler v. Glasgow, 97 Ala. 700,	2096	White v. Jones, 14 La. Ann. 681,	543
Wheeler v. Guild, 20 Pick. 545,	399	White v. Kuntz, 107 N. Y. 518,	156, 1630, 1638, 1983
Wheeler v. Hatheway, 53 Mich. 77,	799	White v. Mann, 26 Maine, 361,	276
Wheeler v. Jackson, 137 U. S. 245,	2158	White v. Mechanics', etc., Association, 22 Gratt. 233,	1614
Wheeler v. Knazgs, 8 Ohio, 169,	389, 393	White v. Merrill, 82 Cal. 14,	2211
Wheeler v. Newbould, 16 N. Y. 392,	2247	White v. Miller, 71 N. Y. 118,	345, 348, 349
Wheeler v. Pullman, etc., Steel Co., 143 Ill. 197,	1391	White v. Missouri Pacific Railroad, 19 Mo. App. 400,	270
Wheeler v. Reed, 36 Ill. 81,	1360	White v. Mooers, 86 Maine, 62,	1118, 1157
Wheeler v. Russell, 17 Mass. 258,	2066, 2072, 2101	White v. Nutt, 1 P. Wms. 61,	423
Wheeler v. San Francisco & A. R. Co., 31 Cal. 46,	1225	White v. O'Bannon, 86 Ky. 93,	1200
Wheeler v. Schroeder, 4 R. I. 883,	454	White v. Oliver, 39 Maine, 92,	139, 144, 897
Wheeler v. Spencer, 15 Conn. 28,	1948	White v. Palmer, 4 Mass. 147,	1812
Wheeler v. Timpon, 59 Hun, 625,	544	White v. Randall, 153 Mass. 394,	133
Wheeler v. Wheeler, 47 Vt. 637,	561	White v. Richmond, 110 N. Car. 456,	578
Wheeler v. Wheeler, 9 Cow. 34,	549	White v. Rintoul, 108 N. Y. 222,	596, 608, 606
Wheeler v. Wheeler, 11 Vt. 60,	189, 520	White v. San Antonio Waterworks Co. (Texas App. 1895), 29 S. W. Rep. 252,	942
Wheeler v. Woodward, 66 Pa. St. 158,	379	White v. Schuyler, 1 Abb. Pr. (N. S.) 300,	1208
Wheeler & Wilson Mfg. Co. v. Jacobs (Com. Pl. 1893), 21 N. Y. Supl. 1006,	1802	White v. Smith, 54 N. Y. 522,	203
Wheeling, etc., Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287,	2135	White v. Smith, 33 Pa. St. 186,	887
Wheelock v. Tanner, 39 N. Y. 481,	399	White v. Soto, 82 Cal. 654,	2180, 2245
Wheelan v. Ansonia Clock Co., 27 Hun, 557,	489	White v. Stanton, 111 Ind. 540,	1176
Wheelan v. Ansonia Clock Co., 97 N. Y. 293,	138, 2231	White v. Thomas, etc., Tire Co., 52 N. J. Eq. 178,	1257
Whelan v. Reilly, 61 Mo. 565,	970	White v. Wager, 25 N. Y. 328,	1652, 1736
Whelan v. Sullivan, 102 Mass. 204,	676	White v. Waite, 47 Vt. 502,	1680
Whelan v. Whelan, 3 Cow. (N. Y.) 557,	1224	White v. Walker, 31 Ill. 422,	550
Whelden v. Chappel, 8 R. I. 230,	2097	White v. Woodward, 5 C. B. 810,	220
Whelpdale v. Cookson, 1 Ves. Sr. 9, Belt's Supl. to Ves. 9,	1293, 1308	White v. Wright, 16 Mo. App. 551,	148
Whetstone v. University, 13 Kan. 320,	1227	White Mountains R. Co. v. Eastman, 34 N. H. 124,	156, 1128
Whidden v. Whidden (N. H. 1893), 32 Atl. Rep. 152,	2288	White Star Line, etc., Co. v. Morange, 91 Ala. 610,	456
Whincup v. Hughes, L. R. 6 C. P. 78,	2284	White Water, etc., Co. v. Vallette, 21 How. (U. S.) 414,	2121
Whipple Case, 28 Kan. 474,	1454	Whitehead, <i>Ex parte</i> , L. R. 14 Q. B. Div. 419,	619
Whipple v. Farrer, 3 Mich. 436,	2256	Whitehead v. Hamilton Rubber Co., 52 N. J. Eq. 78,	1237
Whipple v. Foot, 2 John. 418,	637	Whitehead v. Potter, 4 Ired. L. 257,	214
Whipple v. Giles, 55 N. H. 139,	1697	Whitehead Machine Co. v. Ryder, 139 Mass. 366,	322
Whipple v. Parker, 29 Mich. 369, 648, 656,	1336	Whitehill v. Lowe, 10 Utah, 419,	1113, 1115
Whisenant v. Gordan, 101 Ala. 250,	1119	Whitehurst v. Boyd, 8 Ala. 375,	867
Whiston v. Stodder, 8 Martin (La.) 95,	698, 700, 708	Whitesides v. Hunt, 97 Ind. 191,	1869, 1918, 1919, 1931
Whitaker v. Kilroy, 70 Mich. 635,	1228	Whitfield v. Levy, 35 N. J. Law, 149,	756
Whitaker v. Salisbury, 15 Pick. 534,	573	Whiting v. Plumas Co. (4 Cal. 65,	565
Whitbeck v. Van Ness, 11 Johns. 409,	466, 608	Whiting v. Equitable Life Assur. Soc., 60 Fed. Rep. 197,	468
Whitbeck v. Whitbeck, 9 Cow. 266,	2099	Whitley v. Dunham Lumber Co., 89 Ala. 493,	432, 456
Whitcomb v. Gilman, 35 Vt. 297,	875, 878	Whitlow v. Echols, 78 Ala. 206,	1768
White v. Amesen, 67 Wt. J.,	2245	Whitman, etc., Assoc. v. National, etc., Assoc., 45 Mo. App. 90,	123
White v. Ashton, 51 N. Y. 290,	1919, 1927	Whitmarsh v. Walker, 1 Metc. (Mass.) 313,	640
White v. Barber, 123 U. S. 392,	10, 74	Whitmore v. Farley, 43 Law T. R. (N. S.) 192,	1932
White v. Baxter, 71 N. Y. 254,	135	Whitmore v. Hay, 85 Wis. 240,	1056
White v. Beeton, 7 H. & N. 42,	223, 618	Whitmore v. Nelson (Texas App. 1895), 29 S. W. Rep. 521,	856
White v. Bigelow, 154 Mass. 593,	233	Whitmore v. South Boston Iron Co., 2 Allen, 52,	338, 340
White v. Blunt, 23 L. J. Ex. 36,	1385		
White v. Blum, 4 Neb. 555,	—		
White v. Braddock School Dist., 159 Pa. St. 201,	—		
White v. Breen (Ala. 1896), 19 So. Rep. 59,	623		
White v. Brown, 2 Jones (N. Car.) 403,	2191		
White v. Buss, 3 Cush. 448,	791, 1860, 1934		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Whitney's Appeal, 167 Pa. St. 609,	449	Wilcox v. Hunt, 13 Pet. 378,	696
Whitney v. City of Port Huron, 88 Mich. 268,	460, 462	Wilcox v. Iowa, etc., University, 32 Iowa, 367,	991
Whitney v. Cochran, 1 Scan. (Ill.) 209,	592	Wilcox v. McCarthy, 3 Brad. (N. Y.) 284,	465
Whitney v. Cook, 63 Miss. 551,	529, 532	Wilcox v. Roath, 12 Conn. 550,	1777
Whitney v. Dutch, 14 Mass. 457,	1775, 1776	Wilcox Silver Plate Co. v. Green, 72 N. Y. 17,	670
Whitney v. Heywood, 6 Cush. 82,	357	Wilcox v. Stephenson, 30 Fla. 377,	2223
Whitney v. Peay, 24 Ark. 22,	1595	Wilcox v. Todd, 64 Mo. 388,	1707
Whitney v. Slayton, 40 Maine, 224,	2033, 2040, 2050	Wilcox v. Wood, 9 Wend. 346,	919
Whitney v. State, 10 Ind. 404,	1955	Wilcoxon v. Stitt, 65 Cal. 596,	120
Whitney v. Stearns, 16 Maine, 394,	684, 1132	Wilcux v. Kling, 87 Ill. 107,	758
Whitney v. Taylor, 54 Barb. 536,	331	Wildbahn v. Robidoux, 11 Mo. 660,	631
Whitney v. Twombly, 136 Mass. 145,	1812	Wild v. Harris, 7 C. B. 999,	278
Whitney v. Union Trust Co., 65 N. Y. 576,	1228	Wild v. Williams, 6 M. & W. 490,	588
Whitney v. Wyman, 101 U. S. 392,	1308	Wilde v. Fox (1822), 1 Rand. (Va.) 165,	1179
Whitney Arms Co. v. Barlow, 63 N. Y. 62,	1264, 1281, 1348, 1536,	Wilde v. Wilde, 37 Neb. 891,	1855, 2007, 2241
Whittaker v. Howe, 3 Bear. 883,	2041, 2047	Wilder v. Seelye, 8 Barb. 408,	400, 401, 409
Whitton v. Griffith, 39 Kan. 211,	1859	Wilder v. St. Johnsbury Railroad Co., 65 Vt. 43,	518
Whittemore v. Cope, 11 Utah, 344,	627	Wilder v. Weakley, 34 Ind. 181,	1816, 1837, 2241
Whittemore v. Gibbs, 24 N. H. 484,	661	Wilder v. Whittemore, 15 Mass. 262,	490
Whittemore v. Judd, etc., Co., 124 N. Y. 565,	819	Wildes v. Dudlow, L. R. 19 Eq. 198,	596, 599, 614, 615, 617
Whittenton Mills v. Upton, 10 Gray (Mass.), 582,	2053	Wildey v. Collier, 7 Md. 273,	1994, 2082
Whittier v. Dana, 10 Allen, 326,	689, 954	Wile & Co. v. Rochester Land Co., 25 N. Y. Supl. 794,	1302
Whittier Machine Co. v. Graffam, 156 Mass. 415,	327	Wiles v. Suydam, 64 N. Y. 173,	1388
Whittlesey v. Delaney, 73 N. Y. 571,	2261	Wiley v. Athol, 150 Mass. 426,	138, 146, 148, 347, 1579
Whittlesey v. Frantz, 74 N. Y. 456,	518	Wiley v. Holmes, 28 Mo. 236,	834
Whitton v. Sullivan, 96 Cal. 480,	2195	Wiley v. Seattle City, 7 Wash. 576,	1469
Whitton v. Whitton, 38 N. H. 127,	490	Wilkerson v. Bruce, 37 Mo. App. 156,	525, 527
Whitwell v. Carter, 4 Mich. 329,	1948	Wilkerson v. Randle (Texas App.), 29 S. W. Rep. 431,	346
Whitwell v. Warner, 20 Vt. 425,	1393, 1406	Wilkes v. Cornelius, 21 Ore. 343,	793
Wichita, etc., R. Co. v. Koch, 47 Kan. 753,	1967	Wilkes v. Ferris, 5 John. 335,	667
Wicker v. Hoppock, 6 Wall. (U. S.) 94,	2000	Wilkie v. Womble, 90 N. C. 254,	630
Wickersham v. Chicago Zinc Co., 18 Kan. 481,	1288	Wilkins v. Ohio Nat. Bank, 31 Ohio St. 565,	1373
Wickham v. Grant, 28 Kan. 517,	1543	Wilkinson v. Bauerle, 41 N. J. Eq. 635,	1364, 1365, 1393, 1405, 1406
Wickham v. Martin, 13 Gratt. 427,	427	Wilkinson v. Colley, 164 Pa. St. 35,	2264
Wickham v. Wickham, 2 K. & J. 478,	613	Wilkinson v. Heavenrich, 58 Mich. 574,	215
Wickliffe v. Lee, 6 B. Mon. 543,	409	Wilkinson v. Farmer, 82 Ala. 367,	479
Widner v. Western Union Tel. Co., 47 Mich. 612,	816	Wilkinson v. Roper, 75 Ala. 475,	1117
Widman v. Brown, 83 Mich. 241,	187, 501	Wilkinson v. Sherman, 45 N. J. Eq. 413,	1008
Widoe v. Webb, 20 Ohio St. 431,	1894	Wilkinson v. State, 59 Ind. 416,	2099
Wieber v. Milwaukee, etc., Ins. Co., 30 Minn. 464,	654	Wilkinson v. Tonsley, 16 Minn. 299,	1947, 1948
Wieman v. Anderson, 42 Pa. St. 311,	1634	Wilkinson v. Williamson, 76 Ala. 163,	907
Wiesenfeld v. Byrd, 17 S. C. 106,	472	Wilks v. Railroad Co., 79 Ala. 180,	1112
Wiggin v. Butcher, 154 Mass. 447,	324	Willamette S. M. Co. v. Los Angeles College Co., 94 Cal. 229,	2222
Wiggin v. Tudor, 23 Pick. 434,	818	Willand v. Fenn, Selwyn N. P. 784,	549
Wiggins v. Bush, 12 Johns. 305,	1640	Willard v. Bosshard, 63 Wis. 454,	604
Wiggins v. Keizer, 6 Ind. 252,	221, 262, 649, 652	Willard v. Dow, 54 Vt. 188,	1680
Wiggins v. Lusk, 12 Ill. 132,	15	Willard v. Eastham, 15 Gray (Mass.), 328,	1653
Wiggins v. Snow, 89 Mich. 476,	164, 165, 166	Willard v. Harvey, 24 N. H. 344,	2158
Wiggins Ferry Co. v. Chicago, etc., R. Co., 73 Mo. 339,	75	Willard v. Magoon, 30 Mich. 389,	1709
Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365,	2128	Willard v. Merritt, 45 Barb. 295,	321
Wigglesworth v. Dallison, 1 Doug. 201,	916	Willard v. Ostrander, 48 Kan. 591,	40
Wigglesworth v. Dallison, 2 Smith's Leading Cases (9th Am. ed.), 842,	891, 910	Willard v. Siegel Gas Fixture Co., 47 Mo. App. 1,	905
Wight v. Gardner, 66 Ill. 94,	496	Willard v. Tayloe, 8 Wall. 557,	1166, 1171
Wight v. Rindskopf, 43 Wis. 344,	1855, 2012	Willard v. Trustees, 66 Ill. 55,	1361
Wight v. Sampner, 127 Ill. 167,	854	Willcuts v. Northwestern, etc., Ins. Co., 81 Ind. 300,	876
Wight v. Shelby R. Co., 16 B. Mon. 4,	259	Willemijn v. Bateson, 63 Mich. 309,	1996
Wightman v. Doe, 24 Miss. 675,	1289	Willes v. Greenhill, 4 De Gex, F. & J. 147,	427
Wightman v. United States, 23 Ct. Cl. 144,	784	Willett v. Porter, 42 Ind. 250,	1818
Wilbur v. Cartright, 44 Barb. 536,	321	Willets v. Sun Mut. Ins. Co., 45 N. Y. 45,	10, 74
Wilbur v. Jernegan, 11 R. I. 113,	454	Willey v. Laraway, 64 Vt. 566,	387
Wilbur v. Johnson, 58 Mo. 600,	617	William v. Rogan, 59 Texas, 438,	1327
Wilbur v. Lynde, 49 Cal. 290,	1304, 1590	William and Mary College v. Powell, 12 Gratt. (Va.) 372,	1719
Wilbur v. Wilbur, 17 R. I. 295,	239, 240	William Cramp & Sons Ship, etc., Bldg. Co. v. Sloan, 21 Fed. Rep. 561,	854
Wilbur v. Wilbur, 21 Atl. Rep. 497,	891	William Butler Steel Works v. Atkinson, 68 Ill. 421,	652, 693
Wilcox v. Dodge, 12 Ill. App. 517,	2253	Williams v. Auerbach, 57 Ala. 90,	1743
Wilcox v. Ellis, 14 Kan. 588,	1886		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Williams v. Bank of Commerce, 71 Miss. 858,	1264	Williams College v. Danforth, 12 Pick. 541,	217, 256
Williams v. Bayley, L. R. 1 H. L. 200, 1828, 1832, 1873		Williamsburg City Fire Ins. Co. v. Froth- ingham, 122 Mass. 391,	1228
Williams v. Bemis, 108 Mass. 91,	692, 837	Williamson v. Brandenburg, 6 Ind. App. 97,	2110
Williams v. Birbeck, Hoff. Ch. 359,	949	Williamson v. Clements, 1 Taunt. 523,	221
Williams v. Bruffy, 96 U. S. 176,	2117	Williamson v. Collins, 17 Ohio. 354,	826
Williams v. Burgess, 10 A. & E. 499,	666	Williamson v. Hall, 62 Mo. 405,	110
Williams v. Carr, 80 N. Car. 294,	1922	Williamson v. Hand-in-Hand Mutual Fire Ins. Co., 28 Up. Can. C. P. 266,	895
Williams v. Carrington, 1 Hilt. (N. Y.) 515,	535	Williamson v. Kokomo, etc., Association, 89 Ind. 8-9,	1335
Williams v. Carwardine, 4 B. & Ad. 621, 54, 60		Williamson v. McClure, 37 Pa. St. 402,	853
Williams v. Cheney, 3 Gray, 215,	1265, 1351	Williamson v. New Jersey, 130 U. S. 139, 1468	
Williams v. Chicago R. Co., 112 Mo. 463,	561	Williamson v. Rees, 15 Ohio, 572,	826
Williams v. Chisholm, 128 Ill. 115,	447	Williamson v. Watts, 1 Cambp. 552,	1772
Williams v. Collins, 67 Iowa, 413,	2290	Williar v. Baltimore, etc., Association, 45 Md. 546,	1596
Williams v. Connaway, 3 Houston (Del.), 63,	162	Williard v. Williard, 56 Pa. St. 119,	1688
Williams v. Costello, 95 Ala. 592,	446	Williford v. Bentley, 5 J. J. Marsh. 181,	110
Williams v. Evans, 87 Ala. 725,	1854	Willingham v. Joyce, 3 Ves. 103,	2266
Williams v. Evans, 19 L. R. Eq. 547,	846	Willington v. West Boylston, 4 Pick. (Mass.) 101,	284
Williams v. Forbes, 114 Ill. 167,	1712	Willion v. Berkley, Plowd. 223,	884
Williams v. Ft. W., etc., R. Co., 82 Texas, 553,	106	Willis v. Branch, 94 N. Car. 142,	2174
Williams v. Gay, 21 La. Ann. 110,	2021	Willis v. Hammond, 141 S. Car. 153,	2178
Williams v. Gray, 67 Eng. C. L. R. 730,	853	Willis v. Hodson, 79 Md. 327,	1845
Williams v. Griffith, 5 M. & W. 300,	472	Willis v. St. Paul Sanitation Co. (1893), 53 Minn. 370,	1264
Williams v. Hardie, 85 Texas, 499,	1762	Willitts v. Waite, 25 N. Y. 577,	725
Williams v. Harrison, 11 S. Car. 412,	2098	Willock's Estate, <i>In re</i> , 165 Pa. St. 522,	1705
Williams v. Hastings, 59 N. H. 373,	2098	Willoughby, <i>In re</i> , 11 Paige Ch. 257,	618
Williams v. Hays, 143 N. Y. 442,	1838	Willoughby, etc., v. Motley, 83 Ky. 297, 1988	
Williams v. Healey, 3 Denio, 363,	115	Wills v. Abbey, 27 Texas, 202,	2086, 2087
Williams v. Hedley, 8 East, 373,	1870	Wills v. Brown, 118 Mass. 137,	610
Williams v. Hitchings, 10 Lea (Tenn.), 326,	543	Wills v. Carpenter, 75 Mo. 80,	97
Williams v. Hutchinson, 3 N. Y. 312,	268, 790, 792	Wills v. Kempt, 17 Cal. 98,	2183
Williams v. Jensen, 75 Mo. 681,	233	Wills v. Ross, 37 Ind. 1,	684, 1079
Williams v. Johnson, 30 Md. 500,	2120	Wills v. Simmonds, 8 Hun, 189,	495
Williams v. Kerr, 152 Pa. St. 560,	997	Willwerth v. Leonard, 156 Mass. 277,	1812
Williams v. Lane, 87 Wis. 152,	2109	Wilyams v. Bullmore, 33 Law J. Ch. 461,	1873
Williams v. Leper, 3 Burr. 1886,	608, 609, 610	Wilmarth v. Mountford, 4 Wash. C. C. 79,	394
Williams v. Lewis (1834), 5 Leigh, 686,	1179	Wilmering v. McGaughey, 30 Iowa, 205,	869
Williams v. Lloyd, W. Jones, 179,	294	Wilmington, etc., R. Co. v. Alsbrook, 146 U. S. 279,	2136
Williams v. Lord, 75 Va. 390,	427, 1677	Wilmington Railroad v. Reid, 13 Wall. (U. S.) 264,	2136, 2140
Williams v. Mayor, etc., 6 Har. & J. 529, 1143		Wilmington, etc., R. Co. v. Thompson, 7 Jones (N. C.), 387,	1323
Williams v. Mayor, 2 Mich. 560,	1554	Wilmot v. Smith, 3 C. & P. 453,	403
Williams v. Montgomery, 22 N. Y. Supl. 1033,	1894	Wilmott v. Hurd, 11 Wend. 586,	193
Williams v. Moor, 11 M. & W. 256,	215	Wilmshurst v. Bowker, 7 M. & G. 882,	685
Williams v. Morris, 95 U. S. 444, 676, 679, 684, 691, 1129		Wilsey v. Franklin, 57 Hun, 382,	794
Williams v. Paul, 6 Bing. 653,	2111	Wilson v. Barker, 50 Maine, 447,	800
Williams v. Peinny, 25 Iowa, 436,	1521	Wilson v. Bevans, 58 Ill. 232,	601
Williams v. Porter (Ky.), 21 S. W. Rep. 613,	419	Wilson v. Coolidge, 42 Mich. 112,	1697
Williams v. Robinson, 73 Maine, 186, 675, 676, 688, 1118		Wilson v. Deen, 74 N. Y. 531,	41, 334, 957, 1066, 2179
Williams v. Rogan, 59 Texas, 438,	258	Wilson v. Doran, 110 N. Y. 101,	407
Williams v. Rogers, 11 Bush, 776,	615	Wilson v. Doran, 39 Hun, 88,	407
Williams v. Rorer, 7 Mo. 556,	393	Wilson v. Gaines, 103 U. S. 667,	2139
Williams v. Schatz, 42 Ohio, 47,	16	Wilson v. Haeker, 85 Ill. 349,	980
Williams v. State, 92 Tenn. 275,	1946	Wilson v. Hunter, 14 Wis. 683,	894
Williams v. State, 25 Fla. 7-1,	182	Wilson v. Kellogg, 77 Ill. 47,	1033
Williams v. Stevens Point L. Co., 72 Wis. 487,	1603	Wilson v. Kiesel, 9 Utah, 397,	16
Williams v. Stritz (Miss. 1895), 17 So. Rep. 227,	1115	Wilson v. Knott, 3 Humph. 473,	290, 291
Williams v. Town of Duaneburgh, 66 N. Y. 129,	1535	Wilson v. Logue, 131 Ind. 191,	1720
Williams v. Vanderbilt, 23 N. Y. 217,	2-16	Wilson v. Marlow, 66 Ill. 385,	854
Williams v. Walker, 111 N. Car. 604,	1740	Wilson v. McConnell, 9 Rich. Eq. 500,	227
Williams v. Walker, 18 S. Car. 577,	1880	Wilson v. Metropolitan R. Co., 120 N. Y. 145,	1352
Williams v. Waters, 36 Ga. 454,	902	Wilson v. Miles, etc., Society, L. R. 22 Q. B. Div. 381,	174, 1616
Williams v. Wentworth, 5 Beav. 325,	18-41	Wilson v. Morris, 4 Colo. App. 242,	969, 1066
Williams v. Whedon, 109 N. Y. 333,	1664	Wilson v. Pelton, 40 Ohio St. 306,	805
Williams v. Whiteman (Mss. Jackson 1835),	—	Wilson v. Railway Co., 2 DeGex, J. & S. 475,	1123
Williams v. Williams, 130 N. Y. 193,	706	Wilson v. Railroad Co., L. R. 9 Eq. 28,	1101
Williams v. Winsor, 12 R. I. 9,	1435		
Williams v. Woods, 16 Md. 220,	903		

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Wilson v. Randall, 67 N. Y. 338,	52, 867	Wiswall v. Harriman, 62 N. H. 671,	536
Wilson v. Ray, 13 Ind. 1,	646	Wiswall v. McGowan, Hoff. Ch. 125,	1158
Wilson v. Reed, 3 Johns. 175,	562	Wiswell v. Wiswell, 35 Minn. 371,	1804
Wilson v. Salamanca, 99 U. S. 499,	1461	Witbeck v. Waite, 16 N. Y. 532,	52
Wilson v. Samuels, 100 Cal. 514,	261	Witbeck v. Witbeck, 25 Mich. 439,	1017, 1030
Wilson v. Stratton, 47 Maine, 120,	709	Witherby v. Mann, 11 Johns. 518,	443
Wilson v. Troup, 2 Cow. 195,	893	Witherell v. Jones, 2 Barn. & Ad. 221,	1891
Wilson v. Tummam, 6 Man. & G. 236,	2185	Witherow v. Witherow, 16 Ohio, 238,	146
Wilson v. Williman, 1 Nott & McC. 440,	385	Withers v. Ewing, 40 Ohio St. 400,	198
Wilson v. Wilson, 1 H. L. Cas. 538,	2009	Withers v. Reynolds, 2 B. & Ad. 882,	497
Wilstach v. Heyd, 122 Ind. 574,	679, 1484	Withers v. Richardson, 5 T. B. Mon. 94,	617
Wilton v. Eaton, 127 Mass. 174,	210, 1473	Withrow v. Adams, 4 Texas Civ. App. 438,	1760
Wimer v. Overseers, etc., 104 Pa. St. 317,	199	Withy v. Cottle, T. & Russ. 78,	751
Wimer v. Worth Tp., 104 Pa. St. 317,	1651	Witter v. Biscoe, 13 Ark. 422,	1138
Winans v. Peables, 32 N. Y. 423,	1736	Witz v. Osburn, 83 Va. 227,	427
Winch v. Bean, 62 N. H. 427,	490	Wohlford v. Citizens' Loan, etc., Assn.,	1598
Winchell v. Bowman, 21 Barb. 448,	196	140 Ind. 662,	
Winchester v. Baltimore, etc., R. Co., 4	1288	Wolcott v. Mount, 36 N. J. Law, 262,	315, 348
Md. 231,		Wolcott v. Patterson, 100 Mich. 227,	1697
Winchester v. Newton, 2 Allen, 492,	150	Wolcott v. Van Santvoord, 17 Johns.	2196
Winchester Co. v. Carman, 109 Ind. 31,	170	(N. Y.) 248,	
Winckworth v. Mills, 2 Esp. 484,	613	Wolcott v. Yeager, 11 Ind. 84,	2229, 2248
Windham v. Cerf, 19 La. Ann. 498,	2021	Woldert v. Arledge, 4 Texas C. App. 692,	928
Windham Cotton Mfg. Co. v. Hartford P.		Wolf v. Des Moines, etc., R. Co., 64 Iowa,	753, 760
& F. R. Co., 23 Conn. 373,	1123	380,	
Winebinner v. Weisiger, 3 T. B. Mon.		Wolf v. Fogarty, 6 Cal. 224,	1642
(Ky.) 32,	2015	Wolf v. Frost, 4 Sanf. Ch. 72,	642
Winfield v. Dodge, 45 Mich. 355,	2104	Wolf v. Gerr, 43 Iowa, 339,	135, 144
Winfield Nat. Bank v. Croco, 46 Kan. 620,	1831	Wolf v. Great Falls, etc., Co., 15 Mont.	1165
Winfield Water Co. v. City of Winfield,		49,	
51 Kan. 104,	1578, 1580, 2193	Wolf v. Howes, 20 N. Y. 197,	889
Windmiller v. Pope, 107 N.Y. 674,	498, 507, 945	Wolf v. Marsh, 54 Cal. 228,	2212
Winfield Water Co. v. City of Winfield,		Wolf v. Wall, 40 Ohio St. 111,	2170
51 Kan. 104,	701	Wolf v. Zimmerman, 127 Ind. 486,	1725
Winget v. Quincy Building Assn., 128 Ill.		Wolfe v. Howes, 20 N. Y. 197,	283, 286, 948
67,	1602, 1603	Wolke v. Fleming, 103 Ind. 105,	692, 838, 1183
Wing, Matter of, 83 Hun, 284,	1845	Wolford v. Powers, 85 Ind. 294,	228, 229, 233
Wing v. Chase, 35 Maine, 260,	179, 182, 231, 234	Wolfenden v. Wilson, 33 U. C. Q. B. 442,	660
Wing v. Clark, 24 Maine, 366,	296	Wolff v. Campbell, 110 Mo. 114,	931, 940
Wing v. Mill, 1 B. & A. 105,	187	Wolff v. Koppel, 5 Ill. 458,	613
Wing v. Thompson, 78 Wis. 256,	165, 168	Wolff v. Liverpool Ins. Co., 50 N. J. Law,	120
Winn v. Buil, L. R. 7 Ch. D. 29,	97	453,	
Winneseik Ins. Co. v. Holzgrafe, 53 Ill.		Wolff v. New Orleans, 103 U. S. 358,	1496, 2126
516,	957	Wollaston v. Tribe, L. R. 10 Eq. 44,	253
Winnepesaukee, etc., Assn. v. Gordon, 63	2256	Wolton v. Gavin, 16 Q. B. 48,	2095
N. H. 505,		Wolverhampton R. Co. v. London, etc.,	
Winnipisseege, etc., Co. v. Perley, 46		R. Co., L. R. 16 Eq. 433,	1101, 1422
N. H. 83,	893	Wood's Appeal, 92 Pa. St. 379,	549, 1756
Winpenny v. French, 18 Ohio St. 469,	2090	Wood v. Bayard, 63 Pa. St. 320,	1779
Winslow v. Central, etc., R. Co., 71 Iowa,		Wood v. Benson, 2 C. & J. 94,	220
197,	2003	Wood v. Boynton, 64 Wis. 265,	1022
Winslow v. Herrick, 9 Mich. 380,	830	Wood v. Callaghan, 61 Mich. 402,	471
Winslow v. Patten, 34 Maine, 25,	884	Wood v. Chaplin, 13 N. Y. 509,	466
Winsor v. Lombard, 18 Pick. 57,	348	Wood v. Cochrane, 39 Vt. 544,	859
Winstead v. Reid, Bus. L. (N. Car.) 76,	2191	Wood v. Dummer, 3 Mason, 308,	
Winston v. Dalby, 64 N. Car. 299,	540		1375, 1398, 1400
Winter v. Brockwell, 8 East. 308,	641	Wood v. Edwards, 19 Johns. (N. Y.) 205,	2185
Winter v. City Council, 65 Ala. 403,	804	Wood v. Fisk, 63 N. Y. 245,	823
Winter v. Goebner, 2 Colo. App. 259,	234, 1132	Wood v. Fleet, 36 N. Y. 499,	621
Winter v. Kinney, 1 N. Y. (1 Comst.) 365,	2091	Wood v. Guarantee Trust & Safe Deposit	
Winters v. McMahon, 23 N. Y. Weekly		Co., 128 U. S. 416,	1443
Dig. 119,	1797	Wood v. Hitchcock, 20 Wend. 47,	399
Winter v. Merrick, 69 Ala. 86,	1003	Wood v. Jones, 35 Texas, 64,	842
Winter v. Norton, 1 Ore. 42,	2224	Wood v. Lake, Sayer, 3,	642
Winter v. Trainor, 151 Ill. 191,	1107, 1197	Wood v. Kennedy, 19 Ind. 68,	2125
Winter v. Truax, 87 Mich. 324,	2276	Wood v. Leadbitter, 13 M. & W. 837,	642
Wintermute v. Carner, 8 Wash. 585,	1125	Wood v. Leland, 1 Metc. 387,	827
Winton v. Sherman, 20 Iowa, 295,	378	Wood v. Lindley, 12 Ind. App. 258,	895
Wintz v. Vogt, 3 La. Ann. 16,	2033	Wood v. Lowry, 17 Wend. (N. Y.) 231,	1646
Wirth v. Branson, 98 U. S. 118,	2122	Wood v. Malone, 131 Pa. St. 544,	270, 299
Wisconsin Brick Co. v. Hood, 54 Minn.		Wood v. Mayor, 73 N. Y. 556,	2168
543,	339	Wood v. McCann, 6 Dana (Ky.), 366,	2082
Wisconsin Brick Co. v. Hurd Refrigerator		Wood v. Merritt, 2 Bosw. 368,	826
Co. (Minn.), 62 N. W. Rep. 550,	349	Wood v. Murphy, 47 Mo. App. 539,	424
Wisconsin Cent. R. Co. v. Taylor County,		Wood v. Newkirk, 15 Ohio St. 295,	207
52 Wis. 37,	862	Wood v. Orford, 52 Cal. 412,	1719
Wise v. Brooks, 69 Miss. 891,	1055, 2281	Wood v. Partridge, 11 Mass. 488,	563
Wise v. Grant, 140 N. Y. 593,	1001, 2280	Wood v. Rabe, 96 N. Y. 414,	2280
Wise v. Rogers, 24 Gratt. 169,	32, 2159	Wood v. Ross (Texas App.), 26 S. W. Rep.	332
Wiseman v. Lucksinger, 84 N. Y. 31,	643	148,	
Wiser v. Blachly, 1 Johns. Ch. 437,	1057	Wood v. Rowcliffe, 6 Exch. 407,	862

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Wood v. Savage, 2 Doug. (Mich.) 316,	629	Workingmen's, etc., Bank of Converse, 29	
Wood v. Strother, 76 Cal. 545,	132	La. Ann. 369,	1326
Wood v. Thornly, 58 Ill. 464,	844, 1194	Worland v. Kimberlin, 6 B. Mon. 608,	1364
Wood v. Washburn, 2 Pick. 24,	172	Worley v. Moore, 97 Ind. 15,	797
Wood v. Watkinson, 17 Conn. 500,	834	Worley v. Tuggle, 4 Bush (Ky.), 163,	1062
Wood v. Young, 5 Wend. 620,	558	Worrall's Accounts, 5 W. & S. 111,	2009
Wood, Walter A., Harvester Co. v. Rob-		Worrall v. Munn, 38 N. Y. 137,	1213
bins, 56 Minn. 48,	1319	Worrall v. Munn, 5 N. Y. 229,	215
Wood, etc., Machine Co. v. Smith, 50 Mich.		Worth v. Case, 42 N. Y. 362,	9, 232
565,	131, 133	Worth v. Mumford, 1 Hilt. (N. Y.) 1,	465
Wood Machine Co. v. Gaetner, 55 Mich.		Worth v. Worth, 84 Ill. 442,	1191
453,	336	Worthen v. Griffith, 59 Ark. 562,	
Woodbury v. Parshley, 7 N. H. 237,	641		1392, 1393, 1405
Woodbury v. State, 69 Ala. 242,	992	Worthington v. Thompson, 54 Ark. 151,	187
Woody v. Old Dominion Ins. Co., 31		Worthy v. Johnson, 8 Ga. 236,	356
Gratt. 362,	1097	Worthy v. Jones, 11 Gray, 168,	649, 653
Woodford v. Dorwin, 3 Vt. 82,	707	Worthington v. Emerson, 116 Mass. 374,	470
Woodford v. Hamilton, 139 Ind. 481,	1898	Worthington, <i>In re</i> , 141 N. Y. 9,	1971
Woodhull v. Little, 102 N. Y. 165,	34	Worthington v. Boston, 14 Sup. Ct. Rep.	
Wooding v. Crain, 10 Wash. St. 35,	1145	737,	1554
Woodland, The, 14 Blatchford, 499,	740	Worthington v. Hylyer, 4 Mass. 196,	95, 894
Woodland, The Barque, 7 Benedict, 110,	740	Worthington v. McRoberts, 7 Ala. 814,	630
Woodruff v. Clark, 42 N. J. Law, 198,	1668	Wright's Appeal, 5 Pa. St. 57,	1845
Woodruff v. Erie R. Co., 93 N. Y. 609,		Whelan v. Ansonia Clock Co., 97 N. Y.	
	1281, 1436	293,	293
Woodruff v. Hinman, 11 Vt. 592,	1860	Wray v. Chandler, 64 Ind. 146,	1817, 1850
Woodruff v. Noble Co. Comrs., 110 Ind.		Wright v. Barnes, 14 Conn. 518,	305
App. 179,	1486	Wright v. Behrens, 39 N. J. Law, 413,	379, 398
Woodruff v. Scaife, 83 Ala. 152,	609	Wright v. Bircher, 72 Mo. 179,	1435
Woodruff v. Scruggs, 27 Ark. 26,	2125	Wright v. Brown, 116 N. Car. 26,	1185
Woodruff v. Trapnall, 10 How. (U. S.) 190,		Wright v. Buck, 62 N. H. 656,	458
	2126	Wright v. City of Chicago, 60 Ill. 312,	1546
Woodruff v. Wentworth, 133 Mass. 309,		Wright v. Crabbs, 78 Ind. 487,	2060, 2072
	1859, 1867, 1896	Wright v. Dobie, 3 Texas C. App. 194,	757
Woodruff v. Woodruff, 44 N. J. Eq. 349,		Wright v. First, etc., Co., 5 N. H. 410,	536
	179, 234, 235, 1113	Wright v. Hays, 10 Texas 130,	1739, 1760
Woods v. Armstrong, 54 Ala. 150,	1898	Wright v. Hughes, 13 Ind. 109,	1931
Woods v. Ayres, 39 Mich. 345,	772, 784	Wright v. Hughes, 119 Ind. 324,	1603, 1902
Woods v. Brown, 83 Ind. 164,	1841	Wright v. Laing, 3 B. & C. 165,	471
Woods v. Dial, 12 Ill. 72,	500	Wright v. Lothrop, 149 Mass. 385,	489
Woods v. Land, 30 Mo. App. 789,	—	Wright v. McCormick, 17 Ohio St. 86,	1373
Woods v. Lawrence Co., 1 Black (U. S.)		Wright v. McKike, 70 Mo. 175,	579
386,	1537	Wright v. Meyer (Tex. App.), 25 S. W.	
Woods v. Woods, 127 Mass. 141,	457	Rep. 1122,	142, 277
Woodson v. Massenbug, 3 Texas Civ.		Wright v. Mills, 4 H. & N. 488,	761
App. 146,	1760	Wright v. Mix, 76 Cal. 465,	442
Woodstock, Town of, v. Town of Barnard,		Wright v. Nagle, 101 U. S. 791,	1504, 1531
67 Vt. 97,	1849	Wright v. Percival, 8 L. J. R. Q. B. (N. S.)	
Woodstock Iron Co. v. Richmond & D.		258,	663
Extension Co., 129 U. S. 643,		Wright v. Pipe-Line Co., 101 Pa. St. 204,	
1304, 1425, 1986, 1992, 2082, 2083			1267
Woodward v. Allan, 3 Dana, 164,	364	Wright v. Puckett, 22 Gratt. 370,	1179
Woodward v. Brooks, 18 Ill. App. 150,	724	Wright v. Reusens, 133 N. Y. 298,	860
Woodward v. Darcy, Plow. 184,	548	Wright v. Russel, 3 Wils. 530,	566
Woodward v. Fuller, 80 N. Y. 312,		Wright v. Ryder, 36 Cal. 342,	2027, 2029, 2069
	131, 140, 372, 2231	Wright v. Senn Estate, 85 Mich. 191,	792
Woodward v. Jewell, 25 Fed. Rep. 689,	867	Wright v. Susquehanna, etc., Ins. Co., 110	
Woodward v. Newhall, 1 Pick. 500,	831	Pa. St. 29,	121
Woodward v. Seely, 11 Ill. 157,	641	Wright v. Syracuse, etc., R. Co., 49 Hun,	
Woodward v. Spurr, 141 Mass. 283,	1745, 1754	445,	544
Woodward v. Wilcox, 27 Ind. 207,	1184	Wright v. Tebbitts, 91 U. S. 252,	2003
Woodworth v. Bennett, 43 N. Y. 273,	1940	Wright v. Terry, 23 Fla. 160,	237, 244
Woodridge v. Stern, 42 Fed. Rep. 311,		Wright v. Tinsley, 30 Mo. 389,	1133
	646, 647, 652	Wright v. Trainer, 1 Wkly. Notes Cas.	
Wooley v. Clements, 11 Ala. 220,	767	(Pa.) 198,	50
Wooley v. Constant, 4 Johns. 54,	953	Wright v. Wakeford, 17 Ves. 454,	12
Woolner v. Levy, 48 Mo. App. 469,	384	Wright v. Weeks, 25 N. Y. 153,	674, 684, 692
Wooley v. Funke, 121 N. Y. 87,	876	Wright v. Whithead, 14 Vt. 268,	2243
Woonsocket, etc., Press Co. v. Miller, 18		Wren v. Wren, 100 Cal. 276,	1686
R. I. 657,	1100	Wright v. Wright, 99 Mich. 170,	849, 1211
Woonsocket R. Co. v. Sherman, 8 R. I.		Wright v. Wright, 1 Litt. (Ky.) 179,	2181
564,	156	Wright v. Wright, 139 Mass. 177,	1811
Wooster v. Sage, 67 N. Y. 67,	160, 2182	Wright v. Wright, 54 N. Y. 437,	222
Wooters v. Kauffman, 67 Texas, 488,	831	Wristen v. Bowles, 82 Cal. 84,	87
Wooters v. Smith, 56 Texas, 198,	832	Wullenwaber v. Dunigan, 30 Neb. 877,	1543
Worcester v. Eaton, 11 Mass. 368,	1827, 2016	Wyatt v. Marquis of Hertford, 3 East,	
Worcester v. Milford, 18 Pick. (Mass.)		147,	463
379,	1849	Wyckoff v. Anthony, 90 N. Y. 442,	385, 386
Worcester, Mayor, etc., of, v. Norwich &		Wyckoff v. Summerson (Pa. St.), 19 Atl.	
W. R. Co., 109 Mass. 103,	1439	Rep. 809,	165
Work v. Beach, 129 N. Y. 651,	2199	Wylson v. Dunn, L. R. 34 Ch. Div. 569,	
Work v. Beach, 53 Hun, 7,	779		1120, 1148

[References are to Pages, Vol. I, pp. 1-1050, Vol. II, pp. 1051-2291.]

Wyndham v. Chetwynd, 1 Burr. 414,	590
Wynkoop v. Cowing, 21 Ill. 570,	870
Wynn v. Wood, 97 Pa. St. 216,	605, 609
Wyscaver v. Atkinson, 87 Ohio St. 80,	1540

X Y

Xenos v. Wickham, L. R. 2 H. L. 296,	15, 88
--------------------------------------	--------

Yale v. Dederer, 18 N. Y. 265,	1652, 1653
Yale v. Dederer, 22 N. Y. 450,	1746
Yale v. Dederer, 68 N. Y. 329,	1704
Yale v. Edgerton, 14 Minn. 194,	616
Yale, etc., Stove Co. v. Wilcox, 64 Conn. 101,	1979
Yandes v. Lefavour, 2 Blackf. 371,	543
Yard v. Patton, 13 Pa. St. 278,	182, 231, 234
Yard v. Yard, 27 N. J. Eq. 114,	1021
Yarmouth, Inhabitants of, v. North Yarmouth, 34 Maine, 411,	2142
Yarnell v. Anderson, 14 Mo. 619,	452
Yarnold v. Lawrence, 15 Kan. 126,	1554
Yates v. Bond, 2 McCord. 382,	356
Yates v. Donaldson, 5 Md. 389,	819
Yates v. Gardiner, 20 L. J. Ex. 327,	123
Yates v. Law, 86 Va. 117,	1686, 1719
Yates v. Lyon, 61 N. Y. 344,	1822
Yates v. Pym, 6 Taunt. 446,	325, 328, 926
Yates v. Thomson, 3 Clark & F. 544,	717
Yauger v. Skinner, 14 N. J. Eq. 389,	1813, 1814
Yaw v. Kerr, 47 Pa. St. 333,	196
Yazel v. Palmer, 81 Ill. 82,	1664
Yazoo, etc., R. Co. v. Fulton, 71 Miss. 385,	529
Yazoo, etc., R. Co. v. Thomas, 132 U. S. 174,	2136
Yeakle v. Jacob, 33 Pa. St. 376,	639
Yeartean v. Bacon's Estate, 65 Vt. 516,	1897
Yeats v. Ballentine, 56 Mo. 530,	126, 136
Yell v. Snow, 24 Ark. 554,	829
Yelland, <i>Ex parte</i> , 21 L. J. Ch. 852,	260
Yellow Jacket, etc., Mining Co. v. Stevenson, 5 Nev. 224,	1279
Yeomans v. Williams, L. R. 1 Eq. 184,	515, 555, 557
Yerger v. Rains, 259,	2022
Yerkes v. Richards, 153 Pa. St. 656,	1147
Yerkes v. Salomon, 11 Hun. 471,	1935
Yetter v. Hudson, 57 Texas, 604,	277
Yick Wo v. Hopkins, 118 U. S. 356,	2160
York Buildings Co. v. Mackenzie, 3 Paton (Scotland), 878,	1308
York Park Building Association v. Barnes, 39 Neb. 834,	1235, 1325
Yorkshire Wagon Co. v. Maclure, L. R. 19 Ch. Div. 478,	617
Youn v. Lamont, 56 Minn. 216,	1025
Young's Estate, 148 Pa. St. 573,	793
Young v. Currier, 63 N. H. 419,	572
Young v. Dibrell, 7 Humph. 270,	186

Young v. English, 7 Beav. 10,	469
Young v. Farwell, 139 Ill. 326,	1380
Young v. Fuller, 29 Ala. 461,	955
Young v. Glendenning, 6 Watts, 509,	847
Young v. Harris, 36 Ark. 162,	479
Young v. Higgon, 6 M. & W. 45,	764
Young v. Hill, 67 N. Y. 162,	1047
Young v. Miller, 10 Ohio, 85,	1062
Young v. Otto, 57 Minn. 307,	1811
Young v. Overbaugh, 76 Hun. 151,	844
Young v. Overbaugh, 145 N. Y. 158,	627
Young v. Rathbone, 16 N. J. Eq. 224,	1171
Young v. Young, 80 N. Y. 422,	250, 559, 1670
Young v. Young, 45 N. J. Eq. 27,	7
Young v. Young, 7 Cold. (Tenn.) 461,	1698
Younge v. Guilbeau, 3 Wall. 636,	14, 15, 17, 90, 91

Youngblood v. Birmingham, etc., Trust Co., 95 Ala. 521,	1605, 1888
Youghiogheny Natural Gas Co. v. Westmoreland Paper Co., 158 Pa. St. 559,	2239

Z

Zabriskie v. Central R. Co., 131 N. Y. 72,	327, 341, 504
Zabriskie v. Railroad Co., 23 How. 381,	1430, 1527
Zacharie v. Franklin, 12 Pet. 151,	131
Zaleski v. Clark, 44 Conn. 218,	131
Zane v. Zane (1819), 6 Munf. 406,	1179
Ziegler v. Chapin, 126 N. Y. 342,	1467
Ziegler v. McFarland, 147 Pa. St. 607,	438
Ziehen v. Smith, 148 N. Y. 558,	410
Zihlman v. Cumberland Glass Co., 74 Md. 303,	2234
Zell Guano Co. v. Emry, 113 N. Car. 85,	1634
Zimmer v. New York Central, etc., Co., 137 N. Y. 460,	1963
Zimmerman v. Bitner, 79 Md. 115,	1023
Zimmerman v. Kinkle, 108 N. Y. 282,	1975
Zimmerman v. Zimmerman, 129 Pa. 229,	793
Zimmerman Mfg. Co. v. Dolph (Mich.), 62 N. W. Rep. 339,	335
Zimpelman v. Robb, 53 Texas, 274,	1760
Zinn v. Law, 32 W. Va. 447,	1677
Zinn v. Ritterman, 2 Abb. (N. Y.) Pr. N. S. 261,	2166
Zipcey v. Thompson, 1 Gray, 243,	725
Zoebisch v. Rauch, 133 Pa. St. 532,	1775
Zoller v. Ide, 1 Neb. 439,	1231
Zook v. Odle, 3 Colo. App. 87,	453, 466
Zorntlein v. Bram, 100 N. Y. 12,	1768
Zouch v. Parsons, 3 Burr. 1794,	1772, 1789, 1795
Zuck v. McClure, 98 Pa. St. 541,	500, 945
Zunz v. South Eastern Ry. Co., L. R. 4 Q. B. 539,	64
Zwerneman v. Von Rosenberg, 76 Texas, 522,	985

THE MODERN LAW OF CONTRACTS

CHAPTER I.

INTRODUCTORY.

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| § 1. Simple contracts defined. | § 20. Merger of mortgage in legal title. |
| 2. Contract complete before formally written. | 21. Judgment as estoppel. |
| 3. Rule as to written draft. | 22. The same subject continued—Illustrations. |
| 4. The promise—Consideration essential. | 23. Statutes as contracts. |
| 5. Consideration further discussed—Mutual promises. | 24. The same subject continued—Treaties. |
| 6. New consideration where written contract changed. | 25. State grants. |
| 7. Execution and form of contracts. | 26. Written evidence of contracts the best. |
| 8. Delivery of contracts. | 27. Negotiable instruments—How far conclusive. |
| 9. What is a good delivery. | 28. Where written contract is unambiguous. |
| 10. The same subject continued. | 29. Complete written contract excluding parol evidence. |
| 11. Contracts classified and distinguished. | 30. Contracts in a foreign language. |
| 12. Sealed contracts. | 31. When parol evidence admissible, although contract written. |
| 13. Sealed contracts further considered. | 32. Parol evidence as to written consideration. |
| 14. Express and implied contracts. | 33. Notice and assent as evidence of contract. |
| 15. Implied contracts distinguished. | 34. Circumstantial evidence of contracts. |
| 16. Reservations and exceptions. | |
| 17. Contracts of record. | |
| 18. The same subject continued—Warrant of attorney. | |
| 19. Merger in judgment. | |

§ 1. Simple contracts defined.—Chief Justice Marshall defined a contract as “an agreement in which a party undertakes

to do or not to do a particular thing.”¹ According to its etymology a contract is a drawing together of the minds of parties until they meet in agreement.² The elements of a complete contract are a lawful subject-matter, a sufficient consideration, and the *aggregatio mentium*, or mutual assent, of the parties.³ An instrument which a person signs and executes, when through mental disease or weakness he is incapable of

¹ *Sturges v. Crowninshield*, 4 Wheat. 122, 197. See, also, to the same effect 2 Kent's Commentaries, 449; Story on Contracts, § 1; Wharton on Contracts, § 1; Bouvier's Law Dictionary, 392; California Civ. Code, § 1549. The Louisiana Code defines a contract as “an agreement by which one person obligates himself to another to give, to do or permit, or not to do something expressed or implied by such agreement.” La. Code (1889), § 1761.

² *McNulty v. Prentice*, 25 Barb. 204. It is derived from the Latin verb *contraho*. And see Leake on Contracts, 12. If one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. But no matter what a man's real intention may be, if he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms. *Smith v. Hughes*, L. R. 6 Q. B. 597, per Blackburn, J., 607; *Freeman v. Cooke*, L. R. 2 Ex. 663. And see *Harlow v. Curtis*, 121 Mass. 320. The intention must be communicated. Intention is im-

material till it manifests itself in an act. If a man intends to buy, and says so to the intended seller, and he intends to sell, and says so to the intended buyer, there is a contract of sale; and so there would be if neither had the intention. But telling an intention to an indifferent person is no more than though it were noted in one's memorandum book, which is no more than though it existed solely in one's mind. *Brown v. Hare*, 3 H. & N. 484, 495, per Bramwell, J.

³ *Fuller v. Kemp* (1893), 138 N.Y. 231, 236. Thus it is said in *Loaiza v. Superior Court* (1890), 85 Cal. 11, that “to constitute a contract there must be parties capable of contracting, consent, a lawful object, and a sufficient consideration; and the consent must be free, mutual and communicated by each to the other and must not be induced by fraud, undue influence or mistake, else it is not free and the contract may be rescinded.” That free consent of the parties is essential to a binding contract see, also, *Morrill v. Nightingale* (1892), 93 Cal. 455. And again in Comyn on Contracts, 2, the essentials of a simple contract are said to be, “A person able to contract; a person able to be contracted with; a thing to be contracted for; a good and sufficient consideration; clear and explicit words to express the contract; the assent of both contracting parties.” This definition is approved in Story on Contracts (5th ed.), 1. The California Civ. Code, § 1550, is to the same effect.

understanding it, is not his contract, because it lacks the essential element of his assent, and because his mind can not meet another mind in respect to it.¹

§ 2. Contract complete before formally written.—Where parties conclude an agreement, and act upon it, they will be bound by it, although it may have been understood that the agreement was afterwards to be reduced to writing. So also a stipulation to reduce a valid written contract to some other form does not affect its validity, and the stipulation may not be used by either of the parties for the purpose of imposing upon the other additional burdens or obligations, or of evading the performance of any of the provisions of the contract. This rule applies where, by means of letters and telegrams exchanged between the parties, a clear and definite proposition, containing all the requirements of a completed contract, is made by one and accepted by the other, with an understanding that the agreement shall be expressed in a formal contract.² Where it

¹ *Girard v. St. Louis Car Co.* (1894), 123 Mo. 358, per Barclay, J. The testimony for plaintiff tends strongly to prove that he was incapable of understanding the release when he signed it, and that he did not comprehend, or intend to assent to, its terms. The jury so found in response to instructions. Those facts, when established, destroyed the substance of the agreement which the release in form expressed. They took from the apparent contract what was essential to its legal force and validity, namely, the element of assent by the plaintiff. That element is a necessary part of every contract. Without it, a mere writing, expressing some formula of words, imposes no obligation. The signature of plaintiff, obtained to such a paper without the assent of his mind to the act, deprived him of no legal right. He might, indeed, affirm such a signature, or make it his law-

ful act by his subsequent conduct, the effect of which would be to give to the agreement that assent which was necessary to originate an obligation on his part; but, in the absence of such acts as amounted to an approval of it, he might proceed to enforce his rights, irrespective of such a paper. *Brewster v. Brewster* (1875), 38 N. J. Law 119.

² *Sanders v. Pottlitzer Co.* (1894), 144 N. Y. 209, O'Brien, J.: "Here the contract was already in writing, and it was none the less obligatory upon both parties because they intended that it should be put into another form, especially when their intention is made impossible by the act of one or the other of the parties by insisting upon the insertion of conditions and provisions not contemplated or embraced in the correspondence. *Vassar v. Camp*, 11 N. Y. 441; *Brown v. Norton*, 56 Hun, 248; *Pratt v. Hudson River*,

was agreed after arranging the terms of the proposed contract that it should be reduced to writing and signed by the parties, and afterwards some of the parties refused to sign the writing on the ground that it included matters not agreed on, the minds of the parties did not meet, and the contract was therefore not completed.¹

§ 3. Rule as to written draft.—If the written draft of a contract is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect

etc., R. Co., 21 N. Y. 305. The principle that governs in such cases was clearly stated by Judge Selden in the case last cited in these words: 'A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is, in all respects as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by the other; that the terms of this contract were in all respects definitely understood and agreed upon, and that a part of the mutual understanding was, that a written contract, embodying these terms, should be drawn and executed by the respective parties, this is an obligatory contract, which neither party is at liberty to refuse to perform.' In *Green v. Cole*, 103 Mo. 70, 76, Black, J., said: "If the parties make an agreement which they intend shall be binding from the time it is made, effect to it will be given from that time, though they intend it shall be superseded by a more formal written agreement. *Bonnewell v. Jenkins*, L. R. 8 Ch. Div. 70; *Blaney v. Hoke*, 14 Ohio St. 292; *Montague v. Weil*, 30 La. Ann. 50;

Mackey v. Mackey, 29 Grat. 158; *Bell v. Offutt*, 10 Bush (Ky.), 632. In *Allen v. Chouteau*, 102 Mo. 309, a written proposal concluded with these words: 'If this is agreed to, the agreement can be fully drawn up and signed,' and we held that an acceptance of the proposal would make a binding contract though no further written agreement was ever drawn up or signed by the parties. We do not regard the case of *Eads v. Carondelet*, 42 Mo. 113, as in conflict with what has been said; for that case proceeds upon the ground that all the terms of the contract had not been settled, for the mayor was authorized to make a contract with 'such further conditions as may be deemed necessary.' Enough has been said to show that where parties have assented to all the terms of a parol agreement it does not follow from the mere fact that a written contract is to be thereafter prepared and signed that no binding contract was made. If they intend the parol contract shall be binding upon them, then effect will be given to that intention." This is a correct statement of the rule, although the court, upon the facts of this case, reached a different conclusion on a rehearing. *Green v. Cole*, 127 Mo. 587; 30 S. W. Rep. 135.

¹ *Bryant v. Ondrak* (1895), 34 N. Y. Supl. 384; 87 Hun, 477.

the binding force of the contract. If, however, it is viewed as the consummation of the negotiations, there is no contract until the written draft is finally signed. In determining which view is entertained in any particular case, several circumstances may be helpful, as whether the contract is of that class which are usually found in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount is large or small; whether it is a common or unusual contract; and whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract. The burden of proof is upon the party affirming the completion of the contract before the written draft is signed.¹

¹ *Mississippi, etc., Steamship Co. v. Swift* (1894), 86 Me. 248, per Emery, J.: "In *Chinnock v. Marchioness of Ely*, 4 De Gex, J. & S. 638, the defendant's solicitors wrote to the plaintiff, naming the price for an estate about which they had been negotiating. The plaintiff wrote a letter, in which he agreed to give the price named, and then added: 'I shall be obliged if you will forward me the usual contract.' In reply, the defendant's solicitors wrote: 'We have been instructed by the Marchioness of Ely to proceed with the sale to you of these premises. The draft contract is being prepared, and will be forwarded to you for approval in a few days.' Lord Chancellor Westbury held that, so far, the parties were in treaty, merely, and that, without the execution of the draft mentioned, there was no contract concluded. In *Bonnewell v. Jenkins*, L. R. 8 Ch. Div. 70, the defendant's agent offered certain premises for sale. The plaintiff wrote the agents, making an offer of £800 for the estate. The agents wrote in

reply as follows: 'We are instructed to accept your offer of £800 for these premises, and have asked Mr. Jenkins's solicitor to prepare contract.' The lord justices of appeal held that there was a concluded contract. Thesiger, L. J., said: 'The mere reference to a preparation of an agreement, by which the terms agreed upon would be put into a more formal shape, does not prevent the existence of a binding contract.' In *Rossiter v. Miller*, L. R. 5 Ch. Div. 648, there was much correspondence about a sale of certain lots of land, and the question arose whether the correspondence showed a completed contract, without the formal draft which had been referred to in some of the letters. James, L. J., said: 'The reasonable view of the case is that the parties intended the signing of the formal contract to be a condition precedent.' Coleridge, C. J., said, 'If a set of terms be agreed upon in writing, they constitute a contract, although it may be the intention of the parties that they should be put into a more formal shape; but here a

§ 4. The promise—Consideration essential.—The intention of the one party to observe the matter in question, expressed

set of terms was never agreed to.' Baggallay, L. J., said, 'The letters left the defendant a right to believe that the signing of a formal contract was necessary to create a binding agreement.' In the same case, upon an appeal to the house of lords (L. R., 3 App. Cas. 1124), Lord Hatherly said: 'Although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is an agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, though only by letter, an acceptance clearly by letter will not the less constitute an agreement, in the full sense, between the parties, merely because the letter may say: "We will have this agreement put in due form by a solicitor."' In *Ridgway v. Wharton*, 6 H. L. Cas. 238, Lord Cranworth said: 'If parties have entered into an agreement, they are not the less bound by that agreement because they say: "We sent it to a solicitor to have it reduced into form;" but when the parties negotiate and do not say so, the mere fact that they do send it to a solicitor to have the matter reduced into form affords, to my mind, generally cogent evidence that they do not intend to bind themselves till it is reduced into form.' In *Morrill v. Tehama, etc., Mining Co.*, 10 Nev. 135 (125), the court declared the general rule to be that where the parties enter into any general agreement, and the understanding is that it is to be reduced to writing, or, if it is already in a written form, that it is to be signed before it is to be acted on or to take effect,

it is not binding until it is so written or signed. In *Methudy v. Ross*, 10 Mo. App. 101, the court said: 'The mere fact that a written contract was to be subsequently prepared does not show that a final agreement between the parties was not made, but it tends to show it; and in this case we think it clear that there was to be more explicit agreement, which was to be reduced to writing, that this was not done, and that there was no meeting of minds.' In *Eads v. Carondelet*, 42 Mo. 113, the plaintiff made to the city of Carondelet a written proposition, containing the terms on which he would build gunboats in that city. The city council passed an ordinance reciting the proposition, and expressly accepting it as made, but, in the second section of the ordinance, directed and empowered the mayor to enter into a written contract with the plaintiff and employ counsel to draft the contract. The plaintiff carried out his proposition, but the city failed to perform any part. *Held*, that the city was not bound, as further formality was contemplated. In *Water Commissioners v. Brown* 32 N. J. Law, 504, Brown made a proposition to the commissioners to do certain work in laying pipe. The commissioners accepted the proposition, and directed a written contract to be prepared. This was done, but it was not signed. *Held*, that the commissioners were not bound. In this case, however, the law provided that the contracts of the water commissioners should be in writing. This fact showed conclusively that a written contract must have been contemplated. In *Congdon v. Darcy*, 46 Vt. 478, the negotiation was for building a dwelling-house by the plaintiff for the defendant. Everything was agreed

to and accepted by the other, for the purpose of creating a right to its observance, constitutes a promise.¹ This is a general statement of the rule. But where a person from whom an old harness had been stolen, in his excitement exclaimed, "I will give one hundred dollars to any one who will find out the thief," this was held not to be a promise to pay the reward, but rather an explosion of wrath against the thief.² Every promise must be supported by a consideration. The consideration is some matter accepted or agreed upon as a return or equivalent for the promise; and a promise made without any consideration is void.³ Upon this ground a promise by one to make a particular testamentary disposition of property in favor of another is not binding, and can not be enforced unless founded upon a sufficient consideration.⁴

upon, and it was also agreed that the contract should be put in writing if the defendant desired. The defendant afterwards expressed such desire, and a writing was prepared, embodying the agreement, but the defendant refused to sign it. *Held*, there was no completed contract. From these expressions of courts and jurists, it is quite clear that, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument, and attested by signatures, then he will not be bound until the signatures are affixed."

¹ Leake on Contracts, 13.

² *Higgins v. Lessig* (1893), 49 Ill. App. 459.

³ *Tolhurst v. Powers*, 133 N. Y. 460; *Drake v. Lanning*, 49 N. J. Eq. 452; 24 Atl. Rep. 378.

⁴ *Drake v. Lanning* (1892), 49 N. J. Eq. 452; 24 Atl. Rep. 378, Pitney, V. C.: "In *Johnson v. Hubbell*, 10 N. J. Eq. 332, the consideration was a conveyance of land by the son to his sister at the request of the father, who, in consideration of it, promised to dispose of his property by will to the son's advantage. In *Van Dyne v. Freeland*, 11 N. J. Eq. 370; *Van Dyne v. Freeland*, 12 N. J. Eq. 142, the consideration was the loss by the plaintiff of the share which he would otherwise have received in his father's estate and his continued services to defendant until he was twenty-five years of age. In *Davison v. Davison*, 13 N. J. Eq. 246, the consideration was the son's service to the father for fifteen years. In *Young v. Young*, 45 N. J. Eq. 27, the son spent large sums of money upon the land in dispute in necessary repairs and improvements." See, also, *France v. France*, 8 N. J. Eq. 650; *Freeman v. Freeman*, 43 N. Y. 34. In *Myers v. Dean* (1892), 132 N. Y. 65, 72, Bradley, J., said: "The conclusion on this evidence was permitted that the agency of plaintiff was not in any sense a procuring cause of the nego-

§ 5. Consideration further discussed—Mutual promises.—

The performance of gratuitous promises depends wholly upon the good-will which prompted them and will not be enforced by the law. The general rule is that in order to support an action, the promise must have been made upon a legal consideration moving from the promisee to the promisor.¹ In an action on a specialty, however, it is unnecessary to allege con-

tiation for the lease or in obtaining it by the defendant, and if so found by the jury the consequence may have been that the promise to pay was without consideration and ineffectual to charge the defendant. *McClave v. Paine*, 49 N. Y. 561; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378." In *Warren v. Castello*, 109 Mo. 338; 19 S. W. Rep. 29, defendant promised to convey certain land to a woman at any time during a term of fifteen years that she might pay him \$2,000; there was no consideration for the promise and the contract provided that the woman was in no way obligated to purchase the land. *Gantt, P. J.*, said: "There was no consideration for the promise to convey; nothing was paid for the option. The agreement was therefore gratuitous and incapable of enforcement." *Tucker v. Bartle*, 85 Mo. 114; *Neef v. Redmon*, 76 Mo. 195. *Pfluger v. Wilshusen*, 17 N. Y. Supl. 516, holding that an agreement between successive accommodation parties to a note, made after their rights and liabilities have been fixed by judgment against them, in favor of an indorsee, to establish between them the relation of cosureties, is void for want of consideration. *Goldsborough v. Gable* (1892), 140 Ill. 269; 15 L. R. A. 294: A. leased property to B. at a certain rental. Upon the expiration of the lease B. continued to hold the property and the first month paid A. the same amount of rent provided for in the expired lease. After that A.

agreed to take less rent, which B. paid. It was held that A. was not bound by his promise to take less, although it was paid, and that A. might recover the balance due, to wit, the amount the expired lease provided for. *Bickart v. Hoffmann*, 19 N. Y. Supl. 472; *Shortle v. Terre Haute R. Co.*, 131 Ind. 338; 30 N. E. Rep. 1084, where a railroad company is required by law to fence its way, a conveyance of the right of way in consideration of the promise to fence it, is void, as without consideration. *King's Estate*, 150 Pa. St. 143.

¹ *Exchange Bank v. Rice*, 107 Mass. 37, *Gray, C. J.*: "To constitute such consideration, there must be either a benefit to the maker of the promise, or a loss, trouble or inconvenience to, or a charge or obligation resting upon, the party to whom the promise is made." See, also, Chapter V, *infra*. In *Low v. Foss*, 121 Mass. 531, the holder of a note signed by the defendants, as trustees of a religious society, agreed with the society and the trustees to release them from all claims on the note, upon condition that all their debts, as such, should be released or paid from funds subscribed for the purpose, and they were so paid. It was held, in an action on the note, that there was no consideration moving from defendants for the holder's promise, and that it could not be availed of by them. An unsealed written contract must be supported by a consideration. *Rann v. Hughes*, 7 T. R. 346, n.

sideration, as the seal sufficiently imports consideration.¹ Thus in an action against defendant, as indorser of a note payable on demand, given by the maker to plaintiff to secure an antecedent indebtedness, it appeared that there was no request for forbearance, but plaintiff, as he testified, agreed that he would not pay the note away, or put it in bank for collection, but would hold it until such time as he wanted the money, and would then make demand for it, and upon this defendant, at maker's request, indorsed the note. It was held that the evidence failed to disclose any consideration for the indorsement.² The mere inadequacy of a consideration does not render it insufficient except as a circumstance bearing on the question of fraud or undue influence.³ A valuable consideration, however small and nominal, if given or stipulated for in good faith is, in the absence of fraud, sufficient to sustain a parol contract.⁴ Accordingly a grantor, who has been tendered one dollar as a consideration for his deed, can not have it set aside for want of consideration where it does not appear that he expected any other.⁵ And where one acting on the faith of a promise performs the condition upon which the promise was made, the promise attaches to the consideration so performed and renders

¹ *Northern Assur. Co. v. Hotchkiss*, 60 Wis. 415; 63 N. W. Rep. 1020.

² *Strong v. Sheffield* (1895), 144 N. Y. 392, per Andrews, C. J.: "The note in question did not, in law, extend the payment of the debt. It was payable on demand, and, although being payable with interest, it was in form consistent with an intention that payment should not be immediately demanded, yet there was nothing on its face to prevent an immediate suit on the note against the maker, or to recover the original debt. *Merritt v. Todd*, 23 N. Y. 28; *Shutts v. Pingar*, 100 N. Y. 539. Such a suit would have been an assertion that he wanted the money, and would have fulfilled the condition of forbearance. The debtor and the defendant, when they became parties to the note, may have had the hope or expectation that forbearance

would follow, and there was forbearance in fact. But there was no agreement to forbear for a fixed time or for a reasonable time, but an agreement to forbear for such time as the plaintiff should elect. The consideration is to be tested by the agreement, and not by what was done under it. It was a case of mutual promises, and so intended. We think the evidence failed to disclose any consideration for the defendant's indorsement, and that the trial court erred in refusing so to rule."

³ *Robinson v. Hyer*, 35 Fla. 544; 17 So. Rep. 745; *Earl v. Peck*, 64 N. Y. 596; *Worth v. Case*, 42 N. Y. 362; *Nash v. Lull*, 102 Mass. 60.

⁴ *Lawrence v. McCalmont*, 2 How. 426, 449.

⁵ *Rendleman v. Rendleman*, 156 Ill. 568; 41 N. E. Rep. 223.

the promisor liable, for, after he has had the benefit of the consideration for which he bargained, it is no defense to say that the promisee was not bound by the contract to do the act.¹ And again, where one promises to pay another a certain sum of money for doing a particular thing which is to be done before the money is paid, and the promisee does the thing upon the faith of the promise, the promise which was before a mere revocable offer thereby becomes a complete contract, upon a consideration moving from the promisee to the promisor.² Thus a promissory note given in consideration of future services to be rendered by the payee becomes valid and binding upon the rendering of the services, although the payee did not agree to render them at the time of the giving of the note.³ Plaintiffs having contracts to furnish lumber to foreign buyers, defendants contracted with plaintiffs to supply them the lumber called for by the contracts; the lumber thus supplied being inferior, the defendants agreed to save plaintiffs harmless from any loss. It was held that the injury to plaintiffs in shipping an inferior cargo was a sufficient consideration to support defendants' promise to save plaintiffs from loss.⁴ It has been

¹ *White v. Baxter*, 71 N. Y. 254, where the English case of *Hulse v. Hulse*, 17 C. B. 711, is considered and to some extent discredited. So in *Marie v. Garrison*, 83 N. Y. 26, Andrews, J., said, "When a defendant has actually received the consideration of an agreement, by a voluntary performance of an act by the other party, upon his proposition or suggestion, such performance constitutes a consideration which will uphold the defendant's promise."

² *Cottage Street Church v. Kendall*, 121 Mass. 528; *Carr v. Nat. Security Bank*, 107 Mass. 45, 48; *Freeman v. Boston*, 5 Met. 56; *Loring v. Boston*, 7 Met. 409.

³ *Miller v. McKenzie*, 95 N. Y. 575; and see *Willetts v. Sun Mut. Ins. Co.*, 45 N. Y. 45; *Sands v. Croke*, 46 N. Y. 564.

⁴ *Robinson v. Hyer*, 35 Fla. 544; 17 So. Rep. 745, Mabry, C. J.: "We are

of the opinion, however, that there was sufficient consideration in the present case to support the promise to hold plaintiffs harmless against all loss in reference to the shipment of the cargo of lumber. In speaking of a parol modification of a written contract, the court said, in *Hastings v. Lovejoy*, 140 Mass. 261: 'While recognizing and giving effect to the rule of a law that a creditor can not bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained existing debt of a larger amount, because such agreement is without consideration, courts have nevertheless often declared that the rule is not to be extended beyond its precise import, and, especially if a consideration for such agreement is found to exist, of which the law can take notice, that courts will not inquire into its adequacy.' In *Conover v. Stillwell*, 34 N. J. Law, 54, it is said:

said in England that the law requires a consideration for the purpose of guarding against rash and inconsiderate bargains.¹

§ 6. New consideration where written contract changed.—

The general rule that a written contract not under seal may be varied or added to by subsequent oral agreement upon a sufficient consideration as to its terms, to be performed in the future, is sustained by many authorities.² While, as a general rule, a written contract not under seal may be varied by subsequent oral agreement, based upon a sufficient consideration as to its terms to be performed in the future, the prevailing view, following the common-law rule, is that a covenant or contract under seal can not be modified before breach by a parol executory contract.³ The Wisconsin doctrine is that the

'A consideration emanating from some injury or inconvenience to the one party, or from some benefit to the other party, is a valuable consideration.' Plaintiffs were, as above stated, under contract to supply their European buyers with a certain cargo of lumber, and the latter had chartered and sent over a vessel for the purpose of transporting the lumber. While the lumber was being loaded on the vessel, frequent protests were made by plaintiffs to defendants that the lumber was not such as they had agreed to furnish. * * * It was a serious detriment to plaintiffs to allow an inferior cargo to go to Europe as they would be liable under their contract with foreign buyers for a failure to comply with it."

¹ Leake on Contracts, 17; Rann v. Hughes, 7 T. R. 346, n.; Pillans v. Van Mierop, 3 Burr. 1663; Easton v. Pratchett, 1 C. M. & R. 798.

² Robinson v. Hyer, 35 Fla. 544; 17 So. Rep. 745; Wheeler v. Baker, 59 Iowa, 86; 12 N. W. Rep. 767; Hastings v. Lovejoy, 140 Mass. 261; 2 N. E. Rep. 776; Conover v. Stillwell, 34 N. J. Law, 54; Hasbrouck v. Winkler, 48 N. J. Law, 431; 6 Atl. Rep. 22. It was decided in Spann v. Baltzell, 1 Fla. 301, that, as a

general rule, a verbal agreement between the parties to a written contract, made before or at the time of the execution of such contract, is inadmissible to vary its terms or affect its construction; but, after the contract is reduced to writing, it is competent for the parties at any time before the breach of it, by a new contract, not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, subtract from or vary or qualify the terms of it; but that, in such cases, the substituted oral agreements being considered in the light of new contracts, it is requisite that they be made upon some new and valuable consideration.

³ Tischler v. Kurtz (1895), 35 Fla. 323; 17 So. Rep. 661, Mabray, C. J.: "In the case of Hastings v. Lovejoy, 140 Mass. 261, the Massachusetts court held that, in an action for rent reserved in a written lease under seal the lessee could prove in defense that, after the delivery of the lease, the lessor for a good consideration orally agreed that for the future the rent should be reduced. It was said: 'In reference to contracts under seal, it was formerly held, especially in England, that they could not thus be varied. But in the United

consideration existing in an original executory contract is considered as imported into any new parol modification, and that the new agreement, when made, becomes binding upon the parties without any further or new consideration.¹

§ 7. Execution and form of contracts.—Making a mark is sufficient signing of a contract by the general law in England and the United States. According to the rules of evidence adopted in Louisiana, the ordinary mark of a party to a contract places it on a footing with all other private instruments in writing.² But if a written agreement which is intended to be signed by several persons as parties thereto is not signed by all, it is not completely executed and does not bind any of the parties.³ And if the parties to an alleged contract agree that it shall be reduced to writing the contract will not ordinarily be binding without the execution of the written instrument.⁴ A simple contract is created by an agreement which contains a promise made by one party for a valid executed or executory consideration furnished by the other; and such a contract is not required to be in any particular form.⁵

States the tendency of judicial decision has been to apply the same rule in this respect to sealed instruments as to simple contracts.' Considering the real virtue there is in the use of seals at the present day, the view taken by the Massachusetts court has much weight. The legislation of this state has not undertaken to change the legal effect of sealed instruments, and it is our duty, under our system, to keep in mind, in declaring the law, what is the common-law rule, so far as it has not been changed by statute or our peculiar institutions. Without going into a discussion of the cases on the subject, we are of the opinion that the prevailing view in America, following the common-law rule, is that a covenant or contract under seal can not be modified before breach by a parol executory contract. *Sinard v. Patterson*, 3 Blackf. 253; *Carpenter v. Shanklin*, 7 Blackf. 308;

Hume v. Taylor, 63 Ill. 43; *Eddy v. Graves*, 23 Wend. 82; *Allen v. Jaquish*, 21 Wend. 628; *Delacroix v. Bulkley*, 13 Wend. 71; *Coe v. Hobby*, 72 N. Y. 141; *Smith v. Kerr*, 33 Hun, 567. The New York courts hold that, after the breach of a sealed contract, the parties to it may discharge any liability under it by entering into a new agreement in relation to the same subject-matter, founded upon a sufficient consideration."

¹ *Lynch v. Henry*, 75 Wis. 631; 44 N. W. Rep. 837; *Ruege v. Gates*, 71 Wis. 634; 38 N. W. Rep. 181.

² *Zacharie v. Franklin*, 12 Pet. 151; *Jackson v. VanDusen*, 5 Johns. 144; *Wright v. Wakeford*, 17 Ves. 454, 459; *Madison v. Zabriskie*, 11 La. 247; *Tagiasco v. Molinari*, 9 La. 512.

³ *Barber v. Burrows*, 51 Cal. 404. See, also, § 2, *supra*.

⁴ *Fuller v. Reed*, 38 Cal. 99.

⁵ *Aller v. Aller*, 40 N. J. Law, 446. "A

It is settled learning that a deed may be printed or written either in ink or pencil.¹ But if a mandatory statute prescribes a specific mode in which a contract shall be made it must be strictly complied with or the contract will be void.²

§ 8. **Delivery of contracts.**—Delivery is essential to complete a deed. Thus in the case of conveyances, something more is necessary than the signature of the grantor to a blank instrument. There must be an intent to convey, and the delivery of the deed for the purpose of vesting a present title in the grantee; accordingly a deed delivered without the consent of the grantor is of no more effect to pass title than if it were a forgery.³ No particular form or ceremony is necessary to constitute a delivery of a deed; it may be by acts or words, or both. Anything which clearly manifests the intention of the grantor and the person to whom it is made that the deed shall then become operative and effectual—that the grantor shall lose all control over it, and that by it the grantee is to become possessed of the estate embraced in such deed, is a sufficient delivery.⁴ A delivery of a deed need not be formal nor into the hands of the grantee, or of some one for him, if from the circumstances it clearly appears that the donor's intention is that the deed should take effect without such delivery.⁵ But the fact that the grantor in a deed of gift caused its registration constitutes a *prima facie* case of delivery.⁶ And the recording by a husband of a deed from himself to his wife, has been held a

deed is a writing or instrument written upon paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed. A deed can not be written upon wood, leather, cloth or the like, but only upon parchment or paper, for the writing upon them can be least vitiated, altered or corrupted." Coke on Littleton, 35b, 171b; Sheppard's Touchstone, 50.

¹ *Schneider v. Norris*, 2 M. & S. 286.

² *Board v. Gillies* (1894), 138 Ind. 667.

³ *Felix v. Patrick*, 145 U. S. 317;

Hibblewhite v. McMorine, 6 M. & W. 200; *Davidson v. Cooper*, 11 M. & W. 778; *Burns v. Lynde*, 6 Allen, 305; *Everts v. Agnes*, 4 Wis. 343; *Tisher v. Beckwith*, 30 Wis. 55; *Hadlock v. Hadlock*, 22 Ill. 384; *Stanley v. Valentine*, 79 Ill. 544; *Henry v. Carson*, 96 Ind. 412; *Fitzgerald v. Goff*, 99 Ind. 28.

⁴ *Tyler v. Hall*, 106 Mo. 313; *Scott v. Scott*, 95 Mo. 300; *Turner v. Carpenter*, 83 Mo. 333; *Miller v. Lullman*, 81 Mo. 311.

⁵ *Davis v. Garrett*, 91 Tenn. 147; 18 S. W. Rep. 113.

⁶ *Davis v. Garrett*, 91 Tenn. 147; 18 S. W. Rep. 113.

sufficient delivery.¹ As a deed is not valid without delivery, the fact that it is signed and sealed on Sunday does not render it void, if delivered on Monday.² So also delivery of a deed to the real beneficiary is good, although the grantee named in the deed is ignorant of its execution.³ Retention of a deed by the grantor, while it is evidence of non-delivery, is not conclusive that the deed was not delivered;⁴ and a delivery to one of several grantees is delivery to all.⁵ Delivery to the grantee must be absolute and no oral conditions can be made to qualify or vary its purport.⁶ The rules upon this behalf applicable to deeds or conveyances of realty are in general applicable also to all written contracts. The careful reader will therefore note the cases concerning the delivery of a deed with equal attention as though they concerned any other written undertaking or agreement.

§ 9. What is a good delivery.—A deed left by the grantor in a place accessible to the grantee is not thereby delivered, unless there was an intention on the grantor's part to deliver and on the grantee's part to accept the deed.⁷ No delivery of a deed, either absolute or conditional, can be made without parting at the time with the possession of it, and with all power and control over it by the grantor, for the benefit of the grantee.⁸ And everything which goes to show a delivery must

¹ *Glaze v. Three Rivers, etc., Ins. Co.*, 87 Mich. 349.

² *Schwab v. Rigby*, 38 Minn. 395.

³ *Holcombe v. Richards*, 38 Minn. 38; *Eastham v. Powell*, 51 Ark. 530; 11 S. W. Rep. 823.

⁴ *Terhune v. Oldis*, 44 N. J. Eq. 146; 13 Cent. Rep. 117; *Vreeland v. Vreeland*, 48 N. J. Eq. 56.

⁵ *Payne v. Echols* (Pa. St.), 15 Atl. Rep. 895.

⁶ *Hargrave v. Melbourne*, 86 Ala. 270.

⁷ *Tyler v. Hall* (1891), 106 Mo. 313; *Huey v. Huey*, 65 Mo. 689. In *Reichart v. Wilhelm* (1891), 83 Iowa, 510, it appeared that an insolvent debtor a few months before his death executed two deeds, the one to his wife and the

other to his son, of certain land, but up to within a short time before he died exercised acts of ownership over the land as was admitted by the grantees; after his death the deeds were found in his house in a box which had no lock and key and the son had access thereto as a place of deposit for his private papers, and shortly after the father's death he took the deeds and filed them for record. It was held that the evidence did not show a delivery of the deeds and that a conveyance of the land by the son was void as against the father's creditors.

⁸ *Porter v. Woodhouse*, 59 Conn. 568; *Pruitsman v. Baker*, 30 Wis. 644; *Younge v. Guilbeau*, 3 Wall. 636;

happen in the grantor's lifetime.¹ But the deed may be sufficiently delivered although it refers to the grantor's will for some of its provisions.² Not only is delivery essential but the grantee must accept; and where the acceptance is not proven, and the facts do not justify the presumption of law that the grantee has accepted, the title does not pass.³ But delivery of a deed for record, although not known to the grantee, is, if followed by his assent, a good delivery.⁴ Where the grantee has no knowledge of the existence of the deed, and the property which it purports to convey remains in the possession and under the control of the grantor, and where, therefore, the registry is of course without either his assent or knowledge, the presumption of a delivery from the fact of registry is repelled, and the deed is void.⁵ Possession of the deed by the grantee—the converse of possession by the grantor—is strong but not conclusive evidence of a delivery.⁶ Where a deed of property in trust for a man's wife was signed and acknowledged by both the grantor and the trustee, and after the grantor's decease it was found among his papers, in a mutilated and canceled condition, it was held not to be in the power of the grantor

Cook v. Brown, 34 N. H. 460; *Fisher v. Hall*, 41 N. Y. 416; *Jackson v. Leek*, 12 Wend. 105; *Fay v. Richardson*, 7 Pick. 91; *Alsop v. Swathel*, 7 Conn. 500; *Hoboken, etc., Bank v. Phelps*, 34 Conn. 92.

¹ *Porter v. Woodhouse*, 59 Conn. 568, 574.

² *Allen v. De Groodt*, 105 Mo. 442; 16 S. W. Rep. 494, 1049.

³ *Moore v. Flynn*, 135 Ill. 74; *Wiggins v. Lusk*, 12 Ill. 132; *Kingsbury v. Burnside*, 58 Ill. 310; *Dale v. Lincoln*, 62 Ill. 22. *Contra*, in England, *Xenos v. Wickham*, L. R. 2 H. L. 296.

⁴ *Lee v. Fletcher*, 46 Minn. 49; 12 L. R. A. 171, containing a note on delivery of deeds, where the authorities are collected. *Vaughan v. Godman*, 103 Ind. 499, a father executed a deed to his infant daughter six years old, and had it recorded.

Held, sufficient delivery. *Taylor v. McClure*, 28 Ind. 39; *Somers v. Pumphrey*, 24 Ind. 231; *Mallett v. Page*, 8 Ind. 364; *Tallman v. Cooke*, 39 Iowa, 402; *Thatcher v. Wardens, etc., St. Andrew's Church*, 37 Mich. 264; *Jones v. Swayze*, 42 N. J. Law, 279; *Gilbert v. North American Ins. Co.*, 23 Wend. 43; *Byars v. Spencer*, 101 Ill. 429. See, also, *Hotchkiss v. Olmstead*, 37 Ind. 74; *Berry v. Anderson*, 22 Ind. 36.

⁵ *Younge v. Guilbeau*, 3 Wall. 636; *Parmelee v. Simpson*, 5 Wall. 81; *Maynard v. Maynard*, 10 Mass. 456; *Samson v. Thornton*, 3 Metc. 275; *Stone v. French*, 37 Kan. 145.

⁶ *Vreeland v. Vreeland*, 48 N. J. Eq. 56; 21 Atl. Rep. 627; *Seibel v. Rapp*, 85 Va. 28, 31; *Ward v. Lewis*, 4 Pick. 520; *Games v. Stiles*, 14 Pet. 322.

to revoke the deed, inasmuch as he had signed it and procured the trustee's acceptance in due form.¹

§ 10. The same subject continued.—A delivery of an assignment of a claim in suit to a person jointly interested in the purchase with the assignee named in the instrument must be deemed to have been assented to by the assignee, where he subsequently made payments to the assignor in accordance with its provisions, and hence the assignor's title passes by the assignment.² The mere fact that a lease has always been

¹ Seibel v. Rapp, 85 Va. 28.

² Wilson v. Kiesel (1894), 9 Utah, 397, 35 Pac. Rep. 488, per Smith, J.: "It is expressly found by the forty-ninth finding of the fact that this paper was made and executed at the instance and request and pursuant to negotiations conducted by Henderson with Wilson; that Henderson acted in the interest of himself, Brinker, Garretson, and Bigelow, and the assignment was made for all of them, although it was taken in the name of Brinker alone. By the forty-sixth finding it is shown that Henderson and Brinker occupied a single room as an office, and in this office there was a single safe, which was the property of Henderson; that, after the execution of the written assignment, it was delivered by Wilson, to Henderson, who put it in the safe, and kept it up to January, 1893, when he delivered it to Ogden Hiles, Esq., who was attorney for Wilson, and also for Brinker and Henderson. In the fiftieth finding it is shown that Brinker paid \$3,000 to Wilson on the consideration named in the assignment before October 25, 1890. The court below found that these facts constituted no delivery of the writing, and hence that Wilson's title to the claim did not pass. We can not concur in that view. We hold that the delivery of this writing to the partner or joint owner of the obligee

named in it for the joint use and benefit of the person to whom it was delivered and the obligee named is a good delivery. Even a delivery to a disinterested third person for the obligee is a good delivery if assented to by the obligee. See 5 American and English Encyclopedia of Law, 448, and cases cited in note. It must be assumed that Brinker knew of the delivery to Henderson, and assented to it, because it is expressly found that he subsequently made the first two payments (\$3,000) in accordance with its provisions." In Leonard v. Kebler (1893), 50 Ohio St. 444, Spear, J., said: "Under these facts the circuit court held that such paper was never either actually or constructively delivered by Kebler to the assignees named therein or to either of them, and that he did not intend to deliver it during his life; that he did not part with the dominion thereof while he was conscious, and that the assignees took no title by virtue of such instrument. We affirm this holding. Delivery is the final step necessary to perfect the existence of any written contract. Phipps v. Hope, 16 Ohio St. 586; Williams v. Schatz, 42 Ohio St. 47; Gano v. Fisk, 43 Ohio St. 462; Flanders v. Blandy, 45 Ohio St. 108. And the rule is not changed by reason of the fact that the instrument is based on a consideration. Canfield v. Ives, 18 Pick. 253; Mills v. Gore, 20 Pick. 28;

in the possession of the lessor is not conclusive evidence that it has not been delivered so as to become operative, and where it is retained by either party with the consent of the other it must be considered as delivered if both understand that it has been executed and is in operation.¹ Where, under a contract to exchange real property, deeds were deposited in escrow, equity will decree a specific performance at the instance of a party who has performed the conditions on which the deeds were deposited.² And where as part payment for a stock of goods a deed was executed to the vendor, but the deed was placed in the hands of another until the grantor should be saved harmless from certain lawsuits then pending against the vendor, it was held that the transaction did not constitute a delivery in escrow, but that the title was transferred, subject to the grantor's lien for indemnity.³ But the placing upon record by the assignor of a deed of assignment for the benefit of his creditors is a sufficient delivery of such deed.⁴ So, also, delivery of a mortgage by the mortgagor to one of several mortgagees, with a request to file it for record, is a delivery of it to all of the mortgagees.⁵

§ 11. Contracts classified and distinguished.—Express contracts are classified as (a) contracts of record, which are usually judgments, or of the nature of judgments, (b) special contracts or

Younge v. Guilbeau, 3 Wall. 636; *Chamberlain v. Hopps*, 8 Vt. 94; *Elmore v. Marks*, 39 Vt. 538; *Boyd v. Slayback*, 63 Cal. 493; *Pulse v. Miller*, 81 Ind. 190."

¹ *Oneto v. Restano* (1891), 89 Cal. 63.

² *Bowman v. Gork* (Mich. 1895), 63 N. W. Rep. 998.

³ *Wallace v. Butts* (Tex. App. 1895), 31 S. W. Rep. 687, Head, J.: "While, in making this agreement, the word 'escrow' seems to have been used by the parties, yet it is manifest that their intention was to pass the title to the land to Wilson, subject only to the right of Butts Bros. to hold it as security for any sum they might be compelled to pay to the plaintiffs in

the two suits named, by reason of their having made the purchase from Wilson during their pendency. The transaction, therefore, did not constitute a conveyance in escrow proper, although the parties so termed it, but its effect was to transfer the title presently to Wilson, incumbered with a lien in favor of Butts Bros., and to make Kuteman a trustee for both parties to carry out their intention. *Hathaway v. Payne*, 34 N. Y. 92; 1 Devlin on Deeds, §§ 319, 320."

⁴ *Ewing v. Walker* (1895), 60 Ark. 503.

⁵ *Breathwit v. Bank of Fordyce* (1894), 60 Ark. 26.

specialties, which class includes the various instruments requiring seals; and (c) simple, or parol contracts, or such as are either oral or written but not under seal.¹ In its widest sense the word contract includes records and specialties, but it is usually employed to designate only simple contracts.² An executory contract is one in which a party binds himself to do or not to do a particular thing; an executed contract is one in which the object of the contract is performed.³ An executory contract which is uncertain and incomplete may become certain and complete by being acted upon; the acts and conduct of the parties may divest it of uncertainty.⁴ A void contract may be disregarded by either party; a voidable contract can not be. No executed contract, where a valuable consideration has passed, made between parties competent to contract, and not immoral or prohibited by statute, nor against public policy, is void between the parties thereto, however fraudulently it may have been obtained; but it is voidable at the instance of the one who is defrauded.⁵

¹ 1 Abbott's Law Dictionary, p. 280; 2 Blackstone's Commentaries, 465; Story on Contracts, §§ 1, 2; 1 Bouvier's Law Dictionary, 393; Stackpole v. Arnold, 11 Mass. 27.

² Pelham v. State, 30 Tex. 422. The Louisiana Code thus describes and classifies contracts: "No contract is complete without the consent of both parties. In *reciprocal* contracts, it must be expressed. In some *unilateral* contracts, the law provides that, under certain circumstances, it shall be presumed. *Commutative* contracts are those in which what is done, given or promised, by one party, is a consideration for what is done, given or promised by the other. *Independent* contracts are those in which the mutual acts or promises have no relation to each other, either as equivalents or consideration. Contracts are presumed to be commutative unless the contrary be expressed. A *principal* contract is one entered into by both parties on their own accounts, or in

the several qualities they assume. An *accessory* contract is made for assuring the performance of a prior contract, either by the same parties or others, such as suretyship, mortgage and pledge. Contracts considered in relation to the motive for making them are either *gratuitous* or *onerous*. A contract is *aleatory* or *hazardous* when the performance of that which is one of its objects depends on an uncertain event. It is *certain* when the thing to be done depends on the will of the party, or when, in the usual course of events, it must happen in the manner stipulated." Arts. 1766-1776. A contract consisting of mutual executory promises is *bilateral*; if the consideration is executed on one side and executory on the other, the contract is *unilateral*. Leake on Contracts, 18.

³ Fletcher v. Peck, 6 Cranch 87, 136.

⁴ Holtz v. Schmidt, 59 N. Y. 253, 256.

⁵ Och v. Missouri, etc., R. Co. (Mo.

§ 12. **Sealed contracts.**—Where the maker of a note uses a printed blank, and writes his name to the left of the printed word “seal,” so as to bring the latter into the usual place for a seal, he adopts it as his seal, and no other is necessary.¹ But

1995), 31 S. W. Rep. 962, Burgess, J.: “As long ago as 1823, it was held by this court that a New Madrid certificate, obtained through fraud or mistake, and without consideration, was not void, but voidable, and good against the United States until annulled or set aside. *Stuart v. Rector*, 1 Mo. 361. This case was followed and approved in *Mitchell v. Parker*, 25 Mo. 31. See, also, *Kearney v. Vaughan*, 50 Mo. 284.”

¹ *Lorah v. Nissley* (1893), 156 Pa. St. 329; 27 Atl. Rep. 242, per Mitchell, J.: “The days of actual sealing of legal documents, in its original sense of the impression of an individual mark or device upon wax or wafer, or even on the parchment or paper itself, have long gone by. It is immaterial what device the impression bears (*Alexander v. Jameson*, 5 Bin. 238), and the same stamp may serve for several parties in the same deed. Not only so, but the use of wax has almost entirely—and, even of wafers, very largely—ceased. In short, sealing has become constructive, rather than actual, and is in a great degree a matter of intention. It was said more than a century ago in *McDill’s Lessee v. McDill*, 1 Dall. 63, that ‘the signing of a deed is now the material part of the execution. The seal has become a mere form, and a written or ink seal, as it is called, is good.’ And in *Long v. Ramsay*, 1 Serg. & R. 72, it was said by Tilghman, C. J., that a seal with a flourish of a pen ‘is not now to be questioned.’ Any kind of flourish or mark will be sufficient, if it be intended as a seal. ‘The usual mode,’ said Tilghman, C. J., in *Taylor v. Glaser*, 2 Serg. & R. 502, ‘is to make a circular, oval, or square mark opposite to the

name of the signer, but the shape is immaterial.’ Accordingly it was held in *Hacker’s Appeal*, 121 Pa. St. 192; 15 Atl. Rep. 500, that a single horizontal dash, less than an eighth of an inch long, was a sufficient seal, the context and the circumstances showing that it was so intended. On the other hand, in *Taylor v. Glaser*, *supra*, a flourish was held not a seal, because it was put under, and apparently intended merely as a part of, the signature. So, in *Duncan v. Duncan*, 1 Watts 322, a ribbon inserted through slits in the parchment, and thus carefully prepared for sealing, was held not a seal, because the circumstances indicated the intent to use a well-known mode of sealing, by attaching the ribbon to the parchment with wax or wafer, and the intent had not been carried out. These decisions establish beyond question that any flourish or mark, however irregular or inconsiderable, will be a good seal, if so intended; and, *a fortiori*, the same result must be produced by writing the word ‘seal,’ or the letters ‘L. S.,’ meaning originally ‘locus sigilli,’ but now having acquired the popular force of an arbitrary sign for a seal, just as the sign ‘&’ is held and used to mean ‘and’ by thousands who do not recognize it as the middle ages manuscript contraction for the Latin ‘et.’ If, therefore, the word ‘seal’ on the note in suit had been written by Nissley after his name, there could have been no doubt about its efficacy to make a sealed instrument. Does it alter the case any that it was not written by him, but printed before hand? We can not see any good reason why it should. Ratification is equivalent to antecedent authority, and the writing of his name

a reference in a later contract under seal to a former contract not sealed does not have the effect to impart the quality of a sealed contract to the former by requiring them to be read as one.¹ An abstract of title however, which contains the letters "L. S." after the signature of the notary before whom an acknowledgment was taken, sufficiently shows that he certified

to the left of the printed word, so as to bring the latter into the usual and proper place for a seal, is ample evidence that he adopted the act of the printer in putting it there for a seal. The note itself was a printed form, with blank spaces for the particulars to be filled in, and the use of it raises a conclusive presumption that all parts of it were adopted by the signer, except such as were clearly struck out or intended to be canceled before signing. The pressure of business life and the subdivision of labor, in our day, have brought into use many things ready-made by wholesale, which our ancestors made singly for each occasion, and among others the conveniences of printed blanks for the common forms of written instruments. But even in the early days of the century the act of sealing was commonly done by adoption and ratification, rather than as a personal act, as we are told by a very learned and experienced, though eccentric, predecessor, in language that is worth quoting, for its quaintness: *'Illi robur et aes triplex.'* He was a bold fellow who first in these colonies, and particular in Pennsylvania, in time whereof the memory of man runneth not to the contrary, substituted the appearance of a seal by the circumflex of a pen, which has been sanctioned by usage and the adjudication of the courts as equipollent with a stamp containing some effigies or inscription on stone or metal. *

* * How could a jury distinguish the hieroglyphic or circumflex of a pen by one man from another? In fact, the circumflex is usually made by the

scrivener drawing the instrument, and the word 'seal' inscribed within it. Brackenridge, J., in *Alexander v. Jameson*, 5 Bin. 238, 244. We are of opinion that the note in suit was duly sealed. We have not derived much light from the decisions in other states, but, so far as we have found analogous cases, they are in harmony with the views expressed. In *Whiteley v. Davis*, 1 Swan 333, the word 'seal,' without any scroll, was held to be a good seal, even to a public deed by the clerk of a court, he stating in the certificate that no seal of office had been provided. And in *Lewis v. Overby*, 28 Grat. 627, the word 'seal,' without any scroll, was held a good seal, within a statute enacting that 'any writing to which the person making it shall affix a scroll by way of seal shall be of the same force as if it were actually sealed.' The learned court below, and the counsel for appellee, placed much reliance on the decision in *Bennett v. Allen*, 10 Pa. Co. Ct. R. 256. In that case the signature was placed to the left of, but below, the printed letters 'L. S.,' and it is said in the opinion that there was a space of half an inch between. The decision might possibly be sustained on the ground that the position and distance showed that the signer did not intend to adopt the letters 'L. S.' as part of his act, but, unless distinguished on that special ground, the decision is contrary to the settled trend of our cases, and can not be approved."

¹ *Bank of Columbia v. Patterson*, 7 Cranch, 299.

to the acknowledgment under his official seal.¹ And where a common-law seal is absent from an instrument required to be under seal, but it shows upon its face that the party executing it intended to seal it, a court of equity will assume that it is sealed and grant the same relief as if such a seal was attached.² So also, where an action is brought upon an executed sealed instrument, by which defendant's intestate was estopped from denying the consideration of the instrument sued upon, his personal representative is subject to the same estoppel.³

§ 13. Sealed contracts further considered.—A seal unnecessarily affixed to a contract for the sale of personal property can not affect the rights of the parties, and every defense is open to either which would exist had the writing not been sealed. A statement or certificate as to a fact contained in such a sealed contract has not the conclusive effect of a covenant.⁴ So likewise a promissory note without a seal is not a specialty, within the meaning of that phrase at common law; nor is it made a specialty by a statutory provision that the same remedy may be had upon such an instrument as upon a bond or sealed instrument.⁵ And a life policy of insurance reciting that it was "signed and delivered" is not a specialty, because there is a printed device thereon purporting to be a

¹ *Bucklen v. Hasterlik*, 155 Ill. 423; 40 N. E. Rep. 561, Phillips, J.: "It is contended that the letters 'L. S.,' following the name of the notary, do not indicate an official seal. In *Illinois Cent. R. Co. v. Johnson*, 40 Ill. 35, it was contended that an appeal bond was defective because the records showed a mere scrawl instead of a fac-simile of the seal. The court said: 'Moreover, this is a copy of the original bond, and the clerk would not make a fac-simile of the corporate seal or devise which might have been, and, for aught that appears, was, attached to the original bond.' In *Smith v. Butler*, 25 N. H. 521, it was urged that a copy of the summons was bad because of the use of the letters 'L. S.' instead of a copy of the seal of the clerk. There

the court said: "The position in regard to the copy of the seal is also untenable. In copying a writ of summons, the fac-simile of the seal can not well be made, and to do it would require more skill than pertains to the profession generally. By long usage and general understanding of legal writers, 'L. S.' is regarded as the true representation of a seal in a copy of all legal precepts."

² *Barnard v. Gantz* (1893), 140 N. Y. 249, following *Town of Solon v. Williamsburgh Savings Bank*, 114 N. Y. 122.

³ *Bender v. Bender* (1895), 88 Hun, 448.

⁴ *Bridger v. Goldsmith* (1894), 143 N. Y. 424.

⁵ *Bank of U. S. v. Donnally*, 8 Pet. 381.

seal, when there is no evidence that this device was ever adopted by the company as its seal.¹ But where a rule of law requires the contract to be under seal, the sealing is necessary; and an instrument having the form of a deed, but executed without seal, is not a deed.² Where it appears, however, that it was made with the intent to pass an estate, and is otherwise sufficient for that purpose, it will be enforced in equity.³

§ 14. Express and implied contracts.—Mr. Anderson says that a contract is express “when the agreement is formal, and stated either verbally or in writing, and is implied when the agreement is matter of inference and deduction.”⁴ Accordingly a contract is express “when it consists of words written or spoken, expressing an actual agreement of the parties.” It is implied “when it is evidenced by conduct manifesting an intention of agreement.”⁵ An agreement on the

¹ Metropolitan Ins. Co. v. Anderson, 79 Md. 375; 29 Atl. Rep. 606, per Briscoe, J.: “The policies were not declared on as sealed instruments, and we think that neither the proof nor the instruments themselves show that they were specialties. As was said in the case of Jackson v. Myers, 43 Md. 452, 463, ‘What is alleged to be the seal consists simply of an emblem or symbol printed by the printer at the time when the printed blanks were struck. There is no statement or declaration in any part of the policies that they were or were designed to be executed under the corporate seal of the company.’ The policies read: ‘In witness whereof, the said Metropolitan Life Insurance Company, by its president and secretary, signed and delivered this policy,’ etc. Nor does the proof show that the company ever adopted the printed device or emblem for the seal of the company.”

² Munds v. Cassidey, 98 N. C. 558.

³ Munds v. Cassidey, 98 N. C. 558; Downey v. Smith, 2 Dev. Eq. 535; Ponton v. Griffin, 72 N. C. 362; Millhiser v. Erdman, 98 N. C. 292.

⁴ Anderson’s Law Dictionary, 248. In *Ex parte Ford*, L. R. 16 Q. B. Div. 305, it was said that “whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both understood that such a promise was given and accepted.” In *Marzetti v. Williams*, 1 Barn. & Adol. 415, Lord Tenterden said: “The only difference between an express and an implied contract is in the mode of substantiating it. An express contract is proved by an actual agreement; an implied contract, by circumstances, and the general course of dealing between the parties.” In the same case *Park, J.*, said: “The only difference, however, between an express and an implied contract is as to the mode of proof. An express contract is proved by direct evidence, an implied contract by circumstantial evidence.”

⁵ 3 American and English Encyclopedia of Law. See, also, Chap. XVII, *infra*.

other hand may be said to be implied when it is inferred from the acts or conduct of the parties instead of their words. The engagement is signified by conduct instead of words.¹ And where, for example, the services sued for were rendered by plaintiff while she was a member of the family of defendant, who was her cousin, it is proper to instruct the jury that they are authorized to find whether there was a contract, express or implied, to pay for plaintiff's services.²

¹ *Bixby v. Moor*, 51 N. H. 402.

² *Heffron v. Brown*, 155 Ill. 322; 40 N. E. Rep. 583, per Magruder, J.: "If the expectation of each would not constitute a contract unless there was an expression of that expectation, such criticism would not apply here, because the jury were instructed as follows: "If the jury believe from the evidence that the defendant requested the plaintiff to do the services in question, and, by words or acts, knowingly gave her to understand that she would be paid for doing it, and that plaintiff, in compliance with such request (if there was any), did the work in question for the defendant, then she is entitled to recover." "The relationship existing between the parties, and the fact that they and defendant's mother lived together as a single household while the work was being done for which this suit is brought, will not bar a recovery in this case if the jury believe from the evidence that the defendant requested the plaintiff to do the service in question, and promised to pay her for it, or, by words or acts, knowingly led her to believe that she would be paid for doing it." The jury were further instructed that, where voluntary services are rendered by those sustaining family relations, the presumption of law is that the parties do not contemplate payment or receipt of wages; and that where services are rendered by those near of kin, or by those sustaining family relations, the law will imply no contract for compensation;

and that, unless a contract to pay is shown in such case, no recovery can be had. It is true that in instructions asked by the defendant, and given for him, the jury were told that the plaintiff could not recover unless she proved by the preponderance of the evidence an express contract to pay for her services; but they were told in another instruction, that an express contract might be established by circumstances and the conduct of the parties, or by words in connection therewith; and we do not think that the jury could have been misled when all the instructions are considered together as one charge, and in view of the evidence heretofore and hereinafter referred to. In *Morton v. Rainey*, 82 Ill. 215, plaintiff presented a claim for services against the estate of his deceased uncle, in whose family he had lived from the time he was 11 years old until he reached his majority, and during that time had labored for the deceased, and received his board, clothing, and medical attendance; and we there said: "While appellee, during minority, was provided by the deceased with clothing, medical attendance, and all the necessities furnished by a parent to a child, after his majority he provided his own clothing, paid for his own washing and in fact received nothing from the deceased except his board. Under such circumstances, the presumption that appellee was working as he did when a minor is removed, and the facts are sufficient to establish an implied con-

§ 15. Implied contracts distinguished.—A contract is the meeting of two minds, and is to be carefully distinguished from the implied promise to make reparation where one by his fraud or negligence or other tort injures another.¹

tract on the part of the deceased to pay appellee what his services were reasonably worth." In *Mills v. Joiner*, 20 Fla. 479, where a daughter of full age brought suit against her father for services while living with him at his house and as one of his family, it was held to be a presumption of law that he was not bound to pay her, but that "this presumption may be overcome by proof of a special contract, express promise, or an implied promise, and such implied promise or understanding may be inferred from the facts and circumstances shown in evidence; and that "the jury should have been further instructed that if, under all the circumstances of the case, the services were of such a nature as to lead to a reasonable belief that it was the understanding of the parties that compensation should be made for such services, then the jury should find an implied promise." In *Scully v. Scully*, 28 Iowa, 548, where a sister filed a claim against the estate of her deceased brother, a bachelor, for services in doing his housework while a member of his family, it was said: "Where it is shown that the person rendering the service is a member of the family of the person served, and receiving support therein, either as a child, a relative, or a visitor, a presumption of law arises that such services were gratuitous; and in such case, before the person rendering the service can recover, the express promise of the party served must be shown, or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation by one of receiving, and by the other of making, compensation

therefor." In *Smith v. Johnson*, 45 Iowa, 308, it was held that no recovery can be had in such cases where there is no express contract, and "it is not shown in the record that the services were performed with the expectation on the part of either that they were to be paid for."

¹ *People v. Speir*, 77 N. Y. 144, 151, per Danforth, J.: "If one man has obtained money from another, through the medium of oppression, extortion or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrong-doer to restore it to the rightful owner, though it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and, in fact, are not contracts at all. Addison on Contracts, 22." In *Ogden v. Saunders*, 12 Wheat. 213, 341, Marshall, C. J., said: "A great mass of human transactions depends upon implied contracts; upon contracts which are not written, but which grow out of the acts of the parties. In such cases, the parties are supposed to have made those stipulations which, as honest, fair and just men, they ought to have made. When the law assumes that they have made these stipulations, it does not vary their contract, or introduce new terms into it, but declares that certain acts, unexplained by compact, impose certain duties, and that the parties had stipulated for their performance. The difference is obvious between this and the introduction of a new condition into a contract drawn out in writing, in which the parties have expressed ev-

§ 16. Reservations and exceptions.—A reservation is always of something taken back out of that which is already granted, while an exception is of some part of the estate not granted at all. A reservation is never of any part of the estate itself, but of something issuing out of it; as, for instance, rent, or some right to be exercised in relation to the estate, as to cut timber. An exception, on the other hand, must be of a part of the thing granted or described as granted, and can be of nothing else.¹ An exception or reservation in a deed is to be taken most favorably to the grantee, and, if there is uncertainty or ambiguity in the language, he should have the benefit of the doubt or the ambiguity. They should be taken most strongly and construed most strictly against the grantor whose words they are, and against him who stands in his place; and, if an advantage can be gained from an uncertainty or ambiguity in the words, the grantee or person standing in his place is entitled to the benefit of it.² The general rule is that a reser-

everything that is to be done by either.” In 1 Pothier on Obligations, 113, it is said: “In contracts, it is the consent of the contracting parties which produces the obligation; in *quasi-contracts*, there is not any consent. The law alone, or natural equity, produces the obligation, by rendering obligatory the *fact* from which it results. Therefore, these facts are called *quasi-contracts*, because, without being contracts, they produce obligations in the same manner as actual contracts.”

¹ Craig v. Wells, 11 N. Y. 315.

² Grafton v. Moir, 130 N. Y. 465; 29 N. E. Rep. 974; Jackson v. Hudson, 3 Johns. 375; Provost v. Calder, 2 Wend. 517; Jackson v. Gardner, 8 Johns. 394; Ives v. VanAuken, 34 Barb. 566; Borst v. Empie, 5 N. Y. 33, 39, 40; Duryea v. Mayor, 62 N. Y. 592; 4 Kent's Commentaries 468; Craig v. Wells, 11 N. Y. 315. The primary rule of construction applicable to a clause in a deed in the form of an exception or reservation is to gather the intention of the parties from the words, by reading, not simply a single clause, but the entire context,

and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered. Clark v. Devoe, 124 N. Y. 120; 26 N. E. Rep. 275. The deed must be held to convey all the interest in the lands which the grantor had, unless the intent to pass a less estate or interest appears by express terms or be necessarily implied in the terms of the grant. In Blackman v. Striker (1894), 142 N. Y. 555; 37 N. E. Rep. 484, an agreement by certain devisees for the partition of devised land recited that on one parcel of the land was a fenced burying ground, which was to remain the family burying place, and whoever of them should draw said parcel, and thereafter sell it, should in his deed reserve said ground for said purpose of burying, with full liberty to pass and repass. He who drew this parcel sold and conveyed it to his brother and codevisee, “saving, excepting, and reserving unto the heirs of [their father, testator] and to their and each of their heirs, out of this present demise,” said

vation or exception for the benefit of a stranger or person not a party to the deed is void.¹ Where a deed contained the following provision after the habendum clause: "And upon this further condition, that the party of the second part and his heirs and assigns shall permit and allow the parties of the first part and their heirs to have free access with teams, at all times, to and from the waters of Hempstead harbor by the road now and heretofore used through his land, for the purpose of loading and unloading vessels, and also to reach that portion of the shore contiguous to such waters belonging to the parties of the first part, for the purpose of carting to and from the same," it was held that such provision did not constitute a condition subsequent; but that its legal effect was to annex the right of way to the land of the grantor, and was an exception or reservation in his favor.²

§ 17. Contracts of record.—A judgment is a contract of record. The law is well settled that suits on valid judgments in courts other than those in which they were recovered may be maintained at the will of judgment creditors, regardless of the fact that the time allowed, either by statute or the common law, for taking out an execution on the original judgment, has not expired.³ And, in the absence of a statutory prohibition, a suit on a judgment may be maintained in the same court in which the judgment was rendered, although the time has not expired within which an execution may be sued out on the judgment.⁴ This matter is, however, frequently regulated by statute. A judgment, being a simple mode of creating and of

fenced burying ground, with free ingress and egress, to bury the dead, forever. Said grantor made no mention of the burying ground in his will, nor did he or his heirs, for 100 years, lay any claim to it. It was held that he conveyed his whole estate in the parcel, including the fee of the burying ground, subject to the easement.

¹ *Bridger v. Pierson*, 45 N. Y. 601; *Walrath v. Redfield*, 18 N. Y. 457; *Hornbeck v. Westbrook*, 9 Johns. 73.

² *Baker v. Mott* (1894), 78 Hun, 141, per Brown, P. J.: "The legal effect

of the condition was to annex the right of way to the land set off to Adam. It was an exception or reservation in his favor. *Mendell v. Delano*, 7 Metc. 176; *Bowen v. Conner*, 6 Cush. 132; *Rexford v. Marquis*, 7 Lans. 249."

³ *Hickman v. Macon County*, 42 Fed. Rep. 759; *Simpson v. Cochran*, 23 Iowa, 81; 92 Am. Dec. 410; *Kingsland v. Forrest*, 18 Ala. 519; 52 Am. Dec. 232; *Freeman on Judgments*, § 432.

⁴ *Hickman v. Macon County*, 42 Fed. Rep. 759.

securing a debt, attended with easy proof and convenient remedies, is sometimes used for this purpose by agreement between the parties without any previous litigation; also, where a suit has been commenced and is pending, the parties may come to an agreement respecting the entry up of judgment, and the terms on which it is to be enforced.¹ A *bona fide* debt alone is not sufficient to support a confession of a judgment; the confession must be given for a *bona fide* purpose. Accordingly, the fraudulent intent of the parties—as, for instance, to force a settlement with other creditors—renders the judgment void, regardless of the validity of the claim sued on.² A warrant of attorney is an instrument in writing, usually under seal, giving authority to enter up judgment against the party executing it, without process.³

§ 18. The same subject continued—Warrant of attorney.—It is sometimes competent for the parties to include in their contract a provision that upon default a judgment may summarily be entered in favor of the party not in default. In such cases the agreement is in the form of a warrant of attorney, which having been inserted without fraud or surprise is binding and irrevocable, so that even insanity happening after the execution of the warrant of attorney does not invalidate it.⁴ The warrant of attorney may authorize any attorney to confess judgment, and no particular one need be designated by name,⁵ and the attorney may also be authorized to confess judgment upon a complaint in forcible detainer.⁶ A provision in a lease to two lessees that “the party of the second part” authorizes any attorney to enter “their” appearance and confess judgment, gives authority to confess judgment against both lessees.⁷ But if the judgment entered is not in conformity with the terms of the

¹ Leake on Contracts, 156.

² *Galle v. Tode*, 60 Hun, 132; 14 N. Y. Supl. 531. See, also, *McElwain v. Willis*, 9 Wend. 549; *Adsit v. Butler*, 87 N. Y. 585; *Adee v. Bigler*, 81 N. Y. 349; *Carpenter v. Osborn*, 102 N. Y. 552; *Claffin v. Gordon*, 39 Hun, 54.

³ *Kinnersley v. Mussen*, 5 Taunt.

264. A warrant of attorney ordinarily need not be under seal.

⁴ *Spencer v. Reynolds*, 9 Pa. Co. Ct. 249.

⁵ *Poppers v. Meager*, 33 Ill. Upp. 19; *Hall v. Jones*, 32 Ill. 38; *Keith v. Kellogg*, 97 Ill. 147.

⁶ *Poppers v. Meager*, 33 Ill. App. 19.

⁷ *Frank v. Thomas*, 35 Ill. App. 547.

warrant of attorney, it is void, and a new judgment must be entered in accordance with the tenor of the instrument.¹ An affidavit, required to be filed by the warrant, if omitted can not be filed *nunc pro tunc*.² All the pleading usually required in these cases is such a statement of the facts out of which the debt arose as will satisfy creditors and others as to the *bona fides* of the judgment.³ The filing of the papers determines the date of a judgment by confession, and the judgment should be entered as of that date.⁴ After the death of the obligee, his administrator or personal representative must have the judgment entered, and a judgment in the name of a deceased obligee is void.⁵ It seems that judgment on a note containing a warrant of attorney to confess judgment may be made before the maturity of the note.⁶ A warrant of attorney executed by certain members of a copartnership for the purpose of binding the firm, if unauthorized by all, is valid only as to those executing it;⁷ but a warrant of attorney to confess judgment on a note is for the benefit of any holder, although the payee is alone named in the warrant.⁸

§ 19. Merger in judgment.—Whether or not the judgment of a court having jurisdiction merges the contract upon which it is recovered will depend somewhat upon circumstances. A judgment of foreclosure of a mortgage does not so far merge the mortgage in the judgment as to blot out the record of the mortgage, or relieve any one looking at the judgment and the deed given on sale pursuant thereto from the effect of that record as showing what the mortgage contains.⁹ And where a note

¹ Koons v. Hendricks, 6 Kulp. (Pa.) 165.

² Koons v. Hendricks, 6 Kulp. (Pa.) 165.

³ Atwater v. Manchester Bank, 45 Minn. 341; Brown v. Barngrover (1891), 82 Iowa, 204; 47 N. W. Rep. 1082; Richey v. Carpenter, 9 Pa. Co. Ct. 106.

⁴ Snowden v. Preston, 73 Md. 261.

⁵ Guyer v. Guyer, 6 Houst. (Del.) 430.

⁶ Teel v. Yost, 128 N. Y. 387. But,

in the absence of express authority in the note itself, an entry of judgment before maturity will, unless satisfactorily explained, be set aside, on motion.

⁷ Uhlenborn v. Kaufman, 41 Ill. App. 373.

⁸ Packer v. Roberts (1891), 140 Ill. 671; 29 N. E. Rep. 668; 40 Ill. App. 613.

⁹ Bernstein v. Nealis (1895), 144 N. Y. 347.

is given as security for the payment of annuities which are due, the merging of it in a judgment changes only the form of the obligation, while its character as a collateral security remains.¹ The judgment of a court of record, however, ordinarily merges or extinguishes the cause of action on which it is founded. If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, *transit in rem judicatam*,—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher.²

§ 20. Merger of mortgage in legal title.—Where the holder of a senior mortgage purchases the legal title to the mortgaged premises, such mortgage is not thereby necessarily merged in the legal title, but he is entitled to keep his mortgage alive to protect such legal title against a valid junior mortgage.³

¹ *Pond v. Harwood* (1893), 139 N. Y. 111.

² *King v. Hoare*, 13 M. & W. 494, *per curiam*.

³ *Swatts v. Bowen*, 141 Ind. 322; 40 N. E. Rep. 1057, *per Hackney, J.*: "The purchase of the legal title by the appellant did not soil her hands, and, by owning that title, she is enabled to do no more than another could do, namely, subject her property to the payment of the appellee's claim after the satisfaction of the senior mortgage. By purchasing, she has certainly committed no injustice that should operate to stay the interference of equity to protect her mortgage against a junior mortgage. As we have said, regarding the appellant's lien as valid and enforceable, it would certainly subserve the ends of

justice to keep it alive, unless the appellant intended to merge it. This we understand to be the test. *Myers v. O'Neal*, 130 Ind. 370; 30 N. E. Rep. 510; *Hanlon v. Doherty*, 109 Ind. 37; 9 N. E. Rep. 782; *Elston v. Castor*, 101 Ind. 426; *Haggerty v. Byrne*, 75 Ind. 499; *Smith v. Ostermeyer*, 68 Ind. 432; *Howe v. Woodruff*, 12 Ind. 214; *Coburn v. Stephens*, 137 Ind. 683; 36 N. E. Rep. 132; *Jewett v. Tomlinson*, 137 Ind. 326; 36 N. E. Rep. 1106. Nor do we understand that a purchaser of the legal title or the equity of the redemption at a foreclosure sale thereby assumes the payment of all liens junior to that upon which he buys. We do not understand *Bunch v. Grave*, 111 Ind. 351; 12 N. E. Rep. 514, to so hold, and certainly the contrary doctrine is enforced in the later cases of *Myers*

§ 21. **Judgment as estoppel.**—A judgment is conclusive upon all the parties and privies to the suit, and if rendered upon the merits, subsequent litigation between the same parties involving substantially the same facts and issues can not be prosecuted.¹ But in order that a judgment may have the effect of an estoppel, it is not enough that the party produce a record showing a judicial determination of the same question litigated in his favor, but it must also appear that it was rendered upon the merits, upon a material point, and substantially upon the same facts presented in the subsequent case.² In an action on the judgment, the defendant as of course can not plead any matter of defense which he might have pleaded in the original action.³ And a judgment against the plaintiff, if rendered on the merits, is conclusive, and precludes him from bringing another action for the same cause.⁴ As to estoppel by judgment the Supreme Court of the United States has held, that when the second suit is upon the same cause of action, and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the first action; but when the second suit is on a different cause of action, although between the same parties, the judgment in the former operates as an estoppel only as to the point or question actually liti-

v. O'Neal, supra, and *Jewett v. Tomlinson, supra*." In *Myers v. O'Neal*, 130 Ind. 370, Miller, J., said: "This case affords a strong illustration of the rule that equity will not permit titles to merge where it would be inequitable to do so. The appellants, whose claims, because of the prior encumbrance, were practically worthless, are in no condition to ask that the doctrine of merger shall be applied in order to work a practical confiscation of the superior property rights of the appellees."

¹ *Tauziède v. Jumel*, 133 N. Y. 614; 44 N. Y. St. Rep. 897; *People v. Holladay*, 93 Cal. 241; *Meyer v. Meyer*, 40 Ill. App. 94; *Ellis v. Northern Pac. R. Co.*, 80 Wis. 459; *Northern Pac. R. Co. v. Ellis*, 144 U. S. 458;

Henderson v. Moss, 82 Tex. 69; *Moses v. Macferlan*, 2 Burr. 1005, 1009.

² *Shaw v. Broadbent*, 129 N. Y. 114; *Campbell v. Consalus*, 25 N. Y. 613; *People v. Johnson*, 38 N. Y. 63; *Weed v. Burt*, 78 N. Y. 191; *Webb v. Buckelew*, 82 N. Y. 555; *Nave v. Adams*, 107 Mo. 414; *James v. James*, 81 Tex. 373.

³ *Mayor, etc., New Orleans v. United States*, 49 Fed. Rep. 40; *Nagel v. Loomis*, 33 Neb. 499; 50 N. W. Rep. 441; *Jewsbury v. Mummery*, L. R. 8 C. P. 56; *Archer v. State*, 74 Md. 410; *Todd v. Maxfield*, 6 B. & C. 105; *Braun v. Weller*, L. R. 2 Ex. 183.

⁴ *Nesbit v. Riverside District*, 144 U. S. 610; *Archer v. State*, 74 Md. 443; *Vooght v. Winch*, 2 B. & Ald. 662; *Overton v. Harvey*, 9 C. B. 324; *Newington v. Levy*, L. R. 6 C. P. 180.

gated and determined, and not as to other matters which might have been litigated and determined.¹ Thus a judgment against a municipal corporation in an action on coupons cut from its negotiable bonds, where the only defense set up is the invalidity of the issue of the bonds by reason of their being in excess of the amount allowed by law, is no estoppel to another action between the same parties, on the bonds themselves and other coupons cut from them, where the defense set up is such invalidity, coupled with knowledge of the same by the plaintiff when he acquired the bonds and coupons.²

§ 22. The same subject continued—Illustrations.—A judgment dismissing a suit on plaintiff's own motion, after a general demurrer to his petition has been sustained with leave to amend, does not bar plaintiff from bringing a second action.³ So also a judgment dismissing a suit on the ground that the court had no jurisdiction is no bar to a second action, although the court did in fact have jurisdiction.⁴ And in Kentucky it has been ingeniously held that a judgment on the merits touching the ownership of a mare is not conclusive as to the ownership of a colt foaled by the mare in the meantime.⁵ A judgment at law dismissing a case on the ground of contributory negligence is not a bar to a subsequent libel in admiralty.⁶ So equally a dismissal of the complaint without an announcement by defendants that they rest their case is a nonsuit only, although stated in the conclusions of law to be upon the merits.⁷ In a divorce proceeding brought by the wife, based on cruelty, a dismissal on the merits precludes the same matter from being set up as a defense to a subsequent action for divorce brought by the husband.⁸ But a mere order for a decree is not a final decree.⁹ Matters, however, embraced in the report of a master and confirmed by the court are *res ju-*

¹ *Nesbit v. Riverside District*, 144 U. S. 610; *Cromwell v. County of Sac*, 94 U. S. 351.

² *Nesbit v. Riverside District*, 144 U. S. 610.

³ *Scherff v. Mo. Pac. R. Co.*, 81 Tex. 471.

⁴ *Weigley v. Coffman*, 144 Pa. St. 489.

⁵ *Maize v. Bowman*, 14 Ky. L. Rep. 121.

⁶ *The City of Rome*, 49 Fed. Rep. 392.

⁷ *Sproessig v. Keutl*, 17 N. Y. Supl. 839.

⁸ *Tillison v. Tillison*, 63 Vt. 411.

⁹ *Gilpatrick v. Glidden*, 82 Me. 201.

dicata.¹ The matter adjudicated may be raised by way of set-off, counter-claim, or defense. The actual passing on the merits of the question raised is conclusive, irrespective of the manner in which it is brought before the court.²

§ 23. **Statutes as contracts.**—A statute may contain all the elements of a contract. Thus the Virginia act of 1891, providing for the funding and payment of the public debt and the issue of coupon bonds of the state under its provisions, constitute a contract between the state and the holders of coupons thus issued, and the subsequent Virginia acts passed for the purpose of restraining the use of the coupons for the payment of taxes and other state dues in many respects materially impair the obligation of that contract, and in so far as they have that effect are not valid or binding.³ And where an Ohio statute vested in the Ohio University two townships of land for its support, and authorized it to lease the land for ninety-nine years renewable forever, and provided that said lands should forever be exempt from state taxes, it was held that the acceptance of such leases constituted a valid contract between the state and the lessees, and that a subsequent statute levying a state tax on the leased land was unconstitutional as “impairing the obligation of contracts.”⁴ Under the California statute authorizing an issue of bonds to pay expenses of

¹ Hubbard v. Camperdown Mills, 26 S. C. 581.

² Howe v. Lewis, 121 Ind. 110. See, also, Sayre v. Harpold, 33 W. Va. 553; Sheble v. Strong, 128 Pa. St. 315; Faust v. Faust, 31 S. C. 576; Berry v. Whidden, 62 N. H. 473; Laffoon v. Fretwell, 24 Mo. App. 258; Kenyon v. Wilson, 78 Iowa 408; Smith v. Luse, 30 Ill. App. 37; Sauls v. Freeman, 24 Fla. 209; Stickney v. Goudy, 132 Ill. 213; Helfenstein's Estate, 26 W. N. C. 194; Keator v. St. John, 42 Fed. Rep. 585.

³ McGahey v. Virginia, 135 U. S. 662, per Bradley, J.: “It has always been contended on the part of the bondholders that this statute created a contract between them and the state firm and inviolable which the legislature

had no constitutional right to impair; and such was for several years the uniform holding of the Virginia supreme court. See Antoni v. Wright, 22 Gratt. 833; Wise v. Rogers, 24 Gratt. 169; Clarke v. Tyler, 30 Gratt. 134.” The learned justice also reviewed and in the main approved of the federal decisions in Hartman v. Greenhow, 102 U. S. 672; Antoni v. Greenhow, 107 U. S. 769; Virginia Coupon Cases, 114 U. S. 269; Barry v. Edmunds, 116 U. S. 550; Chaffin v. Taylor, 116 U. S. 567; Royall v. Virginia, 121 U. S. 102; Sands v. Edmunds, 116 U. S. 585; *In re* Ayers, 123 U. S. 443. See, also, State v. Pickett (1894), 46 La. Ann. 7; 14 So. Rep. 340.

⁴ Matheny v. Golden, 5 Ohio St. 361.

expeditions against the Indians, bonds and coupons were issued, payable at the office of the state treasurer in ten years, "provided the same be not sooner paid from funds anticipated in said act to be derived from the government of the United States." Congress did appropriate money to pay these bonds, but provided for payment at the national treasury, and imposed certain reasonable conditions, to prevent imposition and fraud. It was held that the liability of the state of California was contingent upon the failure of congress to provide for the payment of such bonds, and, congress having provided for their payment, the state never became liable thereon.¹

¹Sawyer v. Colgan (1894), 102 Cal. 283; 36 Pac. Rep. 580, *per curiam*: "The bond on its face provides for payment by the state, 'provided the same be not sooner paid from funds anticipated in said act to be derived from the government of the United States.' It was understood that congress might pay the money over to the state, and in that event the bonds would be payable at the office of the state treasurer, but it was not unreasonable to suppose, and such was anticipated, doubtless, that the demands should be made payable by congress at the national treasury. It was the duty of the general government under the constitution to defend the states from invasion or insurrection, and when the state of California found it necessary to raise funds in order to defend itself, the general government became in duty bound to reimburse the state for the cost of such defense. The state, however, recognized its obligation to pay those who had enlisted in its defense, if the general government failed to discharge its obligation to the state. Therefore, it was provided that, if congress did not within ten years make provision for the payment of the bonds, the state would pay them. Our conclusion is that the state of California never became liable to pay bond 420 or its coupons, or any of the coupons of bonds issued under the act of 1852. It is contended by the ap-

pellant that his bonds and coupons bear interest from the time of their maturity until payment; but section 1917 of the civil code, cited, does not apply to an indebtedness of the state, and the state is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or some lawful contract of its executive officers. *United States v. North Carolina*, 136 U. S. 211; 10 Sup. Ct. 920; *Carr v. State*, 127 Ind. 204; 26 N. E. Rep. 778. In mandamus the controller can be required to draw his warrant only for what is expressly authorized by the statute. *Auditorial Board v. Arles*, 15 Tex. 72; *Davis v. Porter*, 66 Cal. 658; 6 Pac. Rep. 746; *Davis v. County of Yuba*, 75 Cal. 452, 13 Pac. Rep. 874, and 17 Pac. Rep. 533, was an action brought to recover the sum of \$5,600 and interest; it was not a case of mandate. The appropriation made by the act of 1851 was not repealed by the act of 1852, as claimed by respondent. The latter act expressly provides that "the repeal in no wise affects the war loan bonds already issued under the provisions of the act so repealed." In view of what has been said, it is unnecessary to consider the contention of the respondent that the act of 1852 is unconstitutional because it created a debt or liability against the state exceeding the limit provided for in ar-

§ 24. **The same subject continued—Treaties.**—Proceedings under a statute may have the effect and force of a judgment which is a contract of the highest nature;¹ and a property right acquired under a state statute can not be divested by repealing the statute.² Where, therefore, under an act directing a city to audit and adjust the amount of damage done to certain private property by the opening of a street, providing for an appraisal thereof by commissioners, and requiring the city to raise the amount by assessment, and pay it over to the owner of the property, the commissioners have made the appraisal, and their report has been confirmed by the court, the owner's claim against the city is fixed, and can not be affected by a subsequent repeal of the act.³ Under the constitution of the

title 8, Const. 1849, and it is not claimed that the act of 1851 is unconstitutional on that or any other ground. We think that petitioner is entitled to a warrant for payment of the coupons issued under the act of 1851, but is not entitled to a warrant for the payment of bond No. 420, or any of the coupons issued under the act of 1852. The judgment is reversed, with directions to the court below to issue a peremptory writ of mandate to respondent, commanding him to draw his warrant upon the state treasurer, payable out of the general fund, in favor of petitioner, for the sum of \$1,800, and to further adjudge that petitioner herein recover from the defendant the costs of this proceeding."

¹ *Woodhull v. Little*, 102 N. Y. 165; *People v. Com. Council*, 78 N. Y. 56.

² *People v. O'Brien*, 111 N. Y. 1.

³ *People v. Com. Council* (1893), 140 N. Y. 300; 35 N. E. Rep. 485, *O'Brien, J.*: "It is contended that the act of 1890 simply conferred power upon the common council to audit the claim, leaving it to their discretion whether it should be exercised or not. The words are that the common council 'is authorized to audit and adjust the amount of dam-

ages,' and, when appraised, 'the same shall be raised * * * and the amount * * * paid over,' etc. It would be a liberal construction of this language in favor of the city to say that it was simply permissive; but, assuming that it was, the rights of the parties must be governed by the rule of law that permissive words used in statutes conferring power or authority upon public officers or bodies will be held to be mandatory where the act authorized to be done concerns the public interest or the rights of individuals. *People v. Board, etc., of Livingston Co.*, 68 N. Y. 114; *People v. Board, etc., of Otsego Co.*, 51 N. Y. 401; *People v. Common Council of Syracuse*, 78 N. Y. 56; *Mayor, etc., v. Furze*, 3 Hill, 612; *Lower v. U. S.*, 91 U. S. 536; *Barnes v. District of Columbia*, 91 U. S. 540. We have seen that the report of the commissioners under the statute, awarding damages to the relator in the sum of \$5,500, confirmed by an order of the court, had all the force and effect of a judgment creating an obligation on the part of the city to pay. *Woodhull v. Little*, 102 N. Y. 165; 6 N. E. Rep. 266; *People v. Common Council of Syracuse, supra*. It vested in the relator, when the order of confirmation was entered, an absolute

United States a treaty is to be regarded as a statute when it operates of itself without the aid of any legislative provision. But when its terms import a contract, when either of the parties undertakes to perform a particular act, the treaty addresses itself to the political, not the judicial department, and the legislature must execute the contract before it can become a rule for the court.¹

§ 25. **State grants.**—The title of a state to its sea coast, and the shores of tidal rivers, is different from the fee-simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign, right, and it has been frequently said that a trust is engrafted upon this title for the benefit of the public, of which the state is powerless to divest itself.² As the title which a state holds can not be surrendered or

right to receive the amount. It created an obligation on the part of the city to pay, and in this sense was a contract of the highest nature. *Cornell v. Donovan*, 14 Daly, 295. All contract obligations are protected from impairment by state legislation by the provisions of the federal constitution. The obligation of a contract is impaired in the constitutional sense by any law which prevents its enforcement, or which materially abridges the remedy for enforcing it, which existed when it was contracted, and does not supply an alternative remedy equally adequate and efficacious. *McGahey v. Virginia*, 135 U. S. 662, 685; 10 Sup. Ct. 972. The remedy subsisting in a state when and where an obligation is made or created and is to be performed is a part of the obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is, therefore, void. *Edwards v. Kearzey*, 96 U. S. 595. This provision of the constitution can not be evaded by indirect methods. The obligation of a muni-

cipal corporation can not be impaired by restraining its power of taxation to the point of disabling it from performance, or by a repeal of the law under which the obligation was to be enforced, or by enacting statutes of limitation that do not allow a reasonable time for bringing the action any more than by open and avowed assaults upon the contract itself. In this case the repealing act could have no other purpose than to prevent the audit and payment of the relator's claim; but whatever the motive which prompted the legislation, it is clearly inoperative and void as to the award made by the commissioners and confirmed by the court."

¹ *Foster v. Neilson*, 2 Pet. 253, 314.

² 3 Kent's Commentaries 545 (9th ed.); 3 Washburn on Real Property, 418 (4th ed.); Gould Law of Waters, §§ 18, 44; Angell on Tide Waters, 158; *Smith v. Rochester*, 92 N. Y. 463; *Gann v. Free Fishers, etc.*, 10 H. L. Cas. 192; *Illinois Central R. Co. v. Illinois*, 146 U. S. 387; *Hardin v. Jordan*, 140 U. S. 371; *Shively v. Bowlby*, 152 U. S. 1; *Saunders v. New York, etc., R. Co.*, 144 N. Y. 75.

granted, except for some public purpose, or some reasonable use for the public benefit, such a grant can never constitute a contract between the state and the grantee, which is beyond the power of revocation by a subsequent legislature.¹ For every purpose which may be useful, convenient or necessary to the public, the state has the unquestionable right to make grants in fee, conditionally, for the beneficial use of the grantee, or to promote commerce according to their terms. The extensive grant to the city of New York, of the lands under water below the shore line around Manhattan island, clearly comes within this principle, since it was a grant to a municipality, constituting a political division of the state, for the promotion of the commercial prosperity of the city and, consequently, of the people of the state.² Grants to railroads for rights of way and other facilities for the transaction of their business, made under the authority of the state, have also been held valid upon the same principle.³

§ 26. Written evidence of contracts the best.—Sometimes the courts can not reach a satisfactory conclusion as to the nature, character or quality of the contract into which parties have entered. Recently, in the state of New York, the transaction at issue was adjudged in the first trial to be a bailment, and in the second and third trials to be a sale. Yet the court of last resort, in its opinion on the third appeal, frankly declares “that the evidence preponderates in favor of the defendant’s contention,” that the transaction was a bailment, and “we again say, as we have said upon the previous occasions when the case was under review, that the equities militate and the evidence tends strongly against the claim of the plaintiffs.” It is apparent from that case that the purpose of a contract may sometimes fail, through the intervention of rules of law, and that in general the best evidence of a contract is a writing.⁴

¹ *Coxe v. State* (1895), 144 N. Y. 396, 406; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387; *Shively v. Bowlby*, 152 U. S. 1; *People v. Squire*, 107 N. Y. 593; *Buffalo, etc., R. Co. v. Buffalo, etc., R. Co.*, 111 N. Y. 132, 140; *Hardin v. Jordan*, 140 U. S. 371.

² *Langdon v. Mayor, etc.*, 93 N. Y. 129.

³ *Saunders v. New York, etc., R. Co.* (1894), 144 N. Y. 75.

⁴ *Crosby v. President, etc., of Delaware Canal Co.* (1894), 141 N. Y. 589; 36 N. E. Rep. 332, per Gray, J.: “The defendant, claim-

§ 27. Negotiable instruments—How far conclusive.—As between original parties to a note and those occupying their po-

ing to have always retained its ownership of the lumber, introduced evidence for the purpose of showing that the lumber had been furnished to the Harndens only to be used in the boats contracted for; payment to be made for it by deduction of its value from the price of the boats upon their completion in the spring. It was shown that it was the custom for the defendant to furnish its own lumber to boat builders generally; but solely for the purpose of being used in the construction of boats it had contracted for, and with the understanding that its cost was to be taken out when the boats were paid for. Upon the last trial, the evidence of the company's agent in explanation of the purpose of sending the bill in question was admitted, and was to the effect that it was sent upon this occasion to the Harndens as it had been sent to them upon previous dealings, and, in accordance with the company's universal custom, to other parties, "as a memorandum of the lumber that they had, and as a memorandum of the amount that had to be deducted from the contract price of the boat when the company settled for it," and that it was not sent for any other purpose. With that explanation of the company's agent, in connection with some testimony by other boat builders that the company furnished lumber to all of them upon the same terms, and for the sole purpose described by the company's agent, the defendant's counsel insists that the case was so complete for the defendant as to have made it the duty of the trial judge to decide the question, as one of law, in favor of the defendant, and to have nonsuited the plaintiffs. That the evidence preponderates in favor of the defendant's contention as to what the

transaction amounted to can not be doubted, and, as we have said upon the previous occasions when the case was under review, we again say that the equities militate, and the evidence tends, strongly against the claim of the plaintiffs. It is difficult to understand how the jury could have come to the conclusion which they did upon any fair and conscientious consideration of the proofs; but we can not say that the case had been wholly removed from their province, and, if not, then we can not interfere with their decision of the issue. It does not follow that, with the evidence of the company's agent in the case, however strongly supporting the company's position, the plaintiffs were foreclosed from insisting upon the inconclusiveness of the evidence relied upon by the defendant, or upon certain opposing inferences being possible from the proofs, and that it was the province of the jury to consider and decide. Nor was anything else to be inferred from our previous opinion than that the evidence of the company's agent was admissible in its behalf upon the issues, in view of the use made of this bill by the plaintiffs, and to explain the object in sending it. However convincing the evidence, to the ordinary mind, that the defendant was right in its contention, it can not be said that the facts depended upon were incapable of another aspect, or that, from the circumstances out of which they grew, and which bore upon the relations of these parties, it was impossible to infer that this transaction was not a sale of the lumber. It is the undoubted rule that in such actions the plaintiff must establish his title to, and right to the possession of, the property alleged to have been wrongfully con-

sition, the nature of the contract, as well as the consideration upon which it is founded, is open to inquiry, instead of being

verted; and this was undertaken in this case. The Harndens were in possession of the lumber, and apparently, from the bill rendered, were indebted for it as upon a sale to them, and they had transferred it to plaintiffs by a bill of sale. It appeared that the Harndens had previously bought lumber of the defendant for cash, and that, after an interview between a member of that firm and an officer of the company, the course of dealing was changed, and credit was given to them for lumber ordered and delivered. With lumber so obtained, boats of other parties were repaired, and there was no proof that any restrictions were imposed upon its use. Nor did it appear that anything was said or written as to the title to this lumber being only conditional in the Harndens. Though its cost was to be received by the defendant only when the boats were built, and then by way of deduction from the sum contracted to be paid for the boats, that was not necessarily conclusive upon the question of the ownership meanwhile, for the title to an article may pass upon a credit sale, if such be the intention of the parties. Another circumstance was that the company was not bound to accept and to pay for the boats until after inspection and approval; thus introducing another element of possible doubt into the question of title. All these circumstances, and some others of more or less importance, were open to the consideration of the jury, in connection with the form of the bill for the lumber sent by the company's agent; and, as it has been already intimated, however strong may seem the inference to our minds that there was only a conditional sale or a bailment of the lumber, a different inference was permis-

sible; so that, under the well-settled rule, the jury became the proper judges between the litigants, and their decision closes the dispute, in the absence of any errors committed in the course of trial which would authorize us to order a new trial.

The defendant's counsel requested the trial judge to charge "that if the jury find that the evidence given by Larter that the bill sent to the Harndens November 24, 1882, was sent only as a memorandum of the quantity and of the quality of the lumber, and its value, is true, the bill is not an admission that the lumber was sold to the Harndens,"—to which request he replied: "I decline to charge in those words, and will leave it as a question of fact, under all the evidence, for the jury to determine whether or not the lumber was sold." We think there was no error in this. Larter was the company's paymaster, and had testified that the bill had been sent, as previous ones had been sent, namely, as a memorandum to show the amount to be deducted from the contract price of the boats when constructed. The effect of that evidence upon the bill was for the jury to decide. It was not legal error for the court to refuse to say what would become of certain evidence if certain other evidence was believed; nor was the court bound to put the proposition to the jury, if we assume its truth, as it was formulated by the counsel. *Conley v. Meeker*, 85 N. Y. 618. Therefore, when, in his reply to the request, the trial judge simply relegated the whole matter to the jury, to be decided upon the evidence before them, he committed no error. In his charge he remarked that "the intention with which a thing is done does not always control the legal

concluded by the terms of the note only.¹ Thus, the relative time at which the indorsements were made, and the agreement or understanding as to the nature of such indorsements, are proper subjects of inquiry between such parties in determining their relative liability to each other, as, to them, the instrument itself is only *prima facie* evidence of the contract implied by law.² But as against an innocent indorsee for value, in the regular course of business, a different rule applies, and prohibits a defendant from asserting any extrinsic matter to vary the apparent liability exhibited by the note itself.³ The courts, following the usage and customs prevalent in mercantile circles, invariably hold that the innocent holder for value without notice is to be protected in construing the agreement he has obtained title to, as a reasonable man would construe it. It would be impossible to ascertain the

effect of the thing done." That is very true, and did not prejudice the defendant's case. That object which one may propose to himself in entering upon some transaction often fails of its accomplishment by the operation and intervention of rules of law. The judge sufficiently explained the bearing of the remark. When subsequently, upon the request of the defendant's counsel, he instructed the jury that the minds of contracting parties must meet to make a valid contract, that the question was one for the jury as to what the contract was, and that "if, from the circumstances, you are satisfied that it was the intention of both parties at that time that the title should pass—that their minds met upon that—then you may treat it as a sale; if, from the circumstances, you do not believe that the parties' minds met, you may treat it as no sale"—he made it clear enough what part intention played in the transaction of the parties, and there should have been no confusion in their minds about it.

The trial judge refused to charge "that the intent of Larter as to the

sending of the bill, * * * if Larter is believed by the jury, does determine the legal effect of the sending of the bill." This was not error. As it has been said, Larter was following the usage in previous transactions, and though his own intention in sending the bill in that form may, nevertheless, have been to treat the matter as a bailment, and the bill as a mere memorandum, that could not control the real arrangement, if it was otherwise; and what that was the facts and circumstances, taken all together, must be considered and weighed, for the absence of any definite agreement upon the subject in words or in writings. We have scrupulously considered these and other rulings upon requests to charge, and upon the admission and exclusion of evidence, and we are not able to say that there exists any error which would justify us in permitting the defendant to submit its case to the chances of another trial.

¹ *Sturtevant v. Randall*, 53 Me. 149; *Smith v. Morrill*, 54 Me. 48.

² *Patten v. Pearson*, 57 Me. 428.

³ *Smith v. Morrill*, 54 Me. 48.

understanding which the parties had privately as to who should or should not be holden. Having failed to make this meaning plain in the written contract, they should be forever estopped, as to such purchaser, from setting up any defense not to be inferred from such contract.¹

§ 28. Where written contract is unambiguous.—Where a written contract is plain and unambiguous on its face, parol evidence is not admissible to explain or alter its meaning.² In

¹ *Bradford v. Prescott* (1893), 85 Me. 482; 27 Atl. Rep. 461, Foster, J.: "Accordingly it is held in Maine and Massachusetts that the obligation which the signer of commercial paper assumes to the taker is to be determined by an inspection of the note as it was when negotiated. *Stevens v. Parsons*, 80 Me. 351; 14 Atl. Rep. 741; *Bigelow v. Colton*, 13 Gray 309; *Spaulding v. Putnam*, 128 Mass. 363, 365. It is the settled doctrine of these states that one not appearing to be a party, either as payee or indorsee, to a note payable to a payee therein named, or his order, who puts his name on the back of it in blank at its inception and before negotiated, is a joint and several promisor. The legal presumption in such case is that it was done for the same consideration with the contract on the face of the note; and when there is no date as to such indorsement the presumption is that it was made at the time when the note had its inception. *Colburn v. Averill*, 30 Me. 310; *Lowell v. Gage*, 38 Me. 35; *Childs v. Wyman*, 44 Me. 433; *National, etc., Bank v. Lougee*, 108 Mass. 371, 373. This presumption will prevail in favor of an innocent indorsee for value before due, and in the regular course of business; and his rights can not be infringed by proof of any extrinsic facts which might affect the original parties to the contract, or those occupying their position and having their rights only.

Sturtevant v. Randall, 53 Me. 149, 157; *Smith v. Morrill*, 54 Me. 48, 53; *Malbon v. Southard*, 36 Me. 147. The plaintiff having had the note in suit presented to him by the payee, before due, and being ignorant of any facts except such as he might obtain from an inspection of the note itself, found the defendant's name upon it. He had a right to presume it was placed there at the inception of the note, and before its delivery to the payee. *Moore v. McKenney*, 83 Me. 80, 85; 21 Atl. Rep. 749."

² *Brady v. Cassidy* (1895), 145 N. Y. 171, 177. In *Diebold Safe Co. v. Huston*, 55 Kan. 104; 39 Pac. Rep. 1035, Allen, J., said: "It appears from the plaintiff's own evidence that the agreement which he entered into with the agent of the safe and lock company was reduced to writing. Oral evidence, therefore, is inadmissible to vary or enlarge its terms. *Drake v. Dodsworth*, 4 Kan. 159; *Brenner v. Luth*, 28 Kan. 581; *Hopkins v. St. Louis, etc., Ry. Co.*, 29 Kan. 544; *Furneaux v. Esterly*, 36 Kan. 539; 13 Pac. Rep. 824; *Phelps-Biglow Windmill Co. v. Piercy*, 41 Kan. 763; 21 Pac. Rep. 793; *Willard v. Ostrander*, 46 Kan. 591; 26 Pac. Rep. 1017. In *Watson v. Roode*, 43 Neb. 348; 61 N.W. Rep. 625, the court said: "The infirmity of the testimony sought to be introduced, and the reason for its exclusion, was that it was a part of the transaction between the parties, and became

arriving at the real intention of the parties, as shown by the language employed by them in a contract, and, in order to make a correct application of the terms used to the subject-matter and objects referred to therein, when the same are not clearly expressed, the situation of the parties and the surrounding circumstances may be considered in construing the contract; but it must be borne in mind that it is the language of the contract itself that is to be construed, and when the parties reduce their agreement to writing, no other language employed by them in making the contract can be resorted to, except that furnished by the instrument itself.¹ To render parol evidence competent, in case of a written contract, it is not enough that there were circumstances known to one of the parties, which might have influenced him in making the contract, which were not known to the other party; to create an ambiguity that opens the contract to parol explanation, it must be established by proof of circumstances known to all the parties.² Where an article is sold by a written contract, which is silent on the subject of warranty, it can not be shown by parol that there was an oral warranty made by the seller at the time of the sale, or previously, as the written instrument is conclusively presumed to embody the entire contract.³ Evidence to explain an ambiguity, or show the meaning of technical terms,

merged in the written contract, and its admission would directly contradict, and render of no effect, one material portion of the written contract. The general rule that such testimony will not be received is well settled. For cases more particularly applicable, see *Smith v. Taylor*, 82 Cal. 533; 23 Pac. Rep. 217; *Koerper v. Jung*, 33 Ill. App. 144.

¹ *Robinson v. Hyer*, 35 Fla. 544; 17 So. Rep. 745. In *House v. Walch* (1895), 144 N. Y. 418, Bartlett, J., said: "We have here a contract clear as to its terms, complete on its face, and parol evidence was inadmissible to vary or contradict the writing. It is a general rule that evidence of what was said between the parties to a valid instrument in writing, either prior to or at the time of its execution, can not

be received to contradict or vary its terms. *Wilson v. Deen*, 74 N. Y. 531; *Eighmie v. Taylor*, 98 N. Y. 288; *Marsh v. McNair*, 99 N. Y. 174; *Englehorn v. Reitlinger*, 122 N. Y. 76; *Thomas v. Scutt*, 127 N. Y. 133.

² *Brady v. Cassidy*, 104 N. Y. 147.

³ *Case Plow Works v. Niles, etc., Co.* 90 Wis. 590; 63 N. W. Rep. 1013; *McQuaid v. Ross*, 77 Wis. 470; *Merriam v. Field*, 24 Wis. 640. In *DeWitt v. Berry*, 134 U. S. 306, 312, Lamar, J., said: "There is good authority for the proposition that if the contract of sale is in writing and contains no warranty, parol evidence is not admissible to add a warranty. *Van Ostrand v. Reed*, 1 Wend. 424; *Lamb v. Crafts*, 12 Metc. 353; *Dean v. Mason*, 4 Conn. 428, 432; *Reed v. Wood*, 9 Vt. 285."

is not an exception to the general rule, but is allowed to enable the court to understand the contract as written, and not to contradict or vary the instrument in any particular.¹ The verification of the complaint by plaintiff is, in legal effect, a written request to the attorney to commence the action, and a written recognition of his authority to do so, and is sufficient presumptive evidence of such authority.²

§ 29. Complete written contract excluding parol evidence.—

When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking were reduced to writing; and all oral testimony is rejected of a previous colloquium between the parties, or of conversation or declaration at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties.³ A writing

¹ *House v. Walch* (1895), 144 N. Y. 418, 422; *Dana v. Fiedler*, 12 N. Y. 40; *Collender v. Dinsmore*, 55 N. Y. 200; *Newhall v. Appleton*, 114 N. Y. 140; *Smith v. Clews*, 114 N. Y. 190.

² *Graham v. Andrews* (1895), 11 N. Y. Misc. 649, per McAdam, J.: "The code provisions are taken from 3 Revised Statutes (6th ed.), page 573, section 15 of which declares that 'any written recognition of the authority of the attorney' shall be deemed presumptive evidence of such authority. Under this statute, a writing signed by one of two plaintiffs on behalf of both, requesting the attorney to continue the action, was a sufficient recognition of his authority to commence it. *Howard v. Howard*, 11 How. Pr. 80. The code (§1514) provides that 'any written request of the plaintiff or his agent to the plaintiff's attorney to commence the action, or any written recognition of his author-

ity so to do, verified by the affidavit of the attorney or any other competent witness, is sufficient presumptive evidence of such authority.' In answer to the defendant's application, the plaintiff's attorney swears 'that the original complaint herein, verified by the plaintiff personally, was filed with the clerk of this court on the 31st day of January, 1895, and that a copy of said complaint and verification was served on the defendants personally.' The complaint, so verified, is in legal effect a written request to the attorney to commence the action, and a written recognition of his authority so to do, sufficient to satisfy every requirement of the code provisions. This is not a proper case for requiring further evidence of authority. Code, § 1513; *Carpenter v. Allen*, 45 N. Y. Super. Ct. 322."

³ 1 Greenleaf on Evidence, § 275, adopted as the correct rule in *Badart*

signed by the parties merges in it all parol contracts which precede it, relating to the same subject-matter.¹ Where the plaintiff executed a written agreement to furnish defendant with railroad ties, to be delivered at the points where they were needed, it was held, in an action for defendant's failure to comply with an alleged contemporaneous agreement to haul part of the ties, that such parol agreement was not admissible in evidence, as it varied the written contract.² And where the agents of a foreign ship, acting as brokers, negotiate an agreement, which, being communicated through their Liverpool house to the owner, results in the execution of a charter which is signed by the Liverpool house on behalf of the charterer, and thereupon the agents, to avoid complications from the necessary lapse of time before the charterer can inspect the instrument, notify him in writing of its terms, requesting confirmation, and at the same time send a similar notification to the owners, this is substantially a transaction by "bought and sold notes;" and where the charterer, by letter to the agent, confirms the terms stated, these two communications become complete evidence of the terms of the contract, and parol evidence is not admissible.³

v. Foulon, 80 Md. 579; 31 Atl. Rep. 513.

¹*Hartsfield v. Chamblin* (S. C. 1895), 21 S. E. Rep. 798.

²*Scott v. Norfolk R. Co.* (Va. 1893), 17 S. E. Rep. 882; *Hubble v. Cole*, 85 Va. 87; *Bruce v. Slemph*, 82 Va. 352; *Hughes v. Tinsley*, 80 Va. 259.

³*Galgate Ship Co. v. Starr* (1893), 58 Fed. Rep. 894, per Morrow, J.: "Now, what was the effect of the letter to Starr & Co., and their reply confirming the terms of the contract? *Darlington Iron Co. v. Foote*, 16 Fed. Rep. 646, 649, is a case much in point, supporting libellant's contention that Starr & Co. became bound thereby to the terms stated in the letter of notification. In the case cited, Judge Wallace, speaking of an agreement deduced from correspondence between a seller and a broker, in which it appeared

'bought and sold notes' had been exchanged, said: 'It has been urged for the defendant that the correspondence was but a negotiation for a contract, and that the parties contemplated the exchange of formal written instruments as a definite conclusion of their negotiation; and in this view of the case emphasis has been placed upon the facts that the defendant was acting as a broker, that the plaintiff's agents knew this, and that both parties regarded the credit which was to be supplied in London as a condition precedent to a final contract. Although defendant was buying the rails to sell to another party, and although his profit was to be derived from a commission of one per cent., to be allowed him on the purchase-money by the plaintiff, there is no room to doubt that both parties contemplated a contract in

§ 30. Contracts in a foreign language.—It is the province of the court to construe all written instruments; but, if the language in which they are expressed is not understood by the court, its meaning must in some way be ascertained before the construction can be determined. The words may have a peculiar and technical meaning; they may be terms belonging to some art, trade, or science; they may, by commercial or local usage, have acquired an unusual signification; or they may be in a foreign language. In all these instances the courts, of necessity, resort to evidence to disclose that which is unknown. The meanings of words are facts; and the jury is the tribunal to decide upon the existence of facts, except under circum-

which he was to be a principal, and by which he was to pay cash for the rails upon delivery. The bought and sold notes, sent by the plaintiff's agent to defendant's in their letter of February 5th, named the defendant as the purchaser, and conclude with the clause, 'An approved bank credit to be arranged when this contract is confirmed.' What was to be done to 'confirm' the contract? Certainly nothing after the bought and sold notes were exchanged. But could either party recant at any time before the notes were exchanged? Did they intend the period of uncertainty to intervene which would take place while the notes were crossing the Atlantic? Certainly not, because in the same letter plaintiff's agents asked defendant to 'cable confirmation of the contract.' Confirmation of the contract was to be signified by a cablegram. If confirmation was to be signified by cablegram, the parties must have regarded the exchange of bought and sold notes; not as the preliminary to a contract, but as evidence of a contract already concluded. In line with this authority are the following rules governing 'bought and sold notes,' as stated by Mr. Benjamin in his work on sales (section 295): 'The bought and sold notes do not constitute the contract, but, * * *

when they correspond and state all the terms of the bargain, are complete and sufficient evidence to satisfy the statute, even though there be no entry in the broker's books, or, what is equivalent, only an unsigned entry.' If there were any dealings or relations between Balfour, Guthrie & Co. and Starr & Co. that might be said to fairly give rise to an obligation on the part of the former to make a disclosure to the latter, it was a personal matter between them, and in no way involved the rights of the libellant in the contract now under consideration. To hold otherwise would be to open transactions of this nature to frauds of the most dangerous character, and the court establishing such a doctrine would, to use the language of Lord Thurlow in a leading case (*Fox v. Mackreth*, 1 White & T. Lead. Cas. Eq. 115, 141), 'run the hazard of undoing all the common transactions of mankind, and of rendering all their dealings too insecure.' From these considerations I have reached the conclusion that the letter of Balfour, Guthrie & Co. of June 5th, having been confirmed by Starr & Co., must be accepted as stating the terms of the contract entered into by the parties in San Francisco to the exclusion of parol testimony."

stances of a special character. To explain the meaning of a contract written in a foreign language, the original and translations are admissible.¹

¹ *Badart v. Foulon*, 80 Md. 579; 31 Atl. Rep. 513, per Bryan, J.: "In *Williams v. Woods*, 16 Md. 220, 252, it was held that, when the terms of a written instrument are technical or equivocal, parol evidence is admissible to explain their meaning, and that this evidence is for the consideration of the jury, and that the court must instruct the jury, conditionally or hypothetically, what should be the proper construction of the written instrument, accordingly as they find the meaning of the words from the evidence. There can be no possible reason for a difference in the mode of proving the meaning of unknown words, whether they belong to science, art, mercantile usage, or a foreign language. It is the circumstance that their meaning is unknown which makes it necessary to have the evidence to explain them. And this necessity applies to a foreign language in exactly the same manner as to any other description of unknown words. In *Shore v. Wilson*, 9 Clark & F. 355, a question arose about the admission of extrinsic evidence to explain certain terms and phrases contained in the deeds by which Lady Hewley's charities were established. The case was very fully and ably argued in the house of lords, in the presence of seven of the judges, whose attendance was requested, and whose opinions were asked by the lords. The decree was passed in accordance with the opinion of six of the judges, and of Lord Brougham, Lord Lyndhurst, and the lord chancellor. Three of the learned judges took occasion to show that, where the writing to be interpreted was in a foreign language, there was no difference in the mode of proof from that which prevailed in the ordinary case of unknown words.

Mr. Justice Erskine said: 'Where the instrument is in a foreign language, * * * the jury must ascertain the meaning of the terms upon the evidence of persons skilled in the particular language.' Page 511, Baron Parks said: 'In the first place, there is no doubt that not only where the language of the instrument is such as the court does not understand it is competent to receive evidence of the proper meaning of that language, as when it was written in a foreign tongue, but it is also competent where technical words or peculiar terms or indeed any expressions are used which at the time the instrument was written had acquired an appropriate meaning, either generally, or by local usage, or amongst particular classes.' Page 555. Lord Chief Justice Tindal, speaking of ascertaining the meaning of a written instrument by external evidence, said: 'Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts, which in many instances use a peculiar language employed by those only who are conversant in trade and commerce.' Pages 566, 567. In 2 Starkie on Evidence, p. 779, the learned author, in speaking of the admission of evidence to explain terms in a contract which are used in a special and peculiar sense, goes on to say: 'The case seems to fall within the same consideration as if the parties, in framing their contract, had made use of a for-

§ 31. When parol evidence admissible although contract written.—The general rule which excludes parol evidence when offered to contradict or vary the terms, provisions or legal effect of a written instrument, has no application to collateral undertakings or cases in which the written instrument was executed in part performance of an entire oral agreement.¹ In a prosecution under the Alabama code, making it a felony to sell mortgaged personal property “for the purpose of hindering, delaying, or defrauding” the mortgagee, the court refused to charge that if the sale was open, and there was no attempt at concealment, a strong presumption arises that no intent to hinder, delay, or defraud the mortgagee existed, and this presumption must be repelled by clear evidence before a conviction is authorized. It was held that the refusal was proper. In such case parol evidence is admissible to show a balance due defendant from the mortgagee on a timber contract, although the contract was in writing.² The rule that all previous negotiations or conferences between the parties are merged in a subsequent written instrument is open to qualification, as, for example, a contract which is not required by statute to be in writing may be partly expressed in writing and partly by an unwritten agreement between the parties; and if so, such

eign language, which the courts are not bound to understand.’ For these reasons, we think that the original contract was properly admitted in evidence along with the translations.”

¹ *Beagle v. Harby* (1893), 73 Hun, 310, Martin, J.: “The general rule which excludes parol evidence when offered to contradict or vary the terms, provisions or legal effect of a written instrument is well settled. There are various cases, however, where this rule does not apply. It has no application to collateral undertakings (*Lindley v. Lacey*, 17 C. B. [N.S.] 578; *Jeffery v. Walton*, 1 Stark. 213; *Batterman v. Pierce*, 3 Hill, 171; *Erskine v. Adeane*, L. R. [8 Ch. App.] 756; *Engelhorn v. Reitlinger*, 122 N. Y. 76), or where the written instrument was executed in part perform-

ance only of an entire oral agreement. (*Chapin v. Dobson*, 78 N. Y. 74; *Van Brunt v. Day*, 81 N. Y. 251; *Juilliard v. Chaffee*, 92 N. Y. 529; *Brigg v. Hilton*, 99 N. Y. 517, 526; *Ferguson v. Baker*, 116 N. Y. 257; *Routledge v. Worthington Co.*, 119 N. Y. 592; *Pond v. Harwood*, 139 N. Y. 111, 126.)”

² *Cobb v. State*, 100 Ala. 19, 14 So. Rep. 362, Stone, C. J.: “Coming up as the question did, collaterally, the rule which requires the production of the highest and best evidence does not apply. Any legal evidence bearing on the inquiry of fraudulent intent was admissible. *Alsabrooks v. State*, 52 Ala. 24; *Mattison v. State*, 55 Ala. 224; *Johnson v. State*, 73 Ala. 523; *Black v. State*, 83 Ala. 81; 3 South. 814.”

agreement may be proved by parol, and when a verbal contract is entire, and a part only, in part performance, is reduced to writing, parol proof of the entire contract is competent.¹ Where the original agreement is partly in writing and partly verbal, the rule which rejects parol evidence in respect to written contracts has no application.² At the time of a negotiation between parties for the sale by plaintiffs to defendants of certain goods, plaintiffs gave to defendants a writing which acknowledged the receipt of an order for the goods and stated the time of delivery and the price. It was held that defendants were not estopped thereby from proving a parol warranty as to quality; that the instrument could not be construed as being the whole contract between the parties but was simply a memorandum; that even if it could be construed as embodying a part of the agreement, and so conclusive as to that part, oral evidence was competent to show the rest.³ Where a contract is not required by statute to be in writing and is partly written and partly verbal, parol evidence is admissible to show what was its consideration.⁴ Where a written contract for laying bricks is silent as to the manner in which the number of bricks

¹ *Beagle v. Harby* (1893), 73 Hun, 310, Martin, J.: "Where a verbal contract is entire, and a part only, in part performance, is reduced to writing, parol proof of the entire contract is competent. *Hutchins v. Hebbard*, 34 N. Y. 24; *Hope v. Balen*, 58 N. Y. 380; *Brigg v. Hilton*, 99 N. Y. 517. The plaintiff's proof in this case showed that the whole contract between the plaintiff and defendants was not reduced to writing, and that the deed was executed and delivered in part performance only of the entire contract between them."

² *Routledge v. Worthington Co.*, 119 N. Y. 592.

³ *Brigg v. Hilton*, 99 N. Y. 517. In *Ferguson v. Baker*, 116 N. Y. 257, the dissolution of a firm was by an indorsement upon the partnership agreement which stated that the dissolution was by mutual consent and that de-

fendant was authorized and consented "to settle all debts to and by the firm." Plaintiff was permitted to show mostly by oral evidence that all the firm affairs were about the time of the dissolution settled and adjusted, its assets divided, and nothing left to be done except the collection and division of the debts due the firm, and that defendant agreed to pay to plaintiff his share of the collections. It was held that the evidence was properly received; that it was not rendered incompetent by the agreement of dissolution as the adjustment of the firm matters and the promise to pay were not merged in, and not contradictory of, said agreement.

⁴ *Cooper v. Southgate* (1894), 10 The Reports (Eng.) 552. And see *Homer v. Ashford*, 11 Moore 91; *Hutton v. Parker*, 7 Dow. Pr. C. 739.

is to be determined, parol evidence is admissible to show the custom by which such a matter is determined and in reference to which the parties must be deemed to have contracted.¹

§ 32. Parol evidence as to written consideration.—The Indiana rule is that a consideration stated upon the face of a written instrument, by way of mere recital, may be explained, varied or contradicted by parol evidence; but where the stipulation as to the consideration is contractual, as where there is a positive promise to pay a consideration specified, the consideration can no more be varied or contradicted by parol evidence than any other part of a written contract.²

¹ *Richlands Glass Co. v. Hildebeitel* (Va. 1895), 22 S. E. Rep. 806; *Lowe v. Lehman*, 15 Ohio St. 179; *Ford v. Tirrell*, 9 Gray, 401; *Hinton v. Locke*, 5 Hill, 437; *Walls v. Bailey*, 49 N. Y. 464.

² *Stewart v. Chicago, etc., R. Co.* 141 Ind. 55; 40 N. E. Rep. 67, *Hackney, J.* "The appellant insists that the consideration stated upon the face of the instrument may be attacked by parol evidence, while the appellee as earnestly insists that it may not be so attacked, because the consideration so stated is contractual, and is protected from attack by the rule that parol evidence can not be heard to contradict, vary, or amend the terms of a written contract complete upon its face. To the contention of the appellant are cited cases holding that, as a general rule, the consideration expressed in written contracts may be explained, varied, and contradicted. See *Levering v. Shockey*, 100 Ind. 558; *McMahon v. Stewart*, 23 Ind. 590; *Thompson v. Thompson*, 9 Ind. 323; *Rockhill v. Spraggs*, 9 Ind. 30; *Everhart v. Puckett*, 73 Ind. 409; *Smith v. Boruff*, 75 Ind. 412; *City of Aurora v. Cobb*, 21 Ind. 492. Treating the instrument pleaded in bar of the cause of action as a receipt, the appellant urges the rule that receipts may be varied by parol evidence. See

Markel's Adm'r v. Spitler's Adm'r, 28 Ind. 488; *Beedle v. State*, 62 Ind. 26; *Stewart v. Armel*, 62 Ind. 593; *Lapping v. Duffy*, 65 Ind. 229; *Lash v. Rendell*, 72 Ind. 475. We will consider the instrument as a contract, not doubting that such is its effect. *Alcorn v. Morgan*, 77 Ind. 184; *Munson v. Wray*, 7 Blackf. 403. None of the general rules suggested are denied, but all are conceded by the parties, and the issue is narrowed to the correct application of these rules. If the consideration, as stated in the instrument in review, is contractual, the appellee's view of the case and the ruling of the circuit court must be affirmed; if not the judgment must be reversed. In *Pickett v. Green*, 120 Ind. 584; 22 N. E. Rep. 737, in speaking of the rule that the consideration expressed in a writing may be varied or contradicted by parol, this court has said: 'The reason generally given for the rule is that the language with reference to the consideration is not contractual, it is merely by way of recital of a fact, viz., the amount of the consideration, and not an agreement to pay it, and hence such recitals may be contradicted.' Referring to the general rule that parol evidence can not be admitted to contradict the terms of a written contract, it was there further said that 'out of this grows the exception

§ 33. Notice and assent as evidence of contract.—A contract creating a general lien in favor of one who does work on the goods and chattels of another may be proved by evidence that the latter had such work done after receiving notice that the other would claim such a lien. Where plaintiff, for several years, dyed and finished clothes for defendant company, as it sent them to him, and a notice that he received goods only on condition that they were subject to a general lien, not only for the dyeing and finishing thereof, but also for the balance of any former amount due, was printed on most of the slips on which dyeing orders were written by defendant, on the delivery slips signed by it or its employes, and on all bills and monthly statements mailed to it, such condition will, in the absence of any denial that the notice was received and read by defendant's officers and employes, be held to be part of the contract for dyeing.¹

to the rule first above stated, that where the contract is complete upon its face, a stipulation as to the consideration becomes contractual, and where there is either a direct and positive promise to pay the consideration named, or an assumption of an incumbrance on the part of a grantee in a deed, which becomes binding upon its acceptance, then the ordinary rules with reference to contracts apply, and the consideration expressed can no more be varied by parol than any other portion of the written contract.' In our judgment, the consideration expressed in the writing before us is not contractual, but is manifestly a recital of the amount of the consideration. It includes no agreement to pay or assume any sum or liability. It may be considered apart from the obligations of the appellant, and its statement was not essential to the validity of such obligations, but it might have been established by parol. We have no doubt that the cases correctly applying the rule that no parol inquiry may be made into the consid-

eration expressed are those where the consideration consists in the performance of some duty which is, by the terms of the writing, undertaken on the one side for the benefit of the other. Such duties can not be diminished or enlarged by parol. As we have said, the consideration of the contract before us involves the performance of no duty. The contract recites, as a consideration for the relinquishment therein stated, the payment to the appellant of a sum of money. If this recital is false, the same right exists to prove that fact by parol as exists in any possible case where the consideration alone of a contract may be attacked by parol."

¹ *Firth v. Hamill*, 167 Pa. St. 382; 31 Atl. Rep. 676. In this case the referee's opinion, which was approved by the court, was as follows: "The transactions between the parties were many and frequent, and no effort was made by the defendant to show that the officers and employes of the company did not receive and read the notice, or that they were not aware of the

§ 34. Circumstantial evidence of contracts.—The Illinois doctrine is that an express contract may be proved, not only by an actual agreement, by direct evidence, by the express

condition upon which the plaintiffs received the goods; and the conclusion is irresistible that they sent the goods in question with knowledge of the condition upon which alone they would be received, and under this state of facts the contract has the same force and effect as if it had been formally signed by the parties. That a general lien may be created by contract between the parties is a proposition that is not disputed; and this may be either by express agreement, or by notice from the dyer that he will receive the goods only upon condition that he shall have a lien upon them for balance due, provided it be shown that the owner received the notice prior to intrusting his property with the dyer. In 2 Kent's Commentaries, 637, cited in *Overton on Liens*, p. 5, § 7, the following proposition is laid down: 'This general lien may also be created by express agreement, as where one or more persons give notice that they will not receive any property for the purpose of their trade or business except on condition that they shall have a lien upon it, not only in respect to the charges arising on the particular goods, but for the general balance of their account. All persons who afterwards deal with them, with the knowledge of such notice, will be deemed to have acceded to that agreement.' At page 52, § 45, it is said: 'A general lien, therefore, must be shown to have its existence through a proven custom of the trade, or it may be shown by a notice of such claim brought home to the bailor prior to his making a deposit of goods. Any further bailment will be presumed made by assent on the part of the bailor. This applies

to all cases where the bailee is not compellable by law to receive the bailment.' In the case of *Kirkman v. Shawcross*, 6 T. R. 14, a meeting of the dyers of Manchester was held, at which certain resolutions were adopted; that the said dyers gave public notice that they would not receive goods except on condition that such goods should be subject to a lien for the general balance of account. These resolutions were signed by the plaintiffs, and were advertised in the Manchester newspapers, and this advertisement was seen by the defendant. It was held that the plaintiffs had a general lien on the defendant's goods for the balance of his general account. In *Wright v. Trainer*, 1 Wkly. Notes Cas. (Pa.) 198, it was held 'that rules posted in a factory, and known to the employees, form part of their contract with the employers.' Even though it appear in evidence that the customer did not read the notice, it is a question for the court and jury to decide, whether, in view of all the circumstances, he ought to have read it. *Watkins v. Rymill*, 10 Q. B. Div. 178. In *Pennsylvania R. Co. v. American Oil Works*, 126 Pa. St. 485; 17 Atl. 671, it was said by the court: 'As between the carrier and the consignee, who is owner, we see no reason why this lien may not be extended by a contract to cover the general balance due by the consignee for the carriage of other goods. There would be no injustice or oppression in asking the consignee to pay what he honestly owed before allowing him to remove the goods from the possession of his creditor, whether that creditor was a natural or an artificial person.'"

words used by the parties, but also by circumstantial evidence; and that an implied contract may be proved by circumstances showing that the parties intended to contract, and by general course of dealing between them.¹ Thus a guaranty is a

¹ *Heffron v. Brown* (1895), 155 Ill. 322; 40 N. E. Rep. 583, per Magruder, J.; "In *Miller v. Miller*, 16 Ill. 296, an instruction was approved which stated that it was 'incumbent on the plaintiff to prove an express hiring or circumstances from which an express hiring may be reasonably inferred,' etc. And in *Brush v. Blanchard*, 18 Ill. 46, it was said: 'There is no evidence of an express contract to pay for services, nor are there any facts in evidence from which such contract can be implied.' Similar language is also used in *Faloon v. McIntyre*, 118 Ill. 292; 8 N. E. Rep. 315, and in *Collar v. Patterson*, 137 Ill. 403; 27 N. E. Rep. 604. The strict rule laid down in the cases in Wisconsin and Pennsylvania has its basis in the danger of fraud and perjury by permitting any member of a family to insist on a greater share of the property of an estate than is given by the law, or by a will, upon the ground that it is due for services. The encouragement of claims for such services is to destroy the peace and harmony of families through the strife and controversy resulting therefrom. The rule in this state is stated in *Miller v. Miller*, *supra*, where we said: 'Where one remains with a parent, or with a person standing in the relation of parent, after arriving at majority, and remains in the same apparent relation as when a minor, the presumption is that the parties do not contemplate payment of wages for services. This presumption may be overthrown, and the reverse established, by proof of an express or implied contract, and the implied contract may be proven by facts and circumstances which show that both par-

ties, at the time the services were performed, contemplated or intended pecuniary recompense other than such as naturally arises out of the relation of parent and child.' This language was quoted and approved in the recent case of *Switzer v. Kee*, 146 Ill. 577; 35 N. E. Rep. 160. But, where it is said that a contract to pay for such services may be implied, something more is meant than the mere promise to pay which the law implies where one person does work for another with the knowledge and approbation of that other. The implied promise thus raised by the law is rebutted when there is shown such a relation between the parties as to exclude the inference that they were dealing on the footing of a contract. *Ayers v. Hull*, *supra*; 3 American and English Encyclopedia of Law, p. 861. The evidence must show that, when the services were rendered, both parties expected them to be paid for. *Miller v. Miller*, *supra*; *Byers v. Thompson*, 66 Ill. 421; *Fruitt v. Anderson*, 12 Ill. App. 421. The facts and circumstances must be such as to show that, at the time the services were rendered, the one expected to receive payment and the other to make payment. *Fruitt v. Anderson*, *supra*." In *Church v. Imperial Gas Co.*, 6 Ad. & El. 846, 859, Lord Denman, C. J., said: "Where the action is brought for the breach of an executed contract the evidence of the contract, if an express one, must be the same as if the action was brought while it was executory; an oral or written agreement or a series of letters might be produced to prove the fact and the terms of the contract."

mercantile instrument, to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical accuracy, but in furtherance of its spirit, and liberally to promote the use and convenience of commercial intercourse. It should be given that effect which will best accord with the intention of the parties, as manifested by the terms of the guaranty, taken in connection with the subject-matter to which it relates, neither enlarging the words beyond their natural import in favor of the creditor, nor restricting them in aid of the surety. The circumstances accompanying the whole transaction may be looked to in ascertaining the understanding of the parties.¹ By an exception in a grant, the thing excepted is taken wholly out of the grant, and is no parcel of the thing granted; that which is excepted out of the general words is in the same case as if it had never been touched.² And the general rule is that where there is a contract for the sale of land, by the terms of which a deed is to be subsequently given, the delivery and acceptance of the deed merges the contract in it, and the contract is superseded by the deed as to such provisions as are covered by the conveyance made in pursuance of its terms, and remains in force only as to any other provisions it may contain.³

¹ *Hooper v. Hooper*, 81 Md. 155; 31 Atl. Rep. 508; *Lee v. Dick*, 10 Pet. 482; *Mauran v. Bullus*, 16 Pet. 528; *Bell v. Bruen*, 1 How. 169; *Davis v. Wells, Fargo & Co.*, 104 U. S. 159; *Mussey v. Rayner*, 22 Pick. 223.

² *Schoonmaker v. Hoyt* (1896), 148 N. Y. 425; 42 N. E. Rep. 1059, where *Martin, J.*, cites *Burr v. Mills*, 21 Wend. (N. Y.) 290, 293; *Craig v. Wells*, 11 N. Y. 315, 320; *Bridger v. Pierson*, 45 N. Y. 601; and *Marvin v. Brewster Mining Co.*, 55 N. Y. 538, 548, in support of the text.

³ *Schoonmaker v. Hoyt*, 148 N. Y. 425; 42 N. E. Rep. 1059; *Witbeck v. Waine*, 16 N. Y. 532; *Murdock v. Gilchrist*, 52 N. Y. 242, 246; *Wilson v. Randall*, 67 N. Y. 338; *Disbrow v. Harris*, 122 N. Y. 362, 365.

CHAPTER II.

OFFER AND ACCEPTANCE.

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| § 35. General nature of contract. | § 55. The same subject continued— |
| 36. What is a proposal. | Counter offers. |
| 37. Revocation of offer. | 56. Ancillary matters. |
| 38. The same subject continued. | 57. Acceptance by conduct. |
| 39. The same subject continued—Il-
lustrations. | 58. The same subject continued. |
| 40. Offer when revocable. | 59. Revocability of an acceptance. |
| 41. General offers. | 60. The same subject continued—
The effect of postal regula-
tions. |
| 42. Revocation of a general offer. | 61. Authority to accept by post. |
| 43. Lapsing of offer by death. | 62. Proposal and acceptance by
letter. |
| 44. Proposal—Reasonable time. | 63. Proposals by telegraph. |
| 45. The effect of a mere inquiry on
an offer—Rejection. | 64. Contract by letters and tele-
grams. |
| 46. Method of refusal. | 65. Certainty of proposal and ac-
ceptance. |
| 47. Proposals contained in tickets,
receipts, etc. | 66. Place of contract. |
| 48. The same subject continued. | 67. The English doctrine of pro-
posals in deeds. |
| 49. What constitutes acceptance. | 68. The same subject continued. |
| 50. Acceptance of written offer—
Delivery. | 69. The American doctrine. |
| 51. Absolute acceptance. | 70. The same subject continued. |
| 52. The same subject continued—
Illustrations. | 71. Revocability of a deed before
delivery. |
| 53. Acceptance to be without con-
dition. | |
| 54. Condition as rejection of offer. | |

§ 35. General nature of contract.—There are certain general principles of a practical kind, which are useful in every case of a simple contract for determining the question whether or not a contract is created on a particular occasion. An offer of terms on the one side, and an assent to or acceptance of those terms on the other, communicated between the parties, must necessarily be the form of every simple agreement. The sending of an order for goods to a merchant or tradesman is an offer to purchase ; and the sending of the goods ordered is

an acceptance of the offer, and creates a contract of sale.¹ An open letter of credit in the common form, undertaking to honor bills of exchange to be drawn by the person to whom it is given, operates as a general offer of a contract, addressed or intended to be shown to all persons who may be willing to act upon it; which may be accepted by any such person making advances upon bills drawn in conformity with its terms.² The publication of an advertisement offering a reward for information is a general offer to any person who is able to give the desired information; and the acceptance of it by giving such information creates a valid contract.³ A guarantee for payment of goods sold to a third person, or for the services of an agent or servant, is in general a mere offer until accepted by acting upon it according to its terms; the party guaranteed is not bound to act upon it, but upon supplying the goods, or making the advances, or employing the agent or servant, he accepts the offer on the guarantee attached.⁴ The sale by auction is decidedly the best illustration of the principle that a contract has its inception in offer and acceptance. Each bidding is an offer of a price for the article put up for sale; and these biddings may be successively made until one is accepted by the fall of the hammer, when the agreement is complete.⁵ And consequently the property in a chattel sold by auction passes at the fall of the hammer.⁶

§ 36. What is a proposal.—Great care should always be taken not to construe the conduct or declarations or letters of a party as a proposal which the party only intended as a preliminary negotiation. The question in such cases always is, did he mean to make a proposal, or was he only settling the terms of an agreement into which he proposed to enter, after

¹ *Harvey v. Johnston*, 6 C. B. 295, 2 Q. B. 301; 36 L. J. Q. B. 112; *Bent* 304, *Cresswell, J.*: "If a man writes, send me such and such goods and I will pay for them, is not the sending of the goods, without more, an acceptance of the offer?"

² *In re Agra and Masterman's Bank*, L. R. 2 Ch. 391; 36 L. J. C. 222.

³ *Williams v. Carwardine*, 4 B. & Ad. 621. Compare *Turner v. Walker*, L. R.

⁴ *Kennaway v. Treleavan*, 5 M. & W. 498; *Westhead v. Sproson*, 6 H. & N. 728; 30 L. J. Ex. 265.

⁵ *Payne v. Cave*, 3 T. R. 148.

⁶ *Sweeting v. Turner*, L. R. 7 Q. B. 310; 41 L. J. Q. B. 58.

all its particulars were adjusted? The fact that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiation to amount to any proposal or acceptance. An agreement, to be finally settled, must comprise all the terms which the parties intend to introduce into the agreement; and until the terms of a proposal are settled, the proposer is at liberty to retire from the bargain. This is particularly applicable to letters and advertisements intended to get trade. Any communication, in general language proper to be addressed generally to those who are interested in a trade or business, is a mere advertisement, and not a proposal.¹

¹ *Hill v. Webb*, 43 Minn. 545; 45 N. W. Rep. 1133; *Ahearn v. Ayres*, 38 Mich. 692; *Lyman v. Robinson*, 14 Allen, 242, 254; *Moulton v. Kershaw*, 59 Wis. 316; *Beaupre v. Pacific & A. Tel. Co.*, 21 Minn. 155, 159; *Kinghorne v. Montreal Tel. Co.*, 18 Upper Canada (Q. B.), 60; *Crocker v. New London, etc., R. Co.*, 24 Conn. 249, 261; *Hussey v. Horne-Payne, L. R.* 4 App. Ca. 311. In this case Lord Selborne says: "The observation has often been made, that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters that would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract beyond and besides those expressed in the letters, *which were still in a state of negotiation only*, and without the settlement of which the parties had no idea of concluding any agreement." I adhere to what I said, when sitting in the court of chancery, in the case of *Jervis v. Berridge* (L. R. 8 Ch. Ap. 360), that

the statute of frauds 'is a weapon of defense, not offense,' and 'does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties.' And I think it especially important to keep that principle in view, when, as in the present case, it is attempted to draw a line at one point of a negotiation, conducted partly by correspondence and partly at meetings between the parties, without regard to the sequel of the negotiations, which to my mind plainly shows that terms of the intended agreement, which were of great practical importance, and were so regarded on both sides, then remained unsettled and were still the subject of negotiation between them." And in the same case Lord Cairns says: "Where you have to find your contract, or your note or memorandum of the terms of the contract in letters, you must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say 'we will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond.' In order fairly to estimate what was arranged and agreed, if any

§ 37. Revocation of offer.—Any offer without consideration may be withdrawn at any time before acceptance.¹ The reason that an offer may be revoked before acceptance is that there is no consideration for it, and, being a mere unilateral promise, it is *nudum pactum*.² In the case of *Cooke v. Oxley*,³ Butler, Judge, says: "It is impossible to support this declaration in any point of view. In order to sustain a promise, there must be either a damage to the plaintiff, or an advantage to the defendant; but here was neither when the contract or offer was first made." A person who has made an offer must be considered as continuously making it, until he has brought to the knowledge of the person to whom it was made that it is withdrawn.⁴

§ 38. The same subject continued.—It is clear that a unilateral promise is not binding, and that, if the person who makes an offer revokes it before it is accepted, which he is at liberty to do, the negotiation is at an end. But, in the absence of an intermediate revocation, a party who makes a proposal by letter to another is considered as repeating the offer every instant of time until the letter has reached its destination, and the correspondent has had a reasonable time to answer it. "Common sense tells us that transactions can not go on without such a rule," says Lord Cottenham.⁵ It can not make any difference whether the negotiation is carried on by post, or by telegraph, or by oral message. If the offer is not retracted, it is in force as a continuing offer, until the time for accepting or rejecting it has arrived. But, if it is retracted, there is an end of the proposal; and, to revoke a proposal once made, the revocation must be communicated before acceptance, and an uncommunicated revocation is, for all practical purposes, and in point of law, no revocation at all.⁶

thing was agreed between the parties, you must look at the whole of that which took place between them."

¹ *Waterman v. Banks*, 144 U. S. 394, 402.

² *Cooke v. Oxley*, 3 T. R. 653.

³ 3 T. R. 653.

⁴ *Henthorn v. Fraser* L. R. (1892), 2 Ch. 27, 1; *Adams v. Lindsell*, 1 B. &

Ald. 681; *Dunlop v. Higgins*, 1 H. L. C. 381; *In re Imperial Land Company* (*Harris's Case*), L. R. 7 Ch. App. 587; *Byrne v. Van Tienhoven*, L. R. 5 C. P. D. 344.

⁵ *Dunlop v. Higgins*, 1 H. L. C. 381.

⁶ *Stitt v. Huidekopers*, 17 Wall. 384; *Waterman v. Banks*, 144 U. S. 394,

§ 39. The same subject continued—Illustrations.—While it is generally held, both in England and America, that an acceptance of a proposal made by correspondence is complete and binding from the time the letter containing the acceptance is posted, the rule as to revocation is different. A revocation of an offer is of no effect until brought to the mind of the person to whom the offer was made, and a revocation sent by post does not operate from the time of posting it.¹ And these two rules may give rise to a seeming anomaly, that the same letter might contain an acceptance, and also such a notice of revocation or offer as to other property that, when posted, it would be effectual as to the acceptance, and not as to the revocation or offer. But this anomaly, if it be one, arises from the different nature of the two communications. As to the acceptance, if it was contemplated that it might be sent by post, the acceptor has done all he was bound to do by posting the letter, but this can not be said as to the notice of withdrawal. This was not a contemplated proceeding. The person withdrawing is bound to bring his change of purpose to the knowledge of the other party.²

§ 40. Offer when revocable.—An offer is revocable until it is accepted in accordance with its terms.³ Accordingly an

402; *Potts v. Whitehead*, 20 N. J. Eq. 55, 57, 59; *Boston, etc., R. Co. v. Bartlett*, 3 Cush. 224; *Craig v. Harper*, 3 Cush. 158; *Burton v. Shotwell*, 13 Bush, 271; *Johnson v. Filkington*, 39 Wis. 62; *Houghwout v. Boisaubin*, 18 N. J. Eq. 315; *Quick v. Wheeler*, 78 N. Y. 300; *Adams v. Lindsell*, 1 B. & Ald. 681; *Dunlop v. Higgins*, 1 H. L. C. 381; *Household Fire Ins. Co. v. Grant*, L. R. 4 Exch. D. 216; *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390; *Byrne v. Van Tienhoven*, L. R. 5 C. P. D. 344; *Stevenson v. McLean*, L. R. 5 Q. B. D. 346; *Henthorn v. Fraser*, L. R. (1892), 2 Ch. 27, 31; *Smith v. Weaver*, 90 Ill. 392.

¹ *Henthorn v. Fraser*, L. R. (1892), 2 Ch. 27; *Byrne v. Van Tienhoven*, L. R. 5 C. P. D. 344; *Stevenson v. McLean*,

L. R. 5 Q. B. D. 346; *Moore v. Pierson*, 6 Iowa, 279; *Tayloe v. Merchants', etc., Ins. Co.*, 9 How. 390; *Wheat v. Cross*, 31 Md. 99; 1 Am. Rep. 28.

² *Household Fire, etc., Co. v. Grant*, L. R. 4 Exch. D. 216, 234. See, especially, the remarks of Lord Bramwell.

³ *Isham v. Therasson* (N. J. Eq. 1895), 30 Atl. Rep. 969, McGill, Ch.: "Regarding the memorandum in the light of an offer to assign the mortgage, it is noticed that it is conditioned upon the receipt of \$250. Its language, divesting it of superfluous words, is: 'I agree * * * to assign * * * in consideration of receiving * * * the sum of \$250.' The only effective acceptance of such an offer was the payment or tender of

offer to purchase goods may be withdrawn at any time before acceptance, but the withdrawal must be brought to the knowledge of the other party. And where a letter withdrawing an offer for the purchase of goods was mailed in time to have reached the other party in the due course of mail before his letter accepting the offer was mailed, and it was shown that the letter of withdrawal was properly directed, and had a return card thereon, but that it had not been returned to the sender, the presumption that the letter was received in due time is, in the absence of rebutting evidence, conclusive.¹

the \$250. Prior to that payment, or the legal tender of the payment—which itself would furnish valuable consideration (*Cutting v. Dana*, 25 N. J. Eq. 265)—the whole matter rested in a mere voluntary promise or offer, which was revocable at the pleasure of the promisor or his legal representatives (*Houghwout v. Boisaubin*, 18 N. J. Eq. 315)."

¹ *Sherwin v. Cash Register Co.*, 5 Colo. App. 162; 38 Pac. Rep. 392, per Thomson, J.: "The order given for the register was simply an offer or proposal which required the acceptance of the plaintiff to constitute a contract. Until such acceptance there was no meeting of minds, or mutuality, in respect to the terms proposed or the subject-matter of the order, and without this there could be no contract. A proposal, while it remains unaccepted, is of no binding force, and is completely under the control of the person who makes it. At any time before acceptance, he may withdraw it, and, when so withdrawn, it is a nullity; but, to render the withdrawal effective, it must be brought to the knowledge of the other party before acceptance. See *Pomeroy on Contracts*, § 58 *et seq.*; also, *Bishop on Contracts*, § 321 *et seq.* We agree with counsel that the notice of the withdrawal of an offer must be actual, and must be received before the offer is ac-

cepted; but we think the admissions concerning the posting of the defendant's letter are at least *prima facie* evidence of actual notice. The letter was deposited in the post-office on January 9, in time for the out-going mail, and the order was given on the 8th, after the departure of the mail, so that the two probably went out together, and were received at the same time. At all events, the letter was posted in time to have reached the plaintiff one or two days before the date of its letter of acceptance. The presumption is that the letter of withdrawal reached its destination within the time usually required for the transmission of letters from the defendant's to the plaintiff's post-office. The presumption that the letter was received in due time is subject to rebuttal by evidence that it was not in fact received. No attempt at rebuttal was made; and, in the absence of rebutting evidence, the presumption became, for the purposes of the case, conclusive. In *Rosenthal v. Walker*, 111 U. S. 185; 4 Sup. Ct. Rep. 382, the court said: "The rule is well settled that if a letter, properly directed, is proven to have been either put into the post-office or delivered to the postman, it is presumed, from the known course of business in the post-office departments, that it has reached its destination at the regular time, and was re-

§ 41. **General offers.**—At its first promulgation an offer need not be made to any specific person. It may be made generally and left open so that any one accepting it is the one contracted with. While there is no matter of contract that can not be negotiated by means of a general offer, the most usual applications of the doctrine of general offer arise out of cases where rewards are offered for the return of lost and stolen property, and for information touching certain matters. It has often been decided that if the loser of property, in order to stimulate the vigilance and industry of others to find and restore it, makes an express promise of a reward, either to a particular person, or in general terms to any one who will return it to him and in consequence of such offer, one does return it to him, it is a valid contract. Until something is done in pursuance of it, it is a mere offer, and may be revoked. But if, before it is retracted, one so far complies with it as to perform the labor for which the reward is stipulated, it is the ordinary case of labor done on request, and becomes a contract to pay the stipulated compensation. It is not a gratuitous service, because something is done which the party was not bound to do, and without such offer might not have been done.¹ An offer can not become a contract unless acted upon or assented to. The motive inducing consent may be immaterial but the consent is vital. Without that there is no contract. That a party claiming a reward of this character must give some information, or do something having some reference to the reward offered, is very obvious. Where a contract is proposed to all the world, in the form of an offer, any party may assent to it and it is binding, but he can not assent without knowledge of the proposition. It therefore follows that one, to be entitled to a reward offered, must show a rendition of the services re-

ceived by the person to whom it was addressed." In this case the presumption of the receipt of the letter is strengthened by the fact that it was never returned to the defendant, either in obedience to the direction of the return card on the envelope, or through the dead-letter office. There

was ample time for its return between the date of its posting and the date of the agreed statement, and the presumption also is that it would have been returned if it had not been delivered.

¹Wentworth v. Day, 3 Metc. 352.

quired after a knowledge of and with a view of obtaining the reward.¹

§ 42. Revocation of a general offer.—A general offer is revocable at any time before it is accepted and before anything is done in reliance on it. There is no contract until its terms are complied with. Like any other offer of a contract, it may, therefore, be withdrawn before rights have accrued under it; and it may be withdrawn through the same channel in which it was made. Care should be taken that the same notoriety is given to the revocation that was given to the offer.² Any general offer not made to any specific person directly may be revoked in the manner in which it was made. And if a person, being ignorant of the withdrawal, performs the service the offer called for, still he can not recover.³

§ 43. Lapsing of offer by death.—An offer which has not been accepted in the life-time of the maker is necessarily terminated by his death; nor can the representatives of the deceased be made liable upon the unaccepted offer.⁴ Thus, a continuing guarantee, so far as it is a mere offer which may be acted upon, is revoked as to a future action upon it, by notice of the death of the guarantor.⁵ So an agency or authority to

¹ *Howland v. Lounds*, 51 N. Y. 604; 10 Am. Rep. 654; *Fitch v. Snedaker*, 38 N. Y. 248; *Tarner v. Walker*, L. R. 1 Q. B. 641; 2 Q. B. 301; *Burke v. Wells, Fargo & Co.*, 50 Cal. 218; *Ryer v. Stockwell*, 14 Cal. 134. *Contra*, *Auditor v. Ballard*, 9 Bush, 572; *Dawkins v. Sappington*, 26 Ind. 199; *Russell v. Stewart*, 44 Vt. 170; *Williams v. Charwardine*, 4 B. & Ald. 621 (*quære*).

² *Shuey v. United States*, 92 U. S. 73. In this case, the secretary of war of the United States issued, and caused to be published in the public newspapers, a proclamation, whereby he announced that there would be paid, by the war department, "for the apprehension of John H. Surratt, one of Booth's accomplices," \$25,000 reward, and also that "liberal rewards will be

paid for any information that shall conduce to the arrest of either of the above named criminals or their accomplices;" and such proclamation was not limited in terms to any specific period, and it was signed "Edwin M. Stanton, Secretary of War." About six months thereafter, the President caused to be published his order revoking the reward. *Held*, that the withdrawal was sufficient to work a revocation of the offer.

³ *Shuey v. United States*, 92 U. S. 73.

⁴ *Mellish, L. J., Dickinson v. Dodds*, L. R. 2 Ch. Div. 463, 475.

⁵ *Coulthart v. Clementson*, L. R. 5 Q. B. D. 42; 49 L. J. Q. B. 204; *Re Sherry*, L. R. 25 Ch. Div. 692; 53 L. J. Ch. D. 404.

contract on behalf of a person is terminated by his death, and a contract purporting to be made under it, although without notice of the death, is not chargeable against his representatives.¹ An offer not having been accepted lapses on the death of the person to whom it is made.² And an offer can not be either accepted or continued, and renewed by the executors or personal representatives of a deceased person.³ An offer relating to the property of a person is terminated by his bankruptcy, which transfers all his property to his trustees.⁴

§ 44. Proposal—Reasonable time.—Where an offer is made, there being no limit in terms, then, by a general rule of law, it must be limited to a reasonable time.⁵ What is a reasonable time, when all the facts and circumstances are proved on which it depends, is a question of law. In order to determine it the objects and purposes of the offer must be considered. Thus, where an advertisement offering a reward for the apprehension of criminals was made and four years thereafter the reward was claimed, the supreme judicial court of Massachusetts held the offer had lapsed before the expiration of four years.⁶ It

¹ *Blades v. Free*, 9 B. & C. 167; *Campanari v. Woodburn*, 15 C. B. 400. In this case, A. agreed with B. that he would endeavor to sell a picture belonging to B., and that, if he succeeded in selling the same, B. should pay him £100. B. died before the picture was sold. In an action against the administratrix of B., upon the above agreement, the count alleged that, in pursuance of the agreement, A. did, before and after the death of B., endeavor to sell, and, after the death of B., he did succeed in selling, the picture. *Held*, plaintiff could not recover because B.'s offer was revoked by his death.

² *Werner v. Humphreys*, 2 M. & G. 853.

³ *In re Cheshire Banking Co.*, L.R. 32 Ch. Div. 301; *Werner v. Humphreys*, 2 M. & G. 853. In this case, a coat, ordered of a tailor, was cut out, tacked together, and tried on during the tailor's

life-time, but was finished and delivered after his death, by his administratrix. *Held*, that a suit brought to recover the price of the coat, as though sold and delivered by the tailor, was improperly brought, and that the administratrix should have counted as for goods sold and delivered by her. *Tindall, C. J.*, said: "If the property in the coat vested in the administratrix, on the intestate's decease, and she finished and delivered it afterwards, it seems to me that such coat was delivered under a new contract made by her with the defendant."

⁴ *Meynell v. Surtees*, 25 L. J. C. 257.

⁵ *Ramsgate Victoria Hotel Co. v. Montefiore*, L. R. 1 Exch. 109; *Bowen v. McCarthy*, 85 Mich. 26; *Loring v. Boston*, 7 Metc. 409; *Larmon v. Jordan*, 56 Ill. 204; *Meynell v. Surtees*, 25 L. J. C. 257; *Powers v. Fowler*, 4 E. & B. 511.

⁶ *Loring v. Boston*, 7 Metc. 409.

has also been held that an interval of four months between the application for shares in a corporation and their allotment was not a reasonable time and the application or proposal had lapsed,¹ and in a late case in Iowa,² where an acceptance was delayed four weeks, the court said, "we could not say that four weeks was not an unreasonable time," and in another case³ a delay to accept for twenty-four hours was held to be an acceptance not within a reasonable time. The better opinion is, that what is, or is not, a reasonable time must depend upon the circumstances attending the negotiation, and the character of the subject-matter of the contract, because in no better way can the intention of the parties be determined. If the negotiation is in respect to an article stable in price, there is not so much reason for an immediate acceptance of the offer, and the same rule would not apply as in a case where the negotiation related to an article subject to sudden and great fluctuations in the market.⁴

§ 45. The effect of a mere inquiry on an offer—Rejection.—

While an acceptance of an offer varying from the terms of the offer is a rejection of the offer,⁵ and constitutes a counter proposal, still a mere inquiry as to the terms of the proposal, or a request to modify or change the offer, does not have the effect of rejecting the offer, and if the offer has not been revoked a party may accept it, although he previously asked the proposer to modify it.⁶ If an offer made is rejected, the party making

¹ Baily's Case, L. R. 5 Eq. 428.

² Ferrier v. Storer, 63 Iowa, 484, 489.

³ Minnesota Linseed Oil Co. v. Collier White Lead Co., 4 Dill. 431.

⁴ Minnesota Linseed Oil Co. v. Collier White Lead Co., 4 Dill. 431.

⁵ National Bank v. Hall, 101 U. S., 43.

⁶ Stevenson v. McLean, L. R. 5 Q. B. D. 346. In this case the defendant, being possessed of warrants for iron, wrote from London to the plaintiffs at Middlesborough asking whether they could get him an offer for the warrants. Further correspondence ensued, and ultimately the defendant

wrote to the plaintiffs fixing 40s. per ton, net cash, as the lowest price at which he could sell, and stating that he would hold the offer open till the following Monday. The plaintiffs on the Monday morning at 9:42 telegraphed to the defendant: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you could give." The defendant sent no answer to this telegram, and after its receipt on the same day he sold the warrants and at 1:25 p. m. telegraphed the plaintiffs he had done so. Before the arrival of his telegram to that effect, the plain-

it is relieved from liability on that offer, and the party who has rejected the offer can not afterwards, at his own option, convert the same offer into an agreement by acceptance; for that purpose he must have the renewed consent of the person who made the offer.¹

§ 46. Method of refusal.—An offer can not be made in such terms that an acceptance will be assumed without communication. Where a letter was sent offering to buy a horse, and stating that if the writer received no answer he would assume that his offer was accepted, to which no answer was returned, it was held that there was no contract. The court said that a person in making an offer to another has no right “to put upon him the burden of the choice of writing a letter of refusal or being bound by the agreement proposed.”² Accordingly where a letter was issued by a company to the shareholders, stating that the new shares were allotted and the certificates enclosed, with a receipt to be signed and returned, it was held that a shareholder who had taken no notice of the communication was not bound to accept the shares, and could not be charged as a shareholder.³

§ 47. Proposals contained in tickets, receipts, etc.—A great number of contracts are in the present state of society made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party tendering it. If the form is accepted without objection by the person to whom

tiffs having at 1 p. m. found a purchaser for the iron, sent a telegram at 1:34 p. m. to the defendant stating that they had secured his price. The defendant refused to deliver the iron, and the plaintiffs brought an action. It was held that under the circumstances the plaintiffs' telegram at 9:42 ought not to be construed as a rejection of the defendant's offer, but merely as an inquiry whether he would modify the terms of it, and that although the defendant was at liberty

to revoke his offer before the close of the day on Monday, such revocation was not effectual till it reached the plaintiffs; consequently the defendant's offer was still open when the plaintiffs accepted it.

¹ *Sheffield Canal Co. v. Sheffield, etc., Ry. Co.*, 3 Eng. Ry. & C. Cas. 121.

² *Felthouse v. Bindley*, 11 C. B. N. S. 869.

³ *Somerville's Case*, L. R. 6 Ch. 266; 40 L. L. C. 431.

it is tendered, this person is, as a general rule, bound by its contents; and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not.¹ To this general rule, however, there are a variety of exceptions. In the first place, the nature of the transaction may be such that the person accepting the document may suppose, not unreasonably, that the document contains no terms at all, but is a mere acknowledgment of an agreement not intended to be varied by special terms. Some illustrations of this exception may be found in the judgments in *Parker v. South Eastern Ry. Co.*,² and in

¹ *Watkins v. Rymill*, L. R. 10 Q. B. D. 178; *Zunz v. South Eastern Ry. Co.*, L. R. 4 Q. B. 539; *Harris v. Great Western Ry. Co.*, L. R. 1 Q. B. D. 515; *Parker v. South Eastern Ry. Co.*, L. R. 2 C. P. D. 416; *Burke v. South Eastern Ry. Co.*, L. R. 5 C. P. D. 1; *Grace v. Adams*, 100 Mass. 505; *Collender v. Dinsmore*, 55 N. Y. 200; *Magnin v. Dinsmore*, 56 N. Y. 168; *Kirkland v. Dinsmore*, 62 N. Y. 171; *Long v. New York, etc., R. Co.*, 50 N. Y. 76; *Bank of Kentucky v. Adams Ex. Co.*, 93 U. S. 174; *Madan v. Sherard*, 73 N. Y. 329, 334.

² L. R. 2 C. P. D. 416. In this case, there was a deposit of articles at the cloak room at a railway station, and a charge was made of 2d. for each, and the depositor received a ticket, on the face of which were printed the times of opening and closing the cloak room and the words, "See Back," and on the back there was a notice that the company would not be responsible for any package exceeding £10. A placard, upon which was printed in legible characters the same condition, was also hung up in the cloak room. The plaintiff deposited his bag, of value exceeding £10, in the defendant's cloak room, paid 2d. and received a ticket. The bag was stolen. In an action to recover its value, the plaintiff swore that he took the ticket

without reading it, imagining it to be only a receipt for the money paid for the deposit of the article, or as evidence that the company had received the article; that he did not read the condition on the back of the ticket, nor did he see the notice hung up in the cloak room. The judge left two questions to the jury: 1. Did the plaintiff read, or was he aware of, the special condition upon which the article was deposited? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or to make himself aware of the condition? The jury answered both questions in the negative, and judgment was directed for the plaintiff. *Held*, by Mellish and Baggally, L. J. J., that there ought to be a new trial, on the ground that there had been a misdirection by the judge, inasmuch as the plaintiff could be under no obligation to read the condition, and that the second question left to the jury ought to have been, whether the company did that which was reasonably sufficient to give the plaintiff notice of the condition. *Held*, further, by Bramwell, L. J., that, on the above facts, it was a question of law, and that judgment ought to be entered for the defendants.

the language of some of the law lords in *Henderson v. Stevenson*,¹ although these must be received with caution for reasons given by Lord Blackburn in his judgment in *Harris v. Great Western Ry. Co.*²

§ 48. The same subject continued.—A second exception would be the case of fraud, as if the conditions were printed in such a manner as to mislead the person accepting the document.³ A third exception occurs, where, without being fraudulent, the document is misleading, and does actually mislead the person who has taken it.⁴ An exception has been suggested of conditions unreasonable in themselves or irrelevant to the main purpose of the contract. Lord Bramwell suggests some illustrations of this in his judgment in *Parker v. South Eastern Ry. Co.*⁵ One is the case of a ticket having on it a condition that the goods deposited in a cloak room should become the absolute property of the railway if not removed in two days.

§ 49. What constitutes acceptance.—What shall constitute an acceptance will depend in a great measure on circumstances.

¹ L. R. 2 H. L. Sc. 470.

² L. R. 1 Q. B. D. 515.

³ *Watkins v. Rymill*, L. R. 10 Q. B. D. 178.

⁴ The case of *Henderson v. Stevenson* (L. R. 2 H. L. Sc. 470) is an illustration of this. In this case a ticket, having on its face only the words "Dublin and Whitehaven," was given to a passenger, who, without looking at it, paid for it, and went on board. Having lost all his luggage he brought an action against the company. *Defense* of the company, that on the back of the ticket there was an intimation that they were not to be liable for losses of any kind or from any cause. Judgment against the company with costs. Per the Lord Chancellor: "It would be extremely dangerous to hold that where a document is complete on the face of it, but having on the back of it something which had not been

brought to the knowledge of a contracting party, he shall be held to have assented to that which he has not seen and of which he knows nothing." Also, per Lord Chancellor Chelmsford: "A mere notice from the steam packet company without the passenger's assent will not discharge them from performing the very essence of their duty, which is to safely and securely carry, unless prevented by unavoidable accidents." Per Lord Hatherley: "A ticket is in reality nothing more than a receipt for the money, which has been paid." Per Lord O'Hagan: "When a company desires to impose special and stringent terms upon its customers, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted."

⁵ L. R. 2 C. P. D. 416.

The mere determination of the mind unacted on can never be an acceptance. The acceptance must be evidenced by some act that binds the party accepting. A man's mental resolution, that can be changed, is not sufficient; both parties must be bound or neither will be. Where the offer is by letter the usual mode of acceptance is by the sending of a letter announcing a consent to accept; where it is made by a messenger a determination to accept returned through him or sent by another would seem to be all the law requires if the contract may be consummated without writing. There are other modes which are equally conclusive upon the parties; any appropriate act which accepts the terms as they were intended to be accepted, so as to bind the acceptor, just as clearly evidences the concurrence of the parties—the bringing their minds together—as a formal letter of acceptance. Anything that will amount to a manifestation of a formed determination to accept, communicated or put in the proper way to be communicated to the party making the offer will complete the contract. The principle governing the matter of acceptance is, that there must be a concurrence of the minds of the parties upon a distinct proposition, manifested by an overt act.¹ In analogy to the rule that the interpretation of a contract in writing is a matter of law for the court, is the rule that what acts or words will suffice to constitute an acceptance, by one party, of a proposal submitted by another, so that a contract or agreement thereby becomes matured, is wholly a question of law for the court.²

§ 50. Acceptance of written offer—Delivery.—Where an offer is in writing, signed and delivered by the party making it, and is accepted, and acted upon by both parties, it is sufficiently executed to make it a binding obligation upon both, and will not be construed as a unilateral agreement.³ Where

¹Howard v. Daly, 61 N. Y. 362; White v. Corlies, 46 N. Y. 467; Trevor v. Wood, 36 N. Y. 307; Lungstrass v. German Ins.Co., 48 Mo. 201; Mactier v. Frith, 6 Wend. 103.

²Falls Wire Manf. Co. v. Broderick, 12 Mo. App. 378; Lancaster v. Elliott, 28 Mo. App. 86.

³Bloom v. Hazzard, 104 Cal. 310; 37 Pac. Rep. 1037, per Belcher, C.: "It is claimed for appellant that the agreement of September 21 was not a contract, and that at most it could only be considered a unilateral offer on the part of the constable, which required an unconditional

one copy of a contract which is to be executed in duplicate has been signed by the parties, but is left with the attorney of one party to have a duplicate executed, there is not a sufficient delivery of the instrument to constitute a contract.¹

§ 51. Absolute acceptance.—To constitute a contract, there must be a proposition by one party, accepted by the other, without any modification whatever. If the acceptance modifies the proposition in any particular, however trifling, it amounts to no more than a counter proposition; it is not in law an acceptance which will complete the contract. The mere proposal of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter according to the terms in which the offer is made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it.²

acceptance to make it binding, and that 'the writing as a contract in itself is void (a) because it is not executed by respondent,—that is, it does not show his assent; (b) because there is no second party to the instrument; (c) there is no mutuality of obligation or rights.' The writing was more than a unilateral offer on the part of the constable. It was an agreement in writing signed and delivered by him to the defendant. It was accepted by defendant, and was acted upon by both parties. This was a sufficient execution to make the writing a binding obligation, and to meet all the objections above noted. *Reedy v. Smith*, 42 Cal. 245."

¹*Lamar Milling Co. v. Craddock*, 5 Colo. App. 203; 37 Pac. Rep. 950, per Reed, J.: The custodian of the signed paper was the attorney of the appellant. There had been no delivery. "Every written contract must, to take effect, be delivered, and the delivery must be absolute." "The delivery of a written contract is any act whereby the party delivering it relinquishes his power over the writ-

ing, whether by passing it directly to the other party, or to any third person, or otherwise, with the express or implied intent that shall operate as a contract." *Bishop on Contracts*, §§ 349, 350; *Fay v. Richardson*, 7 Pick. 91; *Hawkes v. Pike*, 105 Mass. 560; *Thatcher v. Wardens, etc.*, 37 Mich. 264. The contract was to be duplicated. Until the signing of both and delivery of one to appellee, there was no contract. The written paper in the possession of the legal agent of appellant was as much in its custody and under its control as if in the hand of the manager. Until fully executed and delivered, the contract was *in limine*; either party could revoke or withdraw.

²*Eliason v. Henshaw*, 4 Wheat. 225; *Carr v. Duval*, 14 Pet. 77; *Hough v. Brown*, 19 N. Y. 111; *Harlow v. Curtis*, 121 Mass. 320; *Jenness v. Mount Hope Iron Co.*, 53 Me. 20; *Potts v. Whitehead*, 23 N. J. Eq. 512; *Eggleston v. Wagner*, 46 Mich. 610; *Johnson v. Stephenson*, 26 Mich. 63; *Falls Wire Manufacturing Co. v. Broderick*, 12 Mo. App. 378; *Bruner v. Wheaton*,

§ 52. The same subject continued—Illustrations.—Where one wrote to another offering his farm for sale and the letter in answer contained a direct acceptance of the offer, except the security to be given for the proposed payments, it was decided that there was no contract between the parties.¹ A man advertised his estate for sale. The plaintiff proposed to purchase it, and authorized his solicitor to make an offer of a certain sum for it. This offer was accepted by letter, but with the added condition that a certain deposit should be made and the sale completed within a given time. The House of Lords agreed that there was no contract here.² So, also, where defendant offered to sell plaintiff a certain number of kegs of nails and the plaintiff in reply wrote that he would not take the number of kegs proposed, but that the defendant might ship him a certain less number, there was no sale or agreement to sell.³ The doctrine, that the acceptance must be unequivocal has been carried in some cases to the extreme. Thus a resident of California wrote to a resident of Iowa, offering to sell certain land, and added: "Let me hear from you at once." The receiver of the letter telegraphed his acceptance of the offer and added "money at your order at First National Bank here." It was held by the court that as the proposal said nothing about the place where the money was to be paid, it was payable in California, and the depositing it in bank in Iowa was not an unconditional acceptance of the offer.⁴ And where a person in Connecticut wrote to a man in Wisconsin, offering to sell land for a certain sum, nothing being said about the place of payment or delivery of the deed, a letter was

46 Mo. 363; *Baker v. Holt*, 56 Wis. 100; *Clay v. Ricketts*, 66 Iowa, 362; *Baxter v. Bishop*, 65 Iowa, 582; *Honeyman v. Marryatt*, 6 H. L. C. 112; *Kennedy v. Lee*, 3 Meriv. 441; *Hutchison v. Bowker*, 5 M. & W. 535. In the case of *Potts v. Whitehead*, 23 N. J. Eq. 512, 514, the court says: "An acceptance, to be good, must, of course, be such as to conclude an agreement or contract between the parties, and to do this, it must, in every respect, meet and correspond

with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand."

¹ *Barrow v. Ker*, 10 La. Ann. 120.

² *Honeyman v. Marryatt*, 6 H. L. C. 112. Lord Wensleydale said: "There certainly was no complete contract in this case."

³ *Jenness v. Mount Hope Iron Co.*, 53 Maine, 20.

⁴ *Sawyer v. Brossart*, 67 Iowa, 678.

written accepting this proposal, and then added: "You may make out the deed, leaving the name of the grantee in blank, and forward the same to X. or to your agent, if you have one here, to be delivered to me on payment." It was held there was no unconditional acceptance.¹ In another case, the plaintiff by letter offered defendant \$300 for two horses. The defendant wrote back: "You may have the horses for \$300, if you will come for them," and the court declared there was no consummated contract.²

§ 53. Acceptance to be without condition.—The acceptance must be unconditional, and in strict accordance with the proposition; that is, the mind of the person making the offer and of the one accepting it must meet in regard to the same subject-matter.³ Where a resident of one state writes to a resident of another state offering to make him a quitclaim deed to certain land, and the latter replies accepting the offer on the condition that the other turns over to him certain additional deeds, such acceptance does not create a contract. The acceptance must be absolute.⁴ Plaintiff's agent wrote a letter to defendant, its

¹ Baker v. Holt, 56 Wis. 100.

² Fenno v. Weston, 31 Ver. 345.

³ Eads v. Carondelet, 42 Mo. 113; 1 Parsons on Contracts, 475; Green v. Cole, 103 Mo. 70; 15 S.W. Rep. 317. In Bruner v. Wheaton, 46 Mo. 363, the court says: "In order that an acceptance may be operative, it must be unequivocal, unconditional, and without variance of any sort between it and the proposal, and it must be communicated to the other party without unreasonable delay. To constitute a valid contract, there must be a mutual assent of the parties thereto, and they must assent to the same thing in the same sense. Therefore, an absolute acceptance of a proposal, coupled with any qualification or condition, will not be regarded as a complete contract, because there at no time exists the requisite mutual assent to the same thing in the same sense. Any words manifesting an *aggregatio mentium* are sufficient to constitute a con-

tract, but the mutual consent—the *aggregatio mentium*—can not be attained without the assent of both parties." And see Harris v. Scott (N. H. 1893), 32 Atl. Rep. 770.

⁴ In Egger v. Nesbitt, 122 Mo. 667; 27 S. W. Rep. 385, Burgess, J., said: "Defendant's letter to plaintiff of March 4, 1890, was not an acceptance of the proposition contained in defendant's letter to him of date February 26, 1890, for the reason that the acceptance was not unconditional, but with the understanding that plaintiff would deliver to him all the papers in reference to the land—United States patents and other deeds—about which there was nothing said in defendant's letter or proposition, thereby making a new proposition of his own, and imposing new burdens upon defendant, though light they may have been. As the conditions upon which the proposition was accepted materially differed from the original proposition,

cotenant in a water ditch, suggesting that repairs were necessary, and that thereafter the ditch be kept in good condition, each party paying one-half the expense. Defendant answered that the suggestion was right, and stated that it would direct its manager to co-operate with plaintiff, and examine the property, and report what repairs were necessary. It was held that such correspondence constituted a contract binding each party to pay one-half of the expenses thereafter necessarily incurred in keeping the ditch in repair. Also that subsequent letters to plaintiff by defendant, indicating a desire on its part to modify the contract so that plaintiff should pay for all repairs while using the water, and that it should reimburse plaintiff for one-half when it begins to use the water, are not binding on plaintiff, which regularly and continuously demanded of defendant one-half the expenses incurred in making the repairs.¹ Where an offer is made by one party, and the other annexes a condition to his acceptance, there is no completed contract until the party making the first offer assents to the condition. Thus where defendants sent plaintiff an offer for the unexpired term of a lease, and plaintiff returned an acceptance, subject to the assent of the lessor, there was no contract, defendants not having accepted the condition.²

§ 54. Condition as rejection of offer.—Where the person to whom an offer has been made by letter sends a conditional ac-

it amounted to the rejection of the offer. *Cangas v. Manufacturing Co.*, 37 Mo. App. 297; *Rumsey Strange v. Crowley*, 91 Mo. 287; 2 S. W. Rep. 421."

¹ *Societe, etc., v. Old Jordan Mining Co.* (1894), 9 Utah, 483; 35 Pac. Rep. 492.

² *Putnam v. Grace*, 161 Mass. 237; 37 N. E. Rep. 166. In *Sparks v. Pittsburgh Co.* (1893), 159 Pa. St. 295; 28 Atl. Rep. 152, plaintiff proposed to defendant to erect a rig and drill a well a certain depth on any of defendant's leases, with the further provision that, if defendant decided to drill any more wells on his leases, or "in the vicinity," up to the number of

five, plaintiff was to have the contract therefor at the same price. At the end thereof was written: "Accepted. Contract to be drawn in accordance with the above proposition;" and then was added: "This is about right, and will be satisfactory to P." (defendant). Pending a reference of this by the parties to an attorney to draw a contract, plaintiff drilled the one well, and was paid therefor. It was held that the proposition and acceptance was not a completed contract, so that, a contract not having been drawn, plaintiff could not recover damages for defendant's refusal to allow him to drill other wells which defendant thereafter sunk.

ceptance, such acceptance is a rejection of the offer, and he can not then bind the proposer by an unconditional acceptance made before the offer is withdrawn.¹

¹ *Egger v. Nesbitt*, 122 Mo. 667; 27 S. W. Rep. 385, per Burgess, J.: "It is contended by plaintiff that, even if his letter of March 4, 1890, was no more than a conditional acceptance, yet his letter of March 14, 1890, written prior to any withdrawal of defendant's offer, was an unconditional acceptance of defendant's offer, and that thereby the offer was accepted, and the contract closed. Upon the other hand, the contention is that the plaintiff having rejected the offer of defendant by his conditional acceptance, the offer was at an end, and could not be renewed by a subsequent acceptance of it by plaintiff. *Judd v. Day*, 50 Iowa, 247, is relied upon by plaintiff as sustaining his position, but in that case there was no conditional acceptance of the offer to purchase, and it was rightly held that the offer was a continuing one, unless otherwise specified or withdrawn. Mr. Parsons, in his work on contracts (page 477, 7th ed.), says: 'The party making the offer may renew it; but the party receiving it can not reply accepting with modifications, and, when these are rejected, again reply, accepting generally, and upon his acceptance claim the right of holding the other party to his first offer.' So in *Baker v. Johnson Co.*, 37 Iowa, 186, it is held that a proposal to accept, or an acceptance of an offer upon different terms from those contained in the offer, amounts to a rejection of it. See, also, *Jenness v. Iron Co.*, 53 Me. 20; *National Bank v. Hall*, 101 U. S. 43. Plaintiff nowhere alleges a tender of the purchase-money to defendant personally, but does allege that he has fully performed all the conditions of said contract and agreement on his part on the execution and acceptance

of the terms of said agreement; that he paid the defendant by deposit the sum of \$400 at the First National Bank in the city of Appleton, St. Clair county, Mo., and notified defendant of the fact. He also alleges a refusal by defendant to execute the deed, and a readiness upon his part to pay the purchase price for the land. At the time of the offer by defendant he was a resident of Washington City, D. C., which was well known by plaintiff, where, by the terms of his offer, he was entitled to payment; and the deposit of the money in the bank at Appleton City was no payment or offer to pay the purchase-money to him, and was not an acceptance of the contract. There is no pretense that the money was deposited in the bank by or with the consent or direction of defendant, and, in the absence of something of that kind, defendant was entitled to payment at the place where, or the city which, was at the time his place of residence. In *Gilbert v. Baxter*, 71 Iowa, 327; 32 N. W. Rep. 364, it is held that, 'in case of any offer by a person in one state to sell land in another state at a certain cash price, an acceptance, directing the deed to be sent to a bank in the latter state, to be delivered upon payment of the price, will not create a binding contract, as the terms of the offer entitle the vendor to payment in his own state.' See, also, *Sawyer v. Brossart*, 67 Iowa, 678; 25 N. W. Rep. 876; *Langellier v. Schaefer*, 36 Minn. 361; 31 N. W. Rep. 690. In the case at hand plaintiff directed the deed to be made out in blank, to be sent to the bank, and, upon receipt thereof, the money to be paid over to defendant. This was not an acceptance of the offer to sell as made by defendant. The burden of

§ 55. The same subject continued—Counter offer.—Where one having land for sale sends a letter purporting to accept an offer to buy the land at a certain price, but inclosing for the purchaser's signature conditions of sale importing new terms into the contract, he does not accept the proposing purchaser's offer, but makes to him a counter offer; and he can not compel such purchaser to specifically perform his offer to buy.¹

proof rested upon the plaintiff to show by clear and satisfactory evidence the contract which he seeks to have specifically enforced—that is, that his acceptance of the offer of defendant was unequivocal, unconditional, and without any variance of any sort between it and the proposal,—and, as he failed in this, he was not entitled to the relief which he sought. The judgment is affirmed.” In *Cozart v. Herndon*, 114 N. C. 252; 19 S. E. Rep. 158, Shepherd, C. J., said: “It is well settled that, in order to constitute a contract, there must be ‘a proposal, squarely assented to.’ ‘If the proposal be assented to with a qualification, then the qualification must go back to the proposer for his adoption, amendment, or rejection. If the acceptance be not unqualified, or go to the actual thing proposed, then there is no binding contract. A proposal to accept, or acceptance based upon terms varying from those offered, is a rejection of the offer.’ 1 Wharton on Contracts, 4. ‘The respondent is at liberty to accept wholly or reject wholly, but one of these things he must do; for, if he answer, not rejecting, but proposing to accept under some modification, this is a rejection of the offer.’ 1 Parsons on Contracts, 476. It amounts to a counter proposal, and this must be accepted, and its acceptance communicated to the proposer; otherwise there is no contract. Pollock on Contracts, 10. Applying these general principles to the facts before us, it is plain that there was no contract by

which the defendant Herndon became a stockholder. The proposal of the company was to purchase the land for \$15,000 of its stock. Herndon's answer is not an acceptance, but a proposal to accept with the very important qualification that he is to reserve ‘all and every kind of wood and timber on the place for his own exclusive use and benefit.’ The acceptance of this proposal was never communicated to him, and, after many months, the proposal was revoked, without objection, it seems, by the company. We think his honor was correct in holding that there was no evidence that the defendant Herndon was a stockholder.”

¹ *Jones v. Daniel* (1894), L. R. (1894) 2 Ch. 332; 8 The Reports (Eng.) 579, per Romer, J.: “The plaintiff's case fails. It is clear that here there was no contract between the parties apart from the letters; and if the letters do not show a concluded agreement, there is none. Now, in looking at these letters, I need only refer in the first instance to the letter of 26 April, 1893. The defendant before this had made a written offer for the premises, stating the price he was willing to give. Then the letter of 26 April, in answer, states that the plaintiff, who was the vendor, accepted the offer, ‘and we inclose contract for your signature. On receipt of this signed by you across the stamp and deposit we will send you copy signed by him.’ Turning to the inclosure in that letter I find that it is a document which contains special terms which had never been referred

§ 56. **Ancillary matters.**—The mere fact that the acceptance contains directions and reference to outside matters, ancillary and subordinate to the contract, will not prevent it from being unconditional. Thus a boatload of flour was offered for sale and the offer was accepted in terms of the proposal, but the letter of acceptance also contained this inquiry: "Please say to us how we shall remit." It was held that this inquiry did not qualify the acceptance of the offer.¹ And where the letter of acceptance proposes to transact the business through a bank, instead of in person, this does not qualify the acceptance.² Where a proposal was made by a merchant to ship certain cotton to his factor and the factor replied accepting the proposal, requesting the merchant to designate and mark the cotton to be shipped and to advise when shipped, it was determined that this did not qualify the acceptance, but was merely directory and subordinate to the contract.³ So, likewise, where a proposal by a purchaser to take the remainder of a lease was answered by a letter, which, after acceding to the proposal, added, "We hope to give you possession at half-quarter day," it was held that the addition did not introduce a new term, and that the acceptance was unconditional.⁴

§ 57. **Acceptance by conduct.**—When an offer is made, containing a request express or implied, that the offeree must signify his acceptance by doing some particular thing, then, as soon as he does that thing, a contract is made. If a man sent an offer abroad saying: "I wish to know whether you will supply me with goods of such and such a price, and if you

to in the offer, and those terms include a deposit of £10 per cent. to be paid by the purchaser, a provision fixing the day for completion, and a provision limiting the title of the vendor, and other important terms. Now, what was the fair meaning of that letter, and what would any one receiving it understand to be the meaning of it? I certainly think he would understand it to mean this: 'We are agreed as to the price. I now inclose you the terms, and require you to

assent to them. If you agree to them, sign the contract to pay the deposit, and then there will be a binding contract between us, but not till then.' I think that is what the letter really meant, and what it was intended to mean." *Crossley v. Maycock*, L. R. 18 Eq. 180, followed.

¹ *Clark v. Dales*, 20 Barb. 42.

² *Matteson v. Scofield*, 27 Wis. 671.

³ *Brisban v. Boyd*, 4 Paige, 17.

⁴ *Clive v. Beaumont*, 1 DeG. & S. 397.

agree to that, you must ship the first cargo as soon as you get this letter," then as soon as the cargo was shipped the contract would be complete. So again, where a person writes a letter and says, "I offer to take an allotment of shares," and expressly or impliedly says, "If you agree with me send an answer by post," then, as soon as the answer is sent by the post, he has done an extraneous act, and the contract is consummated. These contracts lack mutuality at their inception; there is then no consideration and the obligation of it is suspended; but when performance of the condition is made there does then attach a consideration, which relates back to the making of the promise, and it becomes obligatory. The promise could not be enforced before performance of the condition on which it is made, for until then there is no consideration; but as soon as the act has been performed, by which a party has been injured, unless the promise is kept, the promise becomes binding. Although there be not mutual promises, yet if, before he calls for the fulfillment of the promise, the promisee do perform that in consideration of his doing which the promise is made, there is a consideration for the agreement, and it can be enforced.¹

§ 58. The same subject continued.—Where a debtor offered to allow his creditor to take certain machinery from his mill in satisfaction of the debt, the action of the creditor in taking such machinery four days thereafter constituted an acceptance of the proposition.² And where a land-owner, desirous of having a railroad constructed over his land, executed a written agreement "releasing to the company which undertakes to construct such road the right of way of lawful width through my land; * * * the damages to be assessed when the road is located, and the amount of such damages to be paid in stock in said railroad," it was held that the acceptance of such agreement by a railroad company by a resolution of its

¹ *Storm v. United States*, 94 U.S. 76; *ton v. Southwick*, 17 Me. 303; *Brog-L'Amoureux v. Gould*, 7 N. Y. 349; *den v. Metropolitan Ry. Co.*, L. R. 2 Willets *v. Sun Mutual Ins. Co.*, 45 App. Ca. 666; *Morton v. Burn*, 7 Ad. N. Y. 45; *Sands v. Crooke*, 46 N. Y. & El. 19.

564; *White v. Baxter*, 71 N. Y. 254; ² *Watters v. Glendenning*, 87 Wis. Marie *v. Garrison*, 83 N. Y. 14; *Hil-* 250 (1894); 58 N. W. Rep. 404.

board of directors, followed by a construction of the road on the right of way so granted, rendered the agreement binding on the land-owner without formal written notice of acceptance, inasmuch as the construction of the road was equivalent thereto, and that a delay of three years in the construction of the road after the agreement was executed was not unreasonable, in view of the nature of the work to be done, including the organization of a company, and the raising of money necessary for the enterprise; and hence that such delay did not invalidate the acceptance, time not being declared to be the essence of the contract.¹ And in a recent case where the defendant contracted with the grantors in a trust deed to advance money, pay their other debts, buy in the land at trustee's sale, take a deed in his own name, and convey the land to the grantors if they repaid advancements within two years, it was held that the grantors in the trust deed who did not sign the contract with defendant were bound by its conditions and covenants, when they received benefits under it, and one of them made a written assignment of it, which was attested by the other.² So, also, an offer by the payee of a matured note to permit the maker to retain

¹ *Hoffman v. Bloomsburg R. Co.* (1893), 157 Pa. St. 174; 27 Atl. Rep. 564, *per curiam*: "Such acceptance was not too late by reason of the delay of over three years. No time was specified in the agreement, and from the nature of the work to be done, the time required to organize the company, and raise the money necessary for the enterprise, it was not intended that it should in any manner be of the essence of the contract. The purpose of the appellant as shown was to secure the building of the railroad, and, as soon as the company was in condition to build, it was contemplated that it should then enter upon the right of way thus granted. No time was designated for acceptance, and a reasonable time was intended. Time does not become of the essence of a contract, unless so declared or indicated by the circumstances. *Shaw v.*

Turnpike Co., 2 Pen. & W. 454; *Hewson v. Paxson*, 38 Leg. Int. 308; *Barnard v. Lee*, 97 Mass. 92. The delay, under the circumstances of this case, was not unreasonable, and it does not appear by the evidence that appellant himself so treated or considered it."

² *Kennedy v. Siemers*, 120 Mo. 73; 25 S. W. Rep. 512, *per Macfarlane, J.*: "We think there is no significance in the fact that the Siemers agreement was not signed by Brault and Bunch, the other parties interested in and to be benefited by it. Its acceptance by them was sufficient to bind them to its covenants and conditions. *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, 73 Mo. 389; *Heim v. Vogel*, 69 Mo. 529. The written assignment of the contract by Mrs. Brault, attested by Bunch, and the co-operation of the latter in its execution, are sufficient proof of its acceptance by them."

the money at a lower rate of interest than called for by the note, is binding when acted upon.¹

§ 59. Revocability of an acceptance.—Where a proposal had been accepted by post, Lord Bramwell in his dissenting opinion in the case of *Household Fire Ins. Co. v. Grant*,² makes use of the following language: "It," meaning the letter of acceptance," is revocable when sent by post, not that the letter can be got back, but its arrival might be anticipated by a letter or telegram, and there is no case to show that such anticipation would not prevent the letter from binding. It would be a most alarming thing to say that it would; that a letter honestly but mistakenly written and posted must bind the writer, if hours before its arrival he informed the person addressed that it was coming, but was wrong and recalled." But the law is probably otherwise in America. The rule is well settled here that a contract is complete the moment of posting the letter of acceptance.³ And this is so because the minds of the parties have met and there is a concurrence upon a distinct proposition, manifested by an overt act.⁴ Or, to use the language of Lord Blackburn,⁵ the party has done an act which clinches the matter and shows an intention to be bound. If, then, the contract takes effect when the acceptance is posted, how can a withdrawal of the letter revoke an acceptance? Of course where the law is as it is in Massachusetts, that an acceptance by post only takes effect when it reaches the proposer,⁶ the language of Lord Bramwell touching the revocability of a letter of acceptance is in point and authoritative. Until a contract is complete it is merely in a state of negotia-

¹ *Vereycken v. Vandenbrooks*, 102 Mich. 119 (1894); 60 N. W. Rep. 687.

² L. R. 4 Ex. Div. 216, 235.

³ *Taylor v. Merchants' Ins. Co.*, 9 How. 390; *Mactier v. Frith*, 6 Wend. 105; *Vassar v. Camp*, 11 N. Y. 441; *Brisban v. Boyd*, 4 Paige, 17; *Hallock v. Commercial Ins. Co.*, 26 N. J. Law, 268; *Abbott v. Shepard*, 48 N. H. 14; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 339; *Stockham v. Stockham*, 32 Md. 196; *Bryant v. Booze*, 55 Geo.

438; *Kentucky Mutual Ins. Co. v. Jenks*, 5 Ind. 96; *Ferrier v. Storer*, 63 Iowa, 484; *Hutcheson v. Blakeman*, 3 Metc. (Ky.) 80; *Lungstrass v. German Ins. Co.*, 48 Mo. 201; *Haas v. Myers*, 111 Ill. 421.

⁴ *Howard v. Daly*, 61 N. Y. 362, 366, per Dwight, C.

⁵ *Brogden v. Metropolitan Ry. Co.*, L. R. 2 App. Ca. 666, 691.

⁶ *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278.

tion. But in those states where it is held that the posting of the letter of acceptance completes the contract, the law probably is that a letter of acceptance is irrevocable after it is posted or mailed.

§ 60. The same subject continued—Effect of postal regulations.—Although a letter of acceptance is irrevocable after it is mailed, the question arises, what is the meaning of the word “mailed?” According to the regulations of the United States post-office the sender of a letter has a *locus pœnitentiæ*, and has the power of reclaiming it after it is posted. In those countries, as in England, where the sender of a letter can not reclaim it after it has been posted, the letter becomes the property of the one to whom it is sent directly it is posted. But where a party may reclaim a letter after it is put in the mail box, the probable effect of this regulation is to make the post-office the agent of the sender of the letter until it leaves the town, and that the posting or mailing of the letter of acceptance is not complete till the letter is dispatched from the office in which it is posted.¹ If this be the effect of such a postal regulation—that the letter is not completely mailed until it leaves the town—then a letter of acceptance is probably revocable up to the time that the sender is unable to have his letter returned to him. In Scotland it is the law that a letter of acceptance is revocable at any time before it reaches the proposer. And if the letter of revocation reaches the proposer before or at the same time as the acceptance, the acceptance is countermanded and revoked.²

¹ *Ex parte Cote*, L. R. 9 Ch. App. 27. In this case the judges, Lord Selborne and Sir G. Mellish, L. J., discuss at some length the effect of a postal regulation, allowing the sender of a letter to reclaim it. The rules of the French post-office permit a person, who has posted a letter, to recover it at any time before it is dispatched from the office where it is posted on complying with certain forms. Therefore, where a letter containing bills of exchange, indorsed to the person to whom the letter was addressed, was posted in a French post-office,—*held*,

that the property in the bills did not pass to the indorsee till the letter had left the office where it was posted.

² *Countess of Dunmore v. Alexander*, 9 Shaw & Dunlop, 190. In this case, a lady having written to another to engage a servant, and thereafter having written not to do so, and the two letters having been delivered, through the post-office, simultaneously to the servant—*held*, that there was no completed contract. This case is constantly cited by text-writers as establishing the law in

§ 61. Authority to accept by post.—Posting an acceptance of an offer may be sufficient, where it can fairly be inferred from the circumstances of the case that the acceptance might be sent by post; that is, where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post was to be used as a means of communicating the acceptance of an offer; then an acceptance by post is justified. But the doctrine that an acceptance by post is authorized upon an implied authority, from the person making the offer to the person

Scotland, that an acceptance of a proposal is revocable at any time before, and up to, and concurrently with, its reception by the proposer, and that a letter of acceptance may be revoked by a letter reaching the proposer at the same time. See Benjamin on Sales, § 74; Leake on Contracts, 31. But all that case decides is, that a *proposal* by letter may be revoked by another letter reaching the party to whom the proposal is made at the same time. The facts of this case were as follows: The Countess of Dunmore wanting to hire a servant wrote to her friend Lady Agnew, saying she had heard that one Elizabeth Alexander was about to leave Lady Agnew's service, and saying she (Dunmore) would hire the servant if her character was good, and also stating the rate of wages she expected to pay. Lady Agnew, in reply, wrote that she could recommend Alexander, who would accept the proposed wages, and then added: "If Lady Dunmore decides upon taking Betty Alexander, perhaps she will have the goodness to mention whether she expects her at the new or the old term." Lady Dunmore then wrote in reply to Lady Agnew requesting that she would "have the goodness to engage Betty Alexander for her at the £12 12s. a year; but she wishes to have her at the new term, or as soon after as possible, because her present one must

go at that time." On the next day Lady Dunmore wrote again to Lady Agnew telling her not to engage Alexander. Both these letters were sent by post by Lady Agnew to Alexander who received them at the same time. Now from these facts it is quite plain that all that was done was, that Lady Dunmore made Lady Agnew her agent to engage a servant; that the only communication upon the subject with Alexander herself, the respondent, was the two letters forwarded to her. The one letter being merely a proposal to engage her and the other a revocation of the proposal. And it is evident that this was the view of the court. Lord Balgray, delivering the opinion, says: "The admission that the two letters were simultaneously received, puts an end to the case. * * * Lady Dunmore conveys a request to Lady Agnew to engage Alexander, which request she recalls by a subsequent letter that arrives in time to be forwarded to Alexander as soon as the first. This, therefore, is just the same as if a man had put an order into the post-office desiring his agent to buy stock for him. He afterwards changes his mind, but can not recover his letter from the post-office. He therefore writes a second letter countermanding the first. They both arrive together, and the result is, that no purchase can be made to bind the principal."

receiving it, to accept by this means, is erroneous. It certainly is somewhat artificial to speak of the person to whom the offer is made as having the implied authority of the other party to send his acceptance by post. He needs no authority to transmit the acceptance through any particular channel; he may select what means he pleases, the post-office no less than any other. The only effect of the supposed authority is to make the acceptance complete so soon as it is posted, and authority will obviously be implied only when the tribunal considers that it is a case in which this result is justified and ought to be reached. And the reason assigned in some of the cases that the post might be used to accept a proposal, because it is the common agent of both parties, is not a satisfactory one. The post-office is only a carrier between them. It is an agent to convey the communication, not to receive it. The communication is not made to the post-office, but by their agency as carriers. The difference is between saying, "Tell my agent A., if you accept," and "Send your answer to me by A." In the former case, A. is to be the intelligent recipient of the acceptance; in the latter, he is only to convey the communication to the person making the offer, which he may do by a letter, knowing nothing of its contents. The post-office is only an agent in the latter sense.¹ All the facts being found, the question as to whether the circumstances under which an offer is made are such that it must have been within the con-

¹ *Henthorn v. Fraser*, L. R. (1892) 2 Ch. 27. In this case H., who lived at Birkenhead, called at the office of a land society in Liverpool, to negotiate for the purchase of some houses belonging to them. The secretary signed and handed to him a note giving him the option of purchase for fourteen days at £750. On the next day the secretary posted to H. a withdrawal of the offer. This withdrawal was posted between 12 and 1 o'clock, and did not reach Birkenhead till after 5 p. m. In the meantime H. had, at 3:50 p. m., posted to the secretary an unconditional acceptance of the offer, which was delivered in Liverpool after the society's office had closed, and was opened by the secretary on the following morning. It was held, that where the circumstances under which an offer is made are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of it, the acceptance is complete as soon as it is posted. And further that in that case, as the parties lived in different towns, an acceptance by post must have been within their contemplation, although the offer was not made by post.

templation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of it, is one of law for the court.¹

§ 62. Proposal and acceptance by letter.—A letter reading, “I am prepared to make the arrangements with you on the terms you name,” in answer to a letter of proposal, does not constitute an unconditional acceptance.² It is well settled that

¹ *Henthorn v. Fraser*, L. R. (1892) 2 Ch. 27.

² *Havens v. American Ins. Co.*, 11 Ind. App. 315; 39 N. E. Rep. 40, per Davis J.: “Counsel for appellee rely upon the case of *Commercial Telegram Co. v. Smith*, 47 Hun, 494. This was an action brought by the Commercial Telegram Company to restrain James D. Smith, as president of the New York Stock Exchange, and others, from interfering with the right of the plaintiff to collect upon the floor or the premises of the New York Stock Exchange the quotations of dealings made at said exchange and the distribution of said quotations to its customers, and the claim of the plaintiff was founded, as in the case at bar, solely upon correspondence between the parties. Some preliminary letters passed between the parties, and on April 25, 1883, the following letter, with the matters not pertinent omitted, was sent to the plaintiff: ‘Committee of Arrangements, New York Stock Exchange, New York, April 25, 1883. Luther E. Shinn, Vice-President Commercial Telegram Company—Dear Sir: I am instructed to forward to you the following plan adopted by the governing committee, which will form the basis of an agreement with you in the matter of your proposed service upon the floor of the exchange, viz.. First. A rental shall be paid by any telegraph company at the rate of \$18,000 per annum, payable monthly in advance. * * * Re-

spectfully, Geo. W. Ely, Secretary of Committee.’ On the following day the plaintiff answered this letter as follows: ‘The Commercial Telegram Company, Executive Offices, Equitable Building, 120 Broadway, New York, April 26, 1883. Geo. W. Ely, Esq., Secretary Committee of Arrangements, New York Stock Exchange—Dear Sir: Your communication of April 25 is received. I am instructed by our executive committee to say, in reply, that the plan set forth in your letter is entirely satisfactory to this company; that we accept the same, and are ready to execute an agreement upon the basis proposed whenever prepared and submitted to us. I am, very truly, yours, Luther E. Shinn, Vice-President and Gen. Man.’ The court held that the letters did not constitute a contract. We quote from the opinion as follows: “It is claimed upon the part of the plaintiff that the letter of April 25th contained an entire contract, and that upon the acceptance of its terms by the letter of April 26th, of the plaintiffs, it became a complete contract, binding upon both parties. It is very important to observe in this connection that although the claim is made, upon the part of the appellant, that these papers constitute an entire and complete contract, it is admitted upon its own points that there are exceptions as to its completeness, namely, that there is no provision as to the time it should

a proposition made by one party by letter to another party at a distance, containing a specific order, which is unconditionally accepted by the latter, will constitute a valid contract between them. The primary question in such case is whether the correspondence shows an agreement upon which the minds of the parties met, or whether the negotiations are inchoate and unperfected until something should intervene and be determined in order to give it full effect.¹

remain in force, nor as to the terms and conditions upon which it could be terminated. These deficiencies seem to have struck the counsel for the appellant, they being, as they admit, essential to the contract; but it is claimed that the law supplies the omission, and a perpetual grant is to be inferred, because the plaintiff could take a grant in perpetuity, and because the plaintiff could perpetually perform the service, and because it would be of advantage to the plaintiff to have such a grant rather than one limited in duration. We know of no rule of law, applicable to those cases where grants of privileges are silent as to their duration, which measures the duration of such grants by the capacity of rapacity of the grantee. The very fact of the absence of these essential elements seems to indicate beyond question that the papers under consideration, if there was no other reason, could not be interpreted as containing a contract binding upon both parties." In the New York case the alleged letter of acceptance says: "I am instructed by our executive committee to say, in reply, that the plan set forth in your letter is entirely satisfactory to this company; that we accept the same, and are ready to execute an agreement upon the basis proposed whenever prepared, etc. * * *" In the case before us the corresponding letter contains the following language "I have your favor

of 1st, and am prepared to make an arrangement with you for special work in Indiana on the terms you name. * * **"

¹Myers v. Smith, 48 Barb. 615. In this case the action was brought on a contract claimed to have been made by correspondence, in which the letters were as follows: "J. Myers, Esq., Ilion—Dear Sir: Yours of the 15th inst. came to hand, and I have refrained from answering till now, expecting to hear from parties I was negotiating with before receiving your letter. The malt I have is at Weedsport. I will sell you ten thousand bushels of the malt, 34 pounds to the bushel, 2½ per cent. off for screenings, at (\$1.54) one dollar and fifty-four cents per bushel, delivered at Weedsport. Answer by return mail, and direct the letter to Weedsport. Respectfully yours, Thomas Smith, per G. O. Smith." This letter was answered within an hour of its receipt, and the reply was as follows: "Ilion, June 20, 1864. Thomas Smith—Dear Sir: Your letter under date of June 18th came to hand this (Monday) forenoon. I will take your malt, ten thousand bushels, deliverable on boat at Weedsport, at 154 cents for 34 pounds to the bushel, and 2½ off for dust or screenings. I will be up as soon as I can get away from home, which will be the last of the week or the fore part of next week. Respectfully yours, J. Myers." The court in

§ 63. **Proposals by telegraph.**—It is well settled by the authorities in this country, and sustained by the later English decisions, that there is no difference in the rules governing the negotiation of contracts by correspondence through the post-office and by telegraph, and a contract is concluded when an acceptance of a proposal or offer is deposited in the telegraph office for transmission.¹ And the reason given for this rule in case of acceptance by post² is entirely applicable to acceptance by telegraph. For, if a bargain could not be closed by telegram before the answer was received, no contract could be completed through the medium of the telegraph; for if one party was not bound by his offer when it was accepted (that is, at the time the telegram of acceptance is deposited in the telegraph office for transmission), then the other party ought not to be bound until after he had received a notification that the answer had been received and assented to, and so it might go on *ad infinitum*.³ And it is now settled that the acceptance of an offer by telegraph completes the contract, when such acceptance is put in the proper and usual way of being communicated by the agency employed to carry it; and that, when an offer is made by telegraph, an acceptance by telegraph takes effect when the dispatch containing the acceptance is de-

this case held that there was a variance between the proposal and alleged acceptance in the use of the words "delivered" and "deliverable," and that the proposed visit of the plaintiff to the defendant carried with it the necessary implication that it was for the purpose of inspecting the malt prior to a full close of the negotiations. The language of the court is as follows: "An acceptance must be in the words of, or must be entirely accordant with, the terms and conditions of an offer, to bind a party who makes the proposition. In this case the variance made the acceptance a different thing from the offer. As thus expressed, it could not have been claimed by the defendant to be binding upon plaintiff, and he could

not have maintained an action for its alleged breach; and for this reason, as well as upon the ground that there was a contingency expressed in the letter—to wit: the visit of the plaintiff to the defendant, and an inspection of the malt prior to a full close of the negotiation—the defendant could not have enforced it as a valid contract against the plaintiff, if he had repudiated its obligations."

¹ "Contracts by Telegraph," 14 Am. Law Reg. 401, by Judge Redfield and authorities cited; also *Trevor v. Wood*, 36 N. Y. 307.

² *Adams v. Lindsell*, 1 B. & Ald. 681.

³ *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 339; *Mactier v. Frith*, 6 Wend. 103; *Vassar v. Camp*, 11 N. Y. 441.

posited for transmission in the telegraph office, and not when it is received by the other party.¹

§ 64. Contract by letters and telegrams.—Where parties have exchanged letters and telegrams with a view to an agreement, and have arrived at a point where a clear and definite proposal is made on one side and accepted on the other with an understanding that this written agreement shall be reduced to a more formal writing, the contract is complete and binding although no such formal writing is ever executed.²

¹ *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dill. 431; *Trevor v. Wood*, 36 N. Y. 307; *Perry v. Mt. Hope Iron Co.*, 15 R. I. 380; *Marshall v. Jamieson*, 42 Up. Can. Q. B. 115; *Thorne v. Barwick*, 16 Up. Can. C. P. 369. An offer or proposal may be made by telegraph as may also the acceptance of such offer or proposal. *Miller v. Nugent*, 12 Ind. App. 348; 40 N. E. Rep. 282. In this case defendant contracted orally to sell plaintiff his farm for \$13,000, but, having an offer of \$13,800, telegraphed plaintiff, "Will you take four hundred and let them have it, or will you take it at \$13,400?" to which he replied by telegram, "I will take \$400, and let them have the farm." There was no answer to this. It was held that plaintiff would not be entitled to \$400 unless defendant sold the farm. In *Egger v. Nesbitt*, 122 Mo. 667; 27 S. W. Rep. 385, *Burgess, J.*, said: "A contract may be made by letter or telegram, and when the offer is made by letter and is accepted by letter, although the letter accepting the offer never reaches the hand of the person making the offer, providing the acceptance is mailed in due time, postage prepaid, and directed to the proper address of the person making the offer, or, if accepted by telegram, the charges being prepaid, and directed, as before stated, in regard to the acceptance by letter; the acceptance must be made within a reasonable time, no time being fixed,

or before the offer is withdrawn. *Bishop on Contracts*, § 328; *Whaley v. Hinchman*, 22 Mo. App. 481; *Greeley-Burnham Grocer Co. v. Capen*, 23 Mo. App. 301; *Maclay v. Harvey*, 90 Ill. 525; 32 Am. Rep. 35, 40, note 1; *Lancaster v. Elliot*, 42 Mo. App. 503; *Tayloe v. Merchants' Insurance Co.*, 9 How. 390." In the case of *Martin v. Northwestern Fuel Co.*, 22 Fed. Rep. 596, a proposition was made by the plaintiff, by telegraph, to sell coal at a certain figure, to which the following reply was made: "Telegram received. You can consider the coal sold. Will be in Cleveland next week, and arrange particulars." The question before the court was whether these two dispatches made a definite contract between the parties; whether there was a direct, unqualified acceptance of the terms offered. The court held that there was not (after citing approvingly the case of *Myers v. Smith*, 48 Barb. 614, in the following language: "So it seems to me that the telegram carrying to the proposed vendor a statement from the proposed vendee that he will come to Cleveland, to his place of business, and arrange particulars, carries with it a fair implication that the particulars are to be arranged before the contract is finally consummated.")

² *Sanders v. Pottlitzer* (1894), 144 N. Y. 209; 39 N. E. Rep. 75, per *O'Brien, J.*: "The writings and tele-

§ 65. Certainty of proposal and acceptance.—A contract means *consensus ad idem*. Lord Westbury puts it thus in the

grams that passed between the parties contain all the elements of a complete contract. Nothing was wanting in the plaintiffs' original proposition but the defendant's assent to it, in order to constitute a contract binding upon both parties according to its terms. This assent was given upon condition that a certain specified modification was accepted. The plaintiffs finally assented to the modification, and called upon the defendant to signify its assent again to the whole arrangement as thus modified, and it replied that it was 'all right,' which must be taken as conclusive evidence that the minds of the parties had met and agreed upon certain specified and distinct obligations which were to be observed by both. It is true, as found by the learned referee, that the parties intended that the agreement should be formally expressed in a single paper, which, when signed, should be the evidence of what had already been agreed upon. But neither party was entitled to insert in the paper any material condition not referred to in the correspondence, and if it was inserted without the consent of the other party it was unauthorized. Hence the defendant, by insisting upon further material conditions, not expressed or implied in the correspondence, defeated the intention to reduce the agreement to the form of a single paper signed by both parties. The plaintiffs then had the right to fall back upon their written proposition, as originally made, and the subsequent letters and telegrams; and, if they constituted a contract of themselves, the absence of the formal agreement contemplated was not, under the circumstances, material. When the parties intended that a mere verbal agreement shall be finally reduced to

writing, as the evidence of the terms of the contract, it may be true that nothing is binding upon either party until the writing is executed. But here the contract was already in writing, and it was none the less obligatory upon both parties because they intended that it should be put into another form, especially when their intention is made impossible by the act of one or the other of the parties, by insisting upon the insertion of conditions and provisions not contemplated or embraced in the correspondence. *Vassar v. Camp*, 11 N. Y. 441; *Brown v. Norton*, 50 Hun, 248; 2 N. Y. Supl. 869; *Pratt v. Hudson River R. Co.*, 21 N. Y. 305. The principle that governs in such cases was clearly stated by Judge Selden in the case last cited, in these words: 'A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is, in all respects, as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear that the minds of the parties had met; that a proposition for a contract had been made by one party, and accepted by the other; that the terms of this contract were in all respects definitely understood and agreed upon, and that a part of the mutual understanding was that a written contract embodying these terms should be drawn and executed by the respective parties—this is an obligatory contract, which neither party is at liberty to refuse to perform.' In this case it is apparent that the minds of the parties met, through the correspondence, upon all the terms as well as the subject-matter of the contract, and that the subsequent failure to reduce this contract to the precise form intended, for the reason stated

case of *Chinnock v. Marchioness of Ely*: "An agreement is the result of the mutual assent of two parties to certain terms, did not affect the obligations of either party, which had already attached, and they may now resort to the primary evidence of their mutual stipulations. Any other rule would always permit a party who has entered into a contract like this, through letters and telegraphic messages, to violate it, whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where, by changes in the market, or other events occurring subsequent to the written negotiations, it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business. A stipulation to reduce a valid written contract to some other form can not be used for the purpose of imposing upon either party additional burdens or obligations, or of evading the performance of those things which the parties have mutually agreed upon by such means as made the promise or assent binding in law. There was no proof of any custom existing between the shippers and consignees of such property in regard to the payment of the expense of firing, lining, and haying the cars. If it be said that such precautions are necessary in order to protect the property while in transit, that does not help the defendant. The question still remains, who was to bear the expense? The plaintiffs had not agreed to pay it, any more than they had agreed to pay the freight or incur the other expenses of transportation. The plaintiffs sent a plain proposition and the defendant accepted without any such conditions as it subsequently sought to attach to it. That the parties intended to make and sign a final paper does not warrant the inference that they also intended to make another and different agreement. The defendant is in no better position than it would be in case it had refused to sign the final writing, without alleging any reasons whatever. The principle, therefore, which is involved in the case, is this: Can parties who have exchanged letters and telegrams with a view to an agreement, and have arrived at a point where a clear and definite proposition is made on the one side and accepted on the other, with an understanding that the agreement shall be expressed in a formal writing, ever be bound until that writing is signed? If they are at liberty to repudiate the proposition or acceptance, as the case may be, at any time before the paper is signed, and as the market may go up or down, then this case is well decided. But if, at the close of the correspondence, the plaintiffs became bound by their offer, and the defendant by its acceptance of that offer, whether the final writing was signed or not, as I think it was, under such circumstances as the record discloses, then the conclusion of the learned referee was erroneous. To allow either party to repudiate the obligations clearly expressed in the correspondence, unless the other will assent to material conditions, not before referred to, or to be implied from the transaction, would be introducing an element of confusion and uncertainty into the law of contract. If the parties did not become bound in this case, they can not be bound in any case. The judgment should be reversed, and a new trial granted; costs to abide the event." All concur, except Earl, Gray and Bartlett, JJ., dissenting. In *Keefe v. Chaffee*, 11 Wash. 292; 39 Pac. Rep. 676, a shingle manufacturer wrote defendant that it desired to

and if it be clear that there is no *consensus*, what may have been written or said becomes immaterial.”¹ The substance of the proposal and acceptance, and not mere form, should be regarded in determining whether or not a contract has been made. There must be not merely a treaty or negotiation for an agreement, but there must be a proposal met by that sort of an acceptance which makes it no longer the act of one party, but of both. There must be a clear description of the subject-matter, relative to which the proposal and acceptance was in fact made and entered into. Both parties need not both actually and really mean the same precise thing, but both must actually give their assent to that proposal and acceptance, be it what it may, which *de facto* arises out of the terms of their communication. If the words used are words which, if read with a mind desirous of understanding them, are intelligible, a slight difference or a slight mistake will not prevent there being a contract, but where a mistake goes to the greater part of the subject-matter, then this is fatal to the idea of a contract. And it is also a principle of law well established that the terms of a proposal and acceptance may be so definite as to evince a contract and the *consensus* necessary to make a contract may perfectly exist, even although the parties may intend to have their agreement expressed in the most solemn and complete form that conveyancers and solicitors are able to prepare. The proposal and acceptance, as discovered from the acts or correspondence of the parties, may show a complete contract or *consensus*, such as a court of equity would

contract for the sale of the entire output of its mills, and defendant replied, stating that he could use a certain amount of shingles at a certain price. Plaintiff then wired, accepting defendant's "terms," and requesting orders. Defendant, before any shipment was made, wired plaintiff to ship five car loads, stating that he had written. The letter acknowledged receipt of plaintiff's telegram, and repeated the orders, and also stated that

defendant would take 100 cars at the price named. Plaintiff, after receipt of the telegram and letter, shipped the five cars as directed, and later wrote, acknowledging receipt of the last letter, and stating that it had twenty cars which it would be ready to ship as soon as it could get cars. It was held that the correspondence did not show a contract for the 100 cars.

¹ 4 D. J. & S. 638, 643.

specifically enforce, although the contract might be imperfect and incomplete as regards form.¹

§ 66. Place of contract.—Where the locality of the making of a contract is material, it is determined by the place of acceptance. Thus, an order to make certain bets having been transmitted by postal telegraph from the plaintiff without the city of London to the defendant within it, he telegraphed from the city that the order had been obeyed. It was held that the contract of agency was made in the city.² And where an offer was made in Boston, and accepted by telegram from Providence, it was held that the contract was made in Rhode Island, although to be performed in Massachusetts.³ Where a letter containing an order for goods was posted in the city of London to a person outside, and the order was accepted by a delivery of the goods ordered to the buyer at his place of business within the city, it was held the contract was made in the city.⁴ “The place of contract is material as *prima facie* denoting the law by which it is to be construed and regulated, and the law by which the capacity of the parties to the contract, as dependent upon infancy, lunacy, marriage, is determined.”⁵

¹ *Kennedy v. Lee*, 3 Mer. 441; *Preston v. Luck*, L. R. 27 Ch. Div. 497; *Chinnock v. Marchioness of Ely*, 4 De Gex, J. & S. 638; *Brogden v. Metropolitan R. Co.*, L. R. 2 App. Cal. 666; *Pacific, etc., Co. v. Riverside, etc., Ry. Co.*, 90 Cal. 627; *Wristen v. Bowles*, 82 Cal. 84; *Allen v. Chouteau*, 102 Mo. 309, 321; *Bonnewell v. Jenkins*, L. R. 8 Ch. Div. 70. Thus in the case of *Preston v. Luck*, L. R. 27 Ch. Div. 497, a negotiation took place as to the sale by L. to P. of a British patent and certain foreign patents for the same inventions, and ultimately an offer was made for sale at £500 and accepted by letter, but it was not quite clear whether the offer and acceptance related to all the patents, or to the British patent only. P. brought an action for specific performance, treating the contract as including all the patents, and moved for

an injunction to restrain L. from parting with them. At the hearing of the motion, he asked leave to amend his writ, and for an injunction as to the British patent only: *Held*, that as L. had understood that he was negotiating about the British patent only, and P. had understood that he was negotiating as to all the patents, there never was the *consensus ad idem* which is necessary to make a contract; and there was, therefore, no contract which P. could enforce, and an injunction was refused.

² *Cowan v. O'Connor*, L. R. 20 Q. B. D. 640.

³ *Perry v. The Mount Hope Iron Co.*, 15 R. I. 380.

⁴ *Taylor v. Jones*, L. R. 1 C. P. D. 87.

⁵ *Leake on Contracts*, 49. See, also, *Male v. Roberts*, 3 Esp. 163.

§ 67. **The English doctrine of proposals in deeds.**—It is well settled in England, that no particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying: “I deliver this as my deed.” But any other words or acts that sufficiently show that it was intended to be finally executed will do as well. And the authorities are quite unanimous that the deed is binding on the obligor before it comes into the custody of the obligee, and even before he knows of it.¹ And this consequence arises on account of the inherent nature of a deed, because it derives its legal effect from the formality of its execution, and not like simple contracts, from the mere fact of agreement. Until a deed is accepted by the obligee it is merely an offer which he may refuse,² because it is well settled that no matter how formal a document may be and how it may purport to bind a party, until acceptance by the person to be benefited thereby it is a mere offer.³ As a consequence of these rules of law a proposal made by deed, for the deed itself until acceptance is a mere offer, is binding on the obligor before the obligee either accepts or knows of the offer, and is irrevocable; thus where a policy of insurance, purporting to be signed, sealed and delivered in the presence of a witness by the directors of an insurance company, was left in the company’s office to be sent for by the insured, according to the usual practice, it was held to be a valid policy and binding upon the company, though they canceled it while it remained in their possession.⁴ A father, being displeased with his son, executed a deed giving his wife £100

¹ *Xenos v. Wickham*, L. R. 2 H. L. 296; 36 L. J. C. P. 313; *Doe v. Knight*, 5 B. & C. 671; *Exton v. Scott*, 6 Sim. 31; *Hall v. Palmer*, 3 Hare, 532; *Fletcher v. Fletcher*, 4 Hare, 67; *Cracknall v. Janson*, L. R. 11 Ch. D. 1; *In re Dodds*, 60 L. J. Q. B. 599. Compare *Dillon v. Coppin*, 4 M. & Cr. 647.

² *Xenos v. Wickham*, L. R. 2 H. L. 296, 312.

³ *Dickenson v. Dodds*, L. R. 2 Ch. Div. 463, 473, per Mellish, J.

⁴ *Xenos v. Wickham*, L. R. 2 H. L. 296.

per annum in augmentation of her jointure; he kept the settlement in his own power, and on being reconciled to his son, canceled it. The wife found the deed after his death, and on a trial at law, the deed being proved to have been executed, was adjudged good, though canceled.¹

§ 68. The same subject continued.—A woman executed a deed, by which she covenanted to stand seized to the use of herself, remainder to a child, her nephew, in fee. She kept this deed in her possession and afterwards burnt it and made a new settlement; it was held that the first settlement was valid and a perpetual injunction was granted against the party claiming under the second.² Where a bond was executed for the benefit of a woman with whom the grantor had cohabited, though retained in the hands of the testator's solicitor, and quite unknown to her till his death, it was declared to be valid for her benefit.³ So in another case where a man had executed a deed in favor of his illegitimate son, though unknown to the son, and the deed was kept in the grantor's possession, and not discovered until after his death, it was held to entitle the son to sue his estate for the amount.⁴ And in delivering a learned and elaborate opinion in a leading case on this subject,⁵ Bailey, Judge, said: "Upon these authorities, it seems to me, where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show he did not intend it to operate immediately, that it is a valid and effectual deed, and that delivery to the party who is to take by it, or to any person for his use, is not essential." Contracts under seal do not have their inception in proposal and acceptance, and the rules touching proposal and acceptance, their communication and revocation have no place in contracts by deed and are entirely inapplicable.

§ 69. The American doctrine.—In the United States the law is well settled, that a sealed instrument in order to take effect

¹ See dictum of Bailey, J., in *Doe v. Knight*, 5 B. & C., 671, 690.

⁴ *Fletcher v. Fletcher*, 4 Hare, 67; *Doe v. Lewis*, 11 C. B. 1035.

² *Naldred v. Gilham*, 1 Pr. Wms. 577.

⁵ *Doe v. Knight*, 5 B. & C. 671, 692.

³ *Hall v. Palmer*, 13 L. J. (N. S.), Ch. 352; 3 Hare, 532.

must be delivered by the grantor, and actually or by implication be accepted as his own by the grantee. A deed takes effect only from its delivery; and there can be no delivery without acceptance, either express or implied. They are necessarily simultaneous and correlative acts.¹ No definite or specific formality is prescribed by law, but it must be the concurrent act of two parties. It must appear that the grantor parts with the control and possession of the instrument with the intention that it shall operate immediately as a transfer of title, and that it passes into the hands or is placed at the disposal of the grantee, or of some other person in his behalf.² It is not necessary that the grantee, or his agent or servant, should be present at the execution, in order to have such a delivery of the instrument made as will give it operative validity and effect. But it is necessary that it should be placed within the power of some other person for the grantee's use, or that the grantor shall unequivocally indicate it to be his intention that the instrument shall take effect as a conveyance and contract, in order to have it produce that result.³ The mere subscribing and sealing, accompanied with the ordinary attestation of those acts by the witnesses, followed by the grantor keeping the deed in his own custody, are not sufficient to constitute a legal delivery of a sealed instrument.⁴

§ 70. The same subject continued.—The cases in England which have established the doctrine that a deed can be effective without the grantee's knowledge or consent, and binding on the grantor beyond revocation, are directly opposite to the entire current of modern authority, both in the state and federal courts, and they have been repudiated. A rule of law by which a voluntary deed, executed by the grantor, afterward

¹ *Hawkes v. Pike*, 105 Mass. 560; *Church v. Gilman*, 15 Wend. 656; *Stillwell v. Hubbard*, 20 Wend. 44; *Merrills v. Swift*, 18 Conn. 257; *Tibbals v. Jacobs*, 31 Conn. 428; *Berry v. Anderson*, 22 Ind. 36; *Parmelee v. Simpson*, 5 Wall. 81; *Younge v. Gailbeau*, 3 Wall. 636; *Heffron v. Flanigan*, 37 Mich. 274.

² *Hawkes v. Pike*, 105 Mass. 560; *Harrison v. Trustees Phillips Academy*, 12 Mass. 456; *Maynard v. Maynard*, 10 Mass. 456; *Elmore v. Marks*, 39 Verm. 538; *Jackson v. Phipps*, 12 Johns. 418.

³ *Fisher v. Hall*, 41 N. Y. 416; *Younge v. Gailbeau*, 3 Wall. 636; *Parmelee v. Simpson*, 5 Wall. 81.

⁴ *Fisher v. Hall*, 41 N. Y. 416.

retained by him during his life in his own exclusive possession and control, never during that time made known to the grantee, and never delivered to any one for him, or declared by the grantor to be intended as a present operative conveyance, could be permitted to take effect as a transmission of the title or as a binding proposal, is so inconsistent with every substantial right of property, that it would be unsafe for any court, either of law or equity, to adopt it.¹ The authorities upon what is necessary to create a legal delivery of a deed have been sufficiently discussed elsewhere.² Judge Cooley, in his edition of Blackstone, makes use of the following language: "No title passes by a deed, though it be executed with all due formalities, so long as the grantor retains it in his own possession."³

§ 71. Revocability of a deed before delivery—Mutuality.—A deed takes effect only from its delivery;⁴ but so long as a deed is within the control and subject to the authority of the grantor, there is no delivery. And whether in the hands of a third person or in the desk of the grantor is immaterial, since in either case he can destroy it at his pleasure. To make the delivery good and effectual, the power of dominion over the deed must be parted with. Until then the instrument passes nothing; it is merely ambulatory, and gives no title and is not binding as to any proposal or term contained therein, and is revocable.⁵ After the delivery of a deed, it is not revocable by the grantor even

¹ *Fisher v. Hall*, 41 N. Y. 416. The court says that such a rule should deserve "no toleration whatever from any intelligent court, either of law or equity."

² Cowen & Hill's Notes, 3d ed., 826; and their general result is stated to be that, "to constitute a complete delivery of a deed, the grantor must do some act putting it beyond his power to revoke." The Supreme Court of the United States has said: "The delivery of a deed is essential to the transfer of the title. It is the final act without which all other formalities are ineffectual. To constitute such de-

livery, the grantor must part with the possession of the deed, or the right to retain it." *Younge v. Guilbeau*, 3 Wall. 636, 641, per Field, J.

³ 1 Cooley's Blackstone, 306.

⁴ Blackstone's Commentaries, 307.

⁵ *Cook v. Brown*, 34 N. H. 460, 475; *Merrills v. Swift*, 18 Conn. 257; *Tibbals v. Jacobs*, 31 Conn. 428; *Berry v. Anderson*, 22 Ind. 36; *Parmelee v. Simpson*, 5 Wall. 81; *Younge v. Guilbeau*, 3 Wall. 636; *Heffron v. Flanagan*, 37 Mich. 274; *Hawkes v. Pike*, 105 Mass. 560; *Church v. Gilman*, 15 Wend. 656; *Stillwell v. Hubbard*, 20 Wend. 44.

with the grantee's consent.¹ The result of the American cases on the subject of sealed instruments is that a deed has no effect until delivered; that a delivery can only be made by such an act on the part of the grantor as communicates the fact to the grantee and such an act on the part of the grantee as communicates to the grantor his acceptance; that the delivery of a deed is synonymous with its acceptance, the two things being correlative terms; that until the deed is delivered and accepted it is revocable; that after delivery of a deed it is irrevocable. A contract by deed has its inception in proposal and acceptance, and the rules governing proposal and acceptance, their communication and revocation are as applicable to a sealed instrument in America as they are to a simple contract. Where plaintiff was employed by a corporation as its assistant manager, the employment to continue so long as the business should be continued, and plaintiff should continue to hold a specified number of shares of the corporate stock, it was held that there was sufficient mutuality.² A contract to employ a person to work from time to time, the service to continue only so long as satisfactory to the employer,³ and which stipulates

¹ *Rogers v. Rogers*, 53 Wis. 36; *Lowber v. Connit*, 36 Wis. 176; *Hinchliff v. Hinman*, 18 Wis. 130; *Bogie v. Bogie*, 35 Wis. 659; *Parker v. Kane*, 4 Wis. 1; *Jeffers v. Philo*, 35 O. S. 173.

² *McMullan v. Dickinson Co.* (Minn. 1896), 65 N. W. Rep. 661, Collins, J.: "The consideration for the agreement was ample and mutual, although the term of service might be terminated by defendant's cessation of business or plaintiff selling his stock in the corporation. The expressions of a contingency whereby the contract might be terminated by the act of either party expressly excluded the idea that each was at liberty to terminate it at any time without regard to the happening of either contingency." In *Bolles v. Lachs*, 37 Minn. 315, there was a contract for the employment of a person in a particular business as

long as the latter might elect to serve; the contract having been broken by the employer and the employee not having by his election fixed the period of service it was held that the obligation violated was too uncertain to enable the employee to recover substantial damages.

³ *Vogel v. Pekoc*, (1895), 157 Ill. 339, Craig, C. J.: "Treating the contract in the same way it would be treated if it had been signed by the parties named as parties of the first part, the next question is whether the contract is mutual. It is a general rule, well understood, that a contract between parties must be mutual. *Weaver v. Weaver*, 109 Ill. 225; *Tucker v. Woods*, 12 Johns. (N. Y.) 190. In the case last cited it is said: 'In contracts where the promise of the one party is the consideration for the promise of the other, promises must be concurrent

for a forfeit if the servant should abandon the service without giving the specified notice, is void for want of mutuality, and such forfeit can not be set off against wages due.

and obligatory upon both at the same time.' 1 Chitty on Contracts, 297; *Delamater v. Borland*, 1 Caines, 594. In Chitty on Contracts, *supra*, the author says: 'The agreement, as before observed, must, in general, be obligatory upon both parties. There are several cases satisfactorily establishing that if the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality.' In 1 Wharton on Contracts, p. 2, the author says: 'The parties to a contract must both be bound. If one promise in consideration of the promise of the other, the one is not bound unless the other is bound. Promise to do a thing on an executed consideration is not a contract; nor is a promise to do a thing in consideration of an illegal or impossible engagement on the other side. Without this reciprocal obligation, no contract can be constituted.' 'It is a general principle,' says Mr. Fry, 'that when from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, this party is equally incapable of enforcing it specifically against the other party, although its execution in the latter way might, in itself, be free from difficulty attending its execution in the former.' Specific Performance, p. 214, § 440. Upon looking into the contract read in evidence, it will be found that the parties of the first part practically agree to do nothing. There is mu-

tually no obligation imposed upon them by the contract. The only portion of the contract claimed to impose any obligation on the parties of the first part is the following: 'The said parties of the first part agree to employ the said party of the second part to perform such work as they may assign to him from time to time, such service to continue only so long as satisfactory to the said parties of the first part.' What obligation does this impose? When are they to employ the party of the second part? What sum are they to pay him? How long is the employment to continue? Suppose they refuse to employ the party of the second part, can an action for damages be maintained for a breach of the contract? The answer to these enigmas is obvious. We think it is plain that the parties of the first part were not bound under the terms of the contract to employ the party of the second part for a single day or hour, and, if they had absolutely refused to employ him, he was without remedy in any court of the country. It may be true that the plaintiff might have entered into a contract which would require him to give two weeks' notice before he could quit the service of his employer, without being liable to respond in damages, as might reasonably be provided in the contract, but no such case is presented by the record. Here the contract implies no obligation on one of the parties, and hence it is void for the want of mutuality."

CHAPTER III.

CERTAINTY.

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| <p>§ 72. Certainty as a general requisite.</p> <p>73. The same subject continued—Contracts sustained if possible.</p> <p>74. Rule of construction.</p> <p>75. Contracts to make future contracts.</p> <p>76. Miscellaneous uncertainties—Particular instances.</p> <p>77. The same subject continued—Stipulations reducible to certainty.</p> | <p>§ 78. <i>Id certum est quod certum reddi potest.</i></p> <p>79. The same subject continued.</p> <p>80. Uncertainty as to time.</p> <p>81. Uncertainty as to place and time.</p> <p>82. "Car loads."</p> <p>83. "More or less."</p> <p>84. The same subject illustrated—"About."</p> <p>85. "More or less" in descriptions of land.</p> <p>86. "Say," and "say about."</p> |
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§ 72. **Certainty as a general requisite.**—It is a plain and well settled proposition that, in order to constitute a valid, verbal or written agreement, the parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean. If the agreement be so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void; neither the court nor the jury can make an agreement for the parties. Such a contract can neither be enforced in equity¹ nor sued upon at

¹ The subject of specific performance of contracts is treated in another part of this work (Chap. XXV, *infra*), but it is proper here to state that a greater degree of certainty is required in the terms of an agreement, which is to be specifically executed in equity, than is necessary in a contract which is to be the basis of an action at law for damages. The action at law is founded upon the mere non-performance by the defendant, and the negative conclusion can often be established without determining all the terms of the agreement with exactness. *Belch v. Miller*, 32 Mo. App. 387; *Foster v. Kimmons*, 54 Mo. 488; *Fry on Specific Performance of Contracts* (2d Am. ed.), *102; *Lapham v. Dreisvoght* 36 Mo. App. 275; *Beach on Modern Equity Jurisprudence*, § 582. In *Indiana* a teacher can not recover from a school corporation for the breach of an executory agreement for employment unless it is so full and definite as to be capable of specific enforcement. *Jewett v. Perrette*, 127 Ind. 97, holding that a stipulation for "good wages"

law.¹ Where one part of a contract is in the form of an unconditional obligation, and another part, which is evidently designed as a qualification or limitation, is absolutely unintelligible, the whole agreement is ineffective for radical uncertainty.²

§ 73. The same subject continued—Contracts sustained if possible.—But the courts very reluctantly reject an agreement regularly and fairly made as unintelligible or insensible. It will be sustained if the meaning of the parties can be ascertained, either by the express terms of the instrument or by fair implication, and to this end words or phrases will be supplied, transposed or treated as surplusage.³ The cardinal rule in the interpretation of contracts is to give effect to every part of them if practicable.⁴ A party who has performed services under a contract, void for uncertainty, is not remediless, but may recover upon a *quantum meruit*.⁵

renders the contract fatally defective under the rule. *Atkins v. Van Buren School Tp.*, 77 Ind. 447.

¹ *Thomson v. Gortner*, 73 Md. 474, 482; *Gelston v. Sigmund*, 27 Md. 334; *Myers v. Forbes*, 24 Md. 598; *Reed v. Lowe*, 8 Utah, 39; 29 Pac. Rep. 740; *Rue v. Rue*, 21 N. J. Law, 369, 375; *Coles v. Hulme*, 8 Barn. & Cr. 568; *Figes v. Cutler*, 3 Stark. 139; *Chumasero v. Gilbert*, 24 Ill. 293, a case of a bond conditioned to pay "—— dollars." *Gilpatrick v. Foster*, 12 Ill. 355, where it was held that a credit of "50" indorsed on a note must be rejected as a nullity unless explained. *In re Clarke*, L. R. 36 Ch. Div. 348, 352, 355. "If it is so uncertain and ambiguous, that neither a general nor particular intent can be clearly gathered from it, the contract can not be enforced." *Nevins, J.*, in *Rue v. Rue*, 21 N. J. Law, 369, 377.

² *Leonard v. Carter*, 16 Wis. 607. But see, also, *Giles v. Halsted*, 24 N. J. Law, 366.

³ *Rue v. Rue*, 21 N. J. Law, 369,

375, citing *Lord Say and Sele's Case*, 10 Mod. 40; *Langdon v. Goole*, 3 Lev. 21; *Coles v. Hulme*, 8 Barn. & Cr. 568; *Targus v. Puget*, 2 Ves. Sr. 194; *Worthington v. Hylyer*, 4 Mass. 196; *Sumner v. Williams*, 8 Mass. 162. It may be perfectly certain that "North" was written for "South" in a description of land in a deed, and the court may, by construction, correct such a palpable discrepancy. *Barnard v. Russell*, 19 Vt. 334, 337.

⁴ *Fitzgerald v. Moran*, 19 N. Y. Supl. 958; *Martin v. Murphy*, 129 Ind. 464; *Morris v. Levison*, L. R. 1 C. P. D. 155, 157. "Where the contract is not expressed in precise terms the facts and circumstances surrounding the subject-matter it contains may be looked to in aid of construction, and the acts of the parties to the instrument are entitled to great weight. *Cathwright v. Callaway County*, 10 Mo. 663; *Patterson v. Camden*, 25 Mo. 13; *Dobbins v. Edmonds*, 18 Mo. App. 307." *Belch v. Miller*, 32 Mo. App. 387.

⁵ *Cole v. Clark*, 3 Pinney (Wis.) 303.

§ 74. Rule of construction.—It is provided by the North Dakota code that, “if the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it.”¹ This is a codification of a general rule of law. Thus, where a written contract specifies a place of delivery, delivery must be tendered at that place, and ambiguities in such written contract are to be solved in the same manner as ambiguities in other writings. The shipment by a vendor at a certain place, of goods consigned to himself at another place, the vendor making a draft for the price, and attaching the bill of lading thereto, is a tender of delivery at the point to which the goods are shipped, and not at the place of shipment.²

¹ Code, § 3564. Hazelton Boiler Co. v. Fargo Gas Co., 4 N. Dakota, 365; 61 N. W. Rep. 151, where this provision of the code is construed.

² Van Valkenburg v. Gregg, 45 Neb. 654; 63 N. W. Rep. 949, per Irvine, C.: “The car occasioning the controversy was loaded at Ohioa, and consigned by Gregg to himself at Beaver City. The bill of lading was then sent by Gregg’s agent to Gregg, at Lincoln, where Gregg made a draft on Van Valkenburg & Son, and, attaching the bill of lading thereto, sent it to Minden, where Van Valkenburg & Son conducted their business. The right of recovery in this case depends upon whether Gregg tendered delivery of the car at the place where he contracted to deliver it. Van Valkenburg & Son claim that the contract was for delivery to them at Ohioa or Tobias. Gregg claims that the price was merely fixed at those points, but that he was justified in consigning the corn to himself at the point designated by the vendees. In such a case there is no doubt that had Gregg consigned the car at Ohioa to the vendees at Beaver City this would have

been a delivery at Ohioa. On the other hand, consigned as it was, the delivery or tender of delivery was at Beaver City, and could not take place until the vendees, by payment of the draft at Minden, obtained possession of the bill of lading. Merchants’, etc., Bank v. Bangs, 102 Mass. 295; Forcheimer v. Stewart, 65 Iowa, 593; 22 N. W. Rep. 886. Gregg did not tender a delivery in accordance with the contract if the contract required a delivery at Ohioa. This we think it did. Where no place of delivery is provided it may be inferred from the circumstances of the case, from the usages of trade, or the previous course of dealing between the parties, or even from the nature of the article sold. Hatch v. Oil Co., 100 U. S. 124. But where the contract designates a place of delivery the contract prevails, and patent ambiguities in a written contract must be solved according to the ordinary rules in such cases. If it were not for the last clause in the written contract, there could be no possible doubt that the delivery was to be at Ohioa or Tobias. It reads: ‘Bought * * * [on] track Ohioa or Tobias.’ It is evident, however, from the last

§ 75. **Contracts to make future contracts.**—Where the terms of a contract are clear, unambiguous and explicit, a provision therein looking to the preparation of a more formal instrument will not be treated as superseding that agreement.¹ But the acceptance of a proposition to make a contract, the terms of which are to be subsequently fixed, does not constitute a binding contract.² Applying this rule it was held that where the agreement providing for a future contract to deliver logs manifestly left the place of delivery to be agreed upon, and required certain payments to be made “within — days” after the sale, evidently contemplating that the prospective contract should fix the number of days, these were deemed such important matters as to render the contract wholly void for want of pre-

clause, that the contract contemplated the shipping of the cars to some other point, and it is claimed that such other point was the point of delivery, and that the first clause only indicated that the vendee was to pay the freight from Ohioa or Tobias to such point; but to give it such a construction does violence to the language of the contract. We think its obvious meaning is that the corn was to be bought, *i. e.* delivered, on the tracks at Ohioa or Tobias, billed to Van Valkenburg & Son at such point as they should designate. Their direction was, ‘On Monday next load another large car to us at Beaver City.’ Gregg did not ship to them at Beaver City, but shipped to himself at Beaver City. A vendor can not recover damages for the refusal of the vendee to accept, unless delivery is tendered at the place required.”

¹ *Wills v. Carpenter*, 75 Md. 80; *Cheney v. Eastern Transp. Line*, 59 Md. 557; *Chinnoek v. Marchioness of Ely*, 4 DeG., J. & S. 638.

² *Wills v. Carpenter*, 75 Md. 80. See, also, *Chinnoek v. Marchioness of Ely*, 4 DeG., J. & S. 638; *Winn v. Bull*, L. R. 7 Ch. D. 29. “A contract between two persons upon a valid consideration,

that they will at some specified time in the future, at the election of one of them, enter into a particular contract, specifying its terms, is undoubtedly binding, and upon a breach thereof, the party having the election or option may recover as damages what such particular contract, to be entered into, would have been worth to him if made. But an agreement that they will in the future make such a contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations and agree upon terms of a contract, if they can, can not be made the basis of a cause of action. There would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain whether any, or, if so, what damages might follow a refusal to enter into such future contract. So, to be enforceable, a contract to enter into a future contract, must specify all its material and essential terms and leave none to be agreed upon as the result of future negotiations.” Per *Gilfillan, C. J.*, in *Shepard v. Carpenter*, 54 Minn. 153; 55 N. W. Rep. 906.

cision.¹ So a memorandum reciting the terms of a contract of employment, which are, however, "subject to the conditions and regulations of a contract which is to be substituted for the memorandum," imposes no legal obligation.² An agreement by the payee of a note with the maker that at its maturity he will double the loan to the latter and take a new note for double the amount of the first one, and a mortgage on certain lands to secure it, is void for uncertainty in the absence of any stipulations as to what the terms of the new note and mortgage shall be.³

§ 76. Miscellaneous uncertainties—Particular instances.—

The court could find no determinate sense whatever in a stipulation in a contract that for "good cause" it might be canceled by either party upon notice, and required only that the revocation should be made in good faith.⁴ Where the defendant, in consideration that the plaintiffs would purchase a storehouse and lot and a stock of goods, agreed to assist them by indorsing their paper and advancing money to enable them to carry on the mercantile business advantageously, the meaning of the parties could not be reduced to certainty by judicial effort.⁵ A contract to aid and assist another to procure an order of court is too indefinite to sustain an action for refusal or neglect.⁶ A father's promise upon a valuable consideration to give his child "a full share" of his property had no lineaments of a contract that the law could recognize.⁷ In one case the court denied a suitor's request to mulct a contractor who had tried in vain to build a house according to specifications calling for more dimensions than finite minds have yet discovered.⁸ The following order accompanied by a draft and measurements

¹ *Shepard v. Carpenter*, 54 Minn. 153; 65 N. W. Rep. 906. Gilfillan, C. J., said: "When a formal contract fails to express some matter, as, for instance, a time for payment, the law may imply the intention of the parties; but where a preliminary contract leaves certain terms to be agreed upon for the purpose of a formal contract there can be no implication of what the parties will agree upon."

² *Walton v. Mather*, 4 Misc. R. 261; 24 N. Y. Supl. 307.

³ *VanSchaick v. VanBuren*, 70 Hun, 575; 24 N. Y. Supl. 306. See, also, *Mayer v. McCreery*, 119 N. Y. 434; *Milliman v. Huntington*, 68 Hun, 258.

⁴ *Cummer v. Butts*, 40 Mich. 322.

⁵ *Erwin v. Erwin*, 25 Ala. 236.

⁶ *Case v. Lennington*, 3 N. J. Law, 420.

⁷ *Adams v. Adams*, 26 Ala. 272.

⁸ *Lyle v. Jackson County*, 23 Ark. 63.

was written upon a postal card: "Please send us pice counter screen like draft." The order was declared to be unintelligible, and a refusal to submit it to the jury to determine whether the letters "pice" meant "piece" or "price" was sustained on appeal.¹ Where, by a memorandum in writing a party agreed to convey to another "seventy acres of land," the vendee "to have half the wheat on the piece that is to be sowed," by a third party, "— — exceeding seven acres," an action for breach of the contract was not sustained, as there was nothing from which it could be ascertained on what part of the earth the premises were situated.²

§ 77. The same subject continued—Stipulations reducible to certainty.—But a contract by a manufacturer in New York to furnish to a jobber in Dubuque goods of a certain brand for their exclusive sale in Dubuque "and the territory tributary thereto" was not so indefinite as to the territory embraced in its terms as to be invalid.³ So, also, a promise by a father to give his

¹ *Cheney Bigelow Wire Works v. Sorrell*, 142 Mass. 442. "These letters do not mean anything," said Morton, C. J., "and neither the court nor the jury can construe them as meaning 'piece.'"

² *Rollin v. Pickett*, 2 Hill, 552. But see *Fish v. Hubbard*, 21 Wend. 651. It was held in *Palmer v. Albee*, 50 Iowa, 429 (by a divided court), that a subscription agreement to give "twenty acres of land" was too indefinite to sustain an action for damages for a failure to convey any certain tract and that the uncertainty could not be removed by parol evidence. In *Delashmuth v. Thomas*, 45 Md. 140, there was an agreement under seal for the lease of a store for a term certain at a fixed rent containing the following words: "The said [lessee] to have the preference of renting said property so long thereafter as it shall be rented for a store." It was held that the lessee derived no definite rights which he could enforce in law or equity. In *Abeel v. Radcliff*, 13 Johns. 297, it was

held that "a covenant in a lease on the part of the lessor to let the lot at the expiration of the term to the lessee without mentioning any price for which it was to be let" was altogether void for uncertainty. See, also, *Clunian v. Cook*, 1 Sch. & Lef. 22. For other instances of contracts held void for uncertainty see *Moore v. Smith*, 19 Ala. 774; *Leslie v. Smith*, 32 Mich. 64. At the bottom of a note payable on demand was a memorandum constituting a part of the contract—"one half payable in twelve months, the balance in twenty-four months." The court decided that it was intended to limit and control the generality of the words "on demand," and thus avoided a fatal repugnancy. *Heywood v. Perrin*, 10 Pick. 228.

³ *Kaufman v. Farley Mfg. Co.*, 78 Iowa, 679, 687. The court argued the case as follows: "There is certainly a section of country tributary to Dubuque for the purpose of such a trade, and it is certainly a matter not insusceptible of proof. * * * While

son a particular farm, "but should Providence determine otherwise he is to receive from my estate one thousand dollars," was held not to involve an inscrutable condition and the court substituted the pronoun "I" in the place of "Providence."¹ And in a contract to buy a stock of merchandise, "all soiled or

perhaps it would be very difficult if not impossible to establish definite lines as bounding the territory intended, the regulations of trade and the experience of tradesmen would enable the court to so find the fact as to meet the intent of all parties and enforce the contract with reasonable certainty if A. should employ B. as a traveling salesman in Dubuque and the territory tributary thereto, we do not think it would be held that either could avoid the contract merely because of indefiniteness as to the territory. The law assumes that the parties contracted understandingly upon the question, and the court will not dismiss them without inquiry as to the fact where its ascertainment is a matter of reasonable certainty. The case should not be confounded with the rule as to contracts being disregarded because of indefiniteness arising from the terms or language used in the contract where the intent of the parties can not be understood."

¹ *Rue v. Rue*, 21 N. J. Law, 369. A building specification provided that all walls should be plastered with K. & Co.'s cement, under the direction of a superintendent of K. & Co. Another specification provided that the cement should be mixed in equal parts. It was held that the two specifications were not inconsistent; that the supervision of the superintendent applied to the laying of the plaster on the walls; and that the plaintiff could not use a less proportion of cement in the mixture because the superintendent assented thereto. *Fitzgerald v. Moran*, 19 N. Y. Supl. 958. A. owed a

certain sum upon a promissory note payable to C. and secured by a mortgage running to him, but representing a debt due to B., and C. held the note and mortgage for B.'s benefit. A. owed other persons besides B., with whom, being insolvent, he settled, paying one in full and to the others different portions of their debts. A. also made a settlement with B. & C., which was evidenced by a written agreement, according to the terms of which A. paid fifty per cent. of B.'s debts, part to B., and part to C., and B. released C. from all liability to him, and the note and mortgage were given up by C. and discharged. The agreement then provided as follows: "Said B. is to receive from said A. *pro rata* per cent. of all moneys said A. may hereafter pay his 'borrowed money creditors,' as he calls them, to the amount of fifty per cent. on" the sum due on said note before the settlement, said amount being stated in figures: "the *pro rata* herein named is intended to mean on all moneys paid borrowed money creditors, after the settlement which A. now says he has made with such creditors," reciting in full the settlements, said to have been made, and leaving the amount remaining unpaid to be computed. It was held in an action by B. against A. upon this agreement, that it was not void for uncertainty, and that the meaning was that, when A. should pay to his "borrowed money creditors" any portion of their debts remaining unpaid, he should pay to B. the same proportion of his debt remaining unpaid. *Raymond v. Rhodes*, 135 Mass. 337.

damaged goods at valuation," the word valuation was construed to mean "value."¹

§ 78. *Id certum est quod certum reddi potest.*—The defendant by an instrument in writing agreed with the plaintiff, a town, that a certain illegitimate child should not become a charge to the town "during such time as under the statute laws of this state the person accused of begetting such child would be liable for the support of such child, and only to an amount not exceeding the amount to which under said statute laws the person begetting such child would be liable." This agreement was upheld as sufficiently definite, the time and amount being capable of ascertainment in the mode provided by the statute referred to.² And a contract to convey lands will not be held invalid because of a defective description where the data are sufficient to enable a surveyor to locate the property.³

§ 79. The same subject continued.—An agreement to pay an attorney for his services an amount equal to that paid another attorney connected with the same action has been held valid.⁴

¹ *Sergeant v. Dwyer*, 44 Minn. 309.

² *Town of Hamden v. Merwin*, 54 Conn. 418. In *Gelston v. Sigmund*, 27 Md. 334, it was decided that a contract on the part of a lessor "to let the tenant retain the possession from July 1, 1866, to July 1, 1867, upon his giving the lessor the same rent the latter might be able to obtain from other parties" was void for uncertainty and could not be enforced, citing *Bromley v. Jefferies*, 2 Vern. 415. But see *Cunningham v. Brown*, 44 Wis. 72, 78, distinguishing *Gelston v. Sigmund*, *supra*.

³ *White v. Hermann*, 51 Ill. 243; See, also, *Atwater v. Schenck*, 9 Wis. 160. "If the land granted be so inaccurately described as to render its identity wholly uncertain it is admitted that the grant is void." *Boardman v. Lessees of Reed*, 3 Peters, 328; *Barnard v. Russell*, 19 Vt. 834, 337.

⁴ *Lungerhausen v. Crittenden* (Mich. 1894), 61 N. W. Rep. 270, per Hooker, J.: "In the law, that is certain which is susceptible of being made certain. If Baldwin or Chadwick should render any services, their compensation would fix the price to be paid to the plaintiffs. There seems to be no claim that they did nothing. On the contrary, this measure of the plaintiffs' compensation seems to be greater than the defendant is disposed to pay. But counsel argue that the contract was void or valid when made, and, as it might have happened that nothing was earned by either of these persons, there was a want of certainty in the contract. We need not trouble ourselves with the question of plaintiffs' rights or remedies in case of the failure of these gentlemen to render service in the case. The plaintiffs performed the service promised, and there was no dispute over the fact

Upon similar grounds a contract providing that payment for cutting timber is to be according to a scale which is to exclude "dead culls" has been held to be unambiguous; and where a lumbering contract provides that payment for cutting the timber is to be made according to the tally of a certain saw-mill where the logs were to be sawed, dead culls being excluded, the fact that the grading of the mill was higher than was customary among other mills is immaterial.¹ Under a contract by which plaintiff agreed for a price named to furnish defendant "free on board cars" at place of delivery a quantity of coal, it was incumbent on defendant to furnish the cars.² But on the other hand, an agreement to use one's best efforts, through a certain newspaper, to advance the value of lands, is too indefinite to constitute a valid consideration for an option to purchase.³ And evidence as to the meaning of the word

that the others did also. There was no legal uncertainty in this contract at its inception. Whatever of uncertainty existed was the uncertainty that might arise from or grow out of contingency, which might have resulted in a failure of consideration, but did not. See *Kent, etc., Manufacturing Co. v. Ransom*, 46 Mich. 416; 9 N. W. Rep. 454."

¹ *Brigham v. Martin* (Mich. 1894); 61 N. W. Rep. 276.

² *Hocking v. Hamilton* (1893), 158 Pa. St. 107, per Thompson, J.: "The appellee undertook to sell and deliver at the tipple the coal at the designated price, and the appellants covenanted to receive it there, and pay for it. If so, they were bound to furnish the cars for it, and the appellee was required to be ready and willing to deliver it there. As he was so prepared, and as the latter neglected and refused to receive it, they became liable in damages for the non-performance of their contract. In *Kunkle v. Mitchell*, 56 Pa. St. 100, it is said: 'The article of agreement between plaintiff and defendant is dated December 27, 1862, by which the defendant Mitchell

agreed to deliver on the car at Indiana 75,000 feet of lumber at eighty-five cents per 100 feet. This is a controlling clause as to the place of delivery. The cars would be either the cars of the plaintiff or those of the railroad company. In either case they were to be provided by the plaintiff, and not by the defendant. The cars, therefore, being to be provided by the plaintiff, the duty was imposed upon him to see that he was at least ready with the cars, or willing to provide them, and to have notified the defendant of such readiness and willingness.' And in *Dwight v. Eckert*, 117 Pa. St. 490; 12 Atl. Rep. 32, it is said: 'It is a well-established principle of law that in a contract for the sale and delivery of goods "free on board vessel" the seller is under no obligation to act until the buyer names the ship to which the delivery is to be made.'"

³ *Barton v. Spinning* (1894), 8 Wash. 458; 36 Pac. Rep. 439, per Hoyt, J.: "It is suggested that the consideration for the option, as expressed in the contract, is too indefinite to be the foundation of a right of action; that the general statement that the

“deal” in a contract, where no extrinsic facts appear to create ambiguity, is rightly excluded.¹

§ 80. Uncertainty as to time.—Where time is of the essence of the contract, the thing to be done must be done within the time stipulated or the contract will be void.² And in the absence of any definite time, or of an express stipulation in reference thereto, the proposal is limited to a reasonable time.³ A letter accepting a proposition, the agreement thereby effected “commencing not later than the 15th day of July, possibly the 1st of July, the date to be fixed by us,” was not so indefinite as to authorize the party to avoid the obligation altogether by refusing to specify a day.⁴ Nor is a written contract of employment void for uncertainty because the number of days’ service to be performed is left blank in said contract; such number to be afterwards determined by the employer from data

respondents are to use their best endeavors, through the Tacoma Ledger, to advance the value of said lands, is not a sufficiently specific agreement on their part; that its performance could not be specifically decreed, as against the respondents; and that, for these reasons, it is not a sufficient consideration to support an action for specific performance in their behalf. The respondents contend that the money consideration to be paid for the land would furnish a sufficient consideration. But an examination of the contract, in its entirety, shows clearly that the parties contemplated other than a money consideration as the equivalent for the conveyance of the land by the appellants to the respondents. There was no obligation on their part to take the land, and pay therefor the agreed cash price. They did not bind themselves to do anything. Such being the terms of the contract, the cash price to be paid for the land had nothing to do with the consideration for the option to purchase. The entire consideration

for such option was that which the respondents were to do and have done to advance the value of the lands to be conveyed, and other lands of the appellants in that vicinity. It is true that there was the payment of one dollar stated in the contract, but it is evident that this was not the consideration which induced its execution. The real consideration was the benefit expected from the use of the columns of the Ledger, and, if such use had been so defined as to make it certain, it would, no doubt, have been a good consideration. It was not so defined, but was left so indefinite that no legal right or obligation could be founded thereon.”

¹ First Nat. Bank v. Coffin, 162 Mass. 180; 38 N. E. Rep. 444.

² Pedrick v. Post, 85 Ind. 255; Coulter v. Clark, 2 Ind. App. 512 (1892). See Chap. XVI, *infra*.

³ Minnesota Oil Co. v. Collier Lead Co., 4 Dillon (U. S.) 431; Ferrier v. Storer, 63 Iowa, 484.

⁴ Troy Fertilizer Co. v. Logan, 96 Ala. 619; 12 So. Rep. 712.

not at hand at the time of making the contract.' There is no fatal uncertainty in a contract to deliver ice for sale at retail "during the coming season."² And where a debtor delivers to his creditor an obligation to pay to the obligee the amount of the debt when certain property owned by the obligor is sold for not less than a certain sum specified, such obligation is valid and may be enforced within a reasonable time whether such property was sold or not.³ But an agreement to extend the time for the payment of a debt until such a time as a bank, which had suspended, should resume payment, is void for uncertainty.⁴ So, also, a contract which furnishes no practicable basis upon which the amount of damages for a breach can be ascertained is void for uncertainty. Thus a contract by which one party agreed to furnish and carry on a shooting gallery in a building in the possession of the other party, the net profits of the business to be divided between them and the business to be continued so long as it paid expenses, is so uncertain that

¹ *Marion School Township v. Carpenter*, 12 Ind. App. 191 (1895). In this case a teacher made a written contract with a township trustee to teach a certain school for the school year at so much per day. The number of days constituting the school year was left blank because of the inability at the time the contract was made to determine that fact; which fact could not be determined until the trustee knew the amount of tuition fund at his disposal for that year. This uncertainty never was remedied in the contract, although it was afterwards discovered by the trustee that the school year would consist of 105 days. The teacher after teaching 56 days was, without legal excuse, dismissed by the trustee, and another employed for the balance of the school year. The first teacher sued for the time. The court says: "The uncertainty in the contract sued on and which is material in this case was the number of days for which the plaintiff was employed, which was to be fixed when the trustee ascertained

the amount of tuition fund which he was to receive for that school year. The number of days for the school term for which appellee was employed was shown to be 105 days. When the number of days constituting the school term were ascertained the time for which the plaintiff was employed was fixed."

² *Booske v. Gulf Ice Co.*, 24 Fla. 550.

³ *Noland v. Bull*, 33 Pac. Rep. 983 24 Ore. 479; *Sivers v. Sivers*, 32 Pac. Rep. 571 (Cal.).

⁴ *Ahlstrom v. Fitzpatrick*, 42 Pac. Rep. 757 (Mont. 1895). It being said in this case: "The time of the alleged extension was not only wholly indefinite, but for all that appears the extension might last for all time." A portion of the price of purchased crops was to be paid "when the crop is taken off at the end of the year." *Held*, that the end of the fruit season, and not the end of the calendar year, was meant. *Brown v. Anderson*, 19 Pac. Rep. 487; 77 Cal. 263. See *South Boulder, etc., R. Co. v. Marfell*, 25 Pac. Rep. 504; 15 Colo. 302.

the breach thereof by the party controlling the building will not enable the other to maintain an action for damages against him.¹

¹ Pulliam v. Schimpf (Ala. 1896), 19 So. Rep. 428, Head, J.: "What is meant by 'paying expenses?' Will the dullness of the trade for a day or a week or a month or a year, causing for that time an excess of expense over receipts, which may be compensated by the better success of the following day or week or month or year, terminate the contract? How long must the failure continue? Who, or what court, has the right to fix the limit? A business of this character, involving complicated settlements of account, which has been conducted by parties, whether, strictly speaking, a partnership or not, is so analogous thereto that a court of equity is the only forum to determine the rights of the parties, neither party having taken it into his hands to violate a covenant of the articles of agreement. Pursuing this remedy, a party may file a bill for a dissolution of the contract, for cause, prior to the expiration of the time fixed by the parties for its continuance. Many causes of such relief, arising either from the fault of parties, or without fault, may be found in the books. Profit being the aim of all such agreements, manifest unprofitableness of the enterprise is a cause. A loss or destruction of the principal means of conducting the business is a cause. A sale by a party of his interest, or a judicial sale thereof by creditors, is a cause. For these and other causes the jurisdiction of the court to dissolve and settle the business in advance of the time fixed therefor by the agreement is commonly invoked; but we think it is yet to be found where the jurisdiction was exercised upon no other alleged equity than the equity to have determined the intent and meaning of

the parties as to the duration of the business, upon an agreement either so uncertain and indefinite as to be incapable of evincing its meaning without the arbitrary interpolation of terms not found in it, or of such a character that the decree pronounced may finally and conclusively determine absolutely nothing, but may leave the matter open for a new suit, of the same character and purpose, every week, month, or year thereafter, until a dissolution shall be decreed, or of such a character as to require a virtual account of the entire operation of the business in order to ascertain the happening of the contingency which determines the contract. The tribunals of the people are not open for purposes of this sort. Again, in all human conception, what is the measure of damage for the breach of an agreement like this? The only measure alleged is the loss of anticipated profits. Conceding that past profits are legal criteria by which to judge the future, for or upon what period of time must the future profits be computed? Does the plaintiff, in his declaration or proof, point us to a time certain, or in the remotest degree probable, when the business would have ceased to pay expenses? Shall the court arbitrarily assume that it would have paid expenses, and therefore be entitled to continue, as a going concern, for the residue of the plaintiff's life, and that profits such as the business had earned should be awarded him for the entire period of his life expectancy? His personal services, under the contract, entered largely into his profits. Shall he remain idle the rest of his days, and require the defendant to pay him the value of his services, or shall he utilize his

§ 81. **Uncertainty as to place and time.**—Contracts which are to be operative only in a certain place or locality should be construed according to the reasonable intention of the parties as gathered from the particular circumstances.¹ Accordingly a contract by a railroad company to establish its depot “at” a specified town is complied with by locating it at a convenient distance from the business portion of the town, and is controlled more by the buildings composing the town than by the corporate limits as defined in the charter.² And a contract not to engage in a certain business in a certain town while another carries on the same business there, is not invalid as indefinite as to its duration.³ When it is stated in an agreement that the employment is to commence at not later than a certain named day but may go into effect at an earlier day, the time within which the agreement is to go into effect is stated with sufficient definiteness.⁴ And an agreement between the solvent shareholders of a corporation that they will contribute to a fund to

services while he lives, and earn, possibly, more than they would have realized in the shooting business, and make the defendant no allowance therefor? How are these alleged rights, the outgrowth of such indefinite duration and unknown circumstances, to be ascertained upon any sort of practical or tangible basis? The plaintiff's loss, manifestly, rests in the idlest conjecture. In *Erwin v. Erwin*, 25 Ala. 236, and *Howard v. East Tennessee, etc., R. Co.*, 91 Ala. 268; 8 So. Rep. 868, we laid down the principle that, when no breach of a contract could be assigned which could be compensated by any criterion of damages to be furnished by the contract itself, the contract is void for uncertainty. That principle is decisive of this case.”

¹ *Cole v. Edwards* (Iowa, 1895,) 61 N. W. Rep. 940. In this case a contract by a physician: “Received of C. \$262 for my share of office fixtures, and proceeds of practice for month of March, and good-will of business in town of W., and agree not to practice therein,”—is sufficiently definite to

be enforced. Where, in such a case, it appears that it was the understanding of the parties that defendant should not practice within W. or vicinity, defendant's chief practice having been in the surrounding country, the contract will be so construed.

² *Frey v. Fort Worth R. Co.*, 6 Tex. Civil App. 29; 24 S.W. Rep. 950. And see *Williams v. Ft. W., etc., R. Co.*, 82 Tex. 553.

³ *Eisel v. Hayes*, 141 Ind. 41; 40 N. E. Rep. 119, per Howard, J.: “The circumstance that the restraint is indefinite in point of time—“while Hayes carries on the butcher business in Brownstown”—does not invalidate the contract. A contract of this nature, reasonable in other respects, is not void merely on the ground that the restriction is indefinite as to duration. *Bowser v. Bliss*, 7 Blackf. 344; *Martin v. Murphy*, *supra*. See, also, the late English case of *Nordenfelt v. Maxim, etc., Co.*, L. R. (1894) App. Cas. 535.”

⁴ *Troy Fertilizer Co. v. Logan*, 96 Ala. 619.

pay the corporate debts is not uncertain, because the contribution of each is not expressly fixed, as it would be understood that each should contribute in proportion to his stock.¹ So also an agreement "to give all moneys and personal property I may be possessed of in the United States" to a person named is not void for uncertainty.²

§ 82. "Car loads."—A contract to deliver a certain number of car loads of wood is not void for uncertainty, because a car load varies from thirty-five thousand to sixty thousand feet. The vendee has a right to insist upon as much, at least, as the specified number of loads of the smallest capacity.³

¹ *Sterling Wrench Co. v. Amstutz* (1893), 50 Ohio St. 484; 34 N. E. Rep. 794.

² *Brady v. Smith* (1894), 8 Misc. R. 465; 28 N. Y. Supl. 776, per Sedgwick, C. J.: "I am of opinion that the agreement was not void for uncertainty. It is a common expression of contracts and wills that 'all shall be or is given.' This expression has its foundation in uncertainty as to whether an enumeration or description, if made, would fulfill the actual intention of the grantor or testator, but the matter is made certain by using the word 'all.' " *Stickler v. Giles*, 9 Wash. 147; 37 Pac. Rep. 293. A debtor told his creditor that he was unable to pay him, but that he had a contract for certain work, and would get his first estimate from the 12th to the 15th of the month, and that he would then pay the debt. The creditor agreed to wait. It was held that it did not constitute a valid contract of extension, because the time was not certain, as it depended on the contingency of the work being performed. Hoyt, J., said: "As we understand the conversation, it amounted to no more than a statement on the part of the appellant that he had the contract for this work, and that in the usual and ordinary course he would receive his

first estimate the middle of August, and that when he did so receive it, and get his money thereon, he would pay the bill; and, thus construed, it did not name any time for the payment with such definiteness as to warrant us in holding that the contract was extended to any definite time. We agree with the contention of the appellant that it is not necessary that such extension should be to a day absolutely definite and certain if it is to some time which the future is sure to make certain. If there had been an absolute certainty that the work under the contract would be performed, and the appellant get his estimate and his pay thereon about the middle of August, and the agreement had been that it should be extended until he did so get his pay, it would probably have been sufficiently definite. But from the very nature of the conversation it is evident that the happening of these events was uncertain, and dependent upon conditions which might or might not result."

³ *Indianapolis Cabinet Co. v. Herrman*, 7 Ind. App. 462; 34 N. E. Rep. 579, where the court said that "so far as the contract is uncertain the courts can not enforce it, but within the limits that the contract is certain, the courts will enforce it." In *Schrieber*

§ 83. "More or less."—The words "more or less" have a plain, ordinary, and popular signification, and are often used in contracts relating both to real and personal estate. As applied to quantity they are to be construed as qualifying a representation or statement of an absolute and definite amount, so that neither party to a contract can avoid it or set it aside by reason of any deficiency or surplus occasioned by no fraud or want of good faith, if there is a reasonable approximation to the quantity specifically stipulated in the contract. In sales of merchandise, especially in large quantities, the office and effect of the words "more or less," in connection with the specific amount which forms the subject-matter of the contract, is to cover any variation from the estimate which is likely to arise from differences in weight, errors in counting, diminution by shrinking or other similar causes. It is sometimes briefly expressed to be "an absolute contract for a specified quantity within a reasonable limit."¹ What is a reasonable limit and a substantial compliance with such a contract, if the facts are

v. Butler, 84 Ind. 576, it was held that a contract for the delivery of a certain number of car loads of ice was not void for uncertainty and that the quantity could be made certain by averment and proof. The suit was based upon the refusal of the defendant, after delivering ten car loads, to deliver the remainder of the specified number of thirty. See, also, *O'Ferrall v. Van Camp*, 124 Ind. 336.

¹*Cabot v. Winsor*, 1 Allen, 546, where it was held that a shortage of five per cent. on "500 bundles, more or less, gunny bags" was not such a deficiency as to fall outside of the fair and reasonable limit of short delivery, and that by delivering a portion of 475 bundles and a readiness to deliver the residue of the 475, the plaintiff proved a full compliance with the terms of his contract. After declaring the law in substantially the language of the text, the court continued: "In such cases parol evidence is not ad-

mitted to show that the parties intended to buy and sell a different quantity or amount from that stated in the written agreement. On the contrary it is held to be a contract for the sale of the quantity or amount specified and the effect of the words, "more or less," is only to permit the vendor to fulfill his contract by a delivery of so much as may reasonably and fairly be held to be a compliance with the contract after making due allowance for an excess or short delivery arising from the usual and ordinary causes, which prevent an accurate estimate of the weight or number of the articles sold." See, further, to the point that the words "more or less" do not render a contract *prima facie* void. *Holland v. Rea*, 48 Mich. 219, 221, and cases there cited; *Morris v. Levison*, L. R. 1 C. P. Div. 155; *Cockerell v. Aucompte*, 2 C. B. (N. S.) 440, 451; *Brown v. Bellows*, 4 Pick. 179, 190.

not in dispute between the parties, is a question of law for the determination of the court.¹

§ 84. The same subject illustrated—"About."—A contract for a herd of cattle containing two hundred and sixty-two head, "more or less," was held not elastic enough to require an acceptance of one hundred and seventy-eight.² Under a contract calling for "about three hundred quarters more or less" of rye, the buyer was not compelled to accept three hundred and fifty quarters.³ But under a contract to deliver five hundred thousand feet of lumber, "more or less," a delivery of four hundred and seventy-three thousand feet was said to be a deviation quite within the degree the courts have held to be reasonable.⁴ A contract to pay "a claim * * * of about \$150" was held to be a contract to pay the whole amount, although the latter was in fact \$50 more than the sum mentioned.⁵

¹ *Cabot v. Winsor*, 1 Allen, 546; *Cross v. Eglin*, 2 B. & Ad. 106; *Moore v. Campbell*, 10 Exch. 323; *Bourne v. Seymour*, 16 C. B. 337; *Stebbins v. Eddy*, 4 Mason, 414, 419; *Pembroke Iron Co. v. Parsons*, 5 Gray, 589.

² *Tilden v. Rosenthal*, 41 Ill. 385. "We understand the phrase 'more or less'" said Lawrence, J., "as having been used by the parties to cover such trifling deficiencies in number as might be caused by the ordinary casualties of death or loss."

³ *Cross v. Eglin*, 2 B. & Ad. 106.

⁴ *Holland v. Rea*, 48 Mich. 218.

⁵ *Turner v. Whidden*, 22 Me. 121. "Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification 'about' or 'more or less,' or words of like import, the contract applies to the specific lot, and the naming of the

quantity is not regarded as in the nature of a warranty but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. In such cases the governing rule is somewhat analagous to that which is applied in the description of lands where natural boundaries and monuments control courses and distances and estimates of quantity. But when no such independent circumstances are referred to and the engagement is to furnish goods of a certain quality or character to a certain amount the quantity specified is material and governs the contract. The addition of the qualifying words 'about' or 'more or less' and the like in such cases is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight. If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significancy, then the contract is to be governed by such added

§ 85. "More or less" in descriptions of land.—The effect of the words "more or less," when annexed to a specified quantity in contracts relating to land, was thus declared in Massachusetts: "In an agreement for the sale and purchase of land for an entire sum, either the description of the land by its boundaries, or the insertion of the words 'more or less,' or equivalent words, will control a statement of the quantity of land or of the length of one of the boundary lines so that neither party may be entitled to relief on account of a deficiency or surplus, unless in case of so great a difference as will naturally raise the presumption of fraud or gross mistake in the very essence of the contract."¹

§ 86. "Say" and "say about."—The same words may have different meanings, according to the context, in different con-

stipulations or conditions." Per Justice Bradley in *Brawley v. United States*, 96 U. S. 168, where a contractor agreed to furnish eight hundred and eighty cords of wood, "more or less as shall be determined to be necessary," by an agent of the vendee. Subsequently, the agent in good faith notified the contractor that only forty cords were required, and it was held that there was no liability beyond the value of the forty cords.

¹ *Noble v. Goggins*, 99 Mass. 231, citing *Stebbins v. Eddy*, 4 Mason, 414; *Marvin v. Bennett*, 8 Paige, 312; 26 Wend. 169; *Morris Canal Co. v. Emmett*, 9 Paige, 168; *Faure v. Martin*, 7 N. Y. 210; *Ketchum v. Stout*, 20 Ohio, 453; *Stull v. Hurt*, 9 Gill, 446; *Weart v. Rose*, 15 N. J. Eq. 290. The latitude which will be given by a court of equity to the words "more or less" in such cases was thoroughly discussed in the light of the authorities by Comstock, J., in *Belknap v. Sealey*, 14 N. Y. 143. For other cases involving the phrase "more or less" in deeds, see *Harrell v. Hill*, 19 Ark. 102; *Smith v. Evans*, 6 Binn. 102; *McCoun v. Delany*, 3 Bibb. 46; 6 Am. Dec. 635; *Pendleton v. Stewart*, 5 Call,

1; *Hoffman v. Johnson*, 2 Bland, 103; *Brady v. Hennion*, 8 Bosw. 528; *Pettit v. Shepard*, 32 N. Y. 97; *Couse v. Boyles*, 4 N. J. Eq. 212; *Blaney v. Rice*, 20 Pick. 62; *Tyson v. Hardesty*, 29 Md. 305; *Phipps v. Tarpley*, 24 Miss. 597; *Baynard v. Eddings*, 2 Strobb. 374; *Peden v. Owens*, Rice (Eq.), 55; *Smith v. Fly*, 24 Texas, 345; *Duvals v. Ross*, 2 Munf. 290; *Gerrens v. Huhn* 10 Nev. 139; *McConnell v. Brayner*, 63 Mo. 461; *Williamson v. Hall*, 62 Mo. 405; *Allison v. Allison*, 1 Yerg. 16; *Sullivan v. Ferguson*, 40 Mo. 79; *United States v. D'Aguirre*, 1 Wall. 311; *Dale v. Smith*, 1 Del. Ch. 1; *Thomas v. Perry*, Pet. C. C. 49; *Pollock v. Wilson*, 3 Dana, 25; *Williford v. Bentley*, 5 J. J. Marsh. 181; *Fannin v. Bellomy*, 5 Bush, 663; *Gentry v. Hamilton*, 3 Ired. (Eq.) 376; *Shipp v. Swann*, 2 Bibb. 82; *Poague v. Allen*, 3 J. J. Marsh. 421; *Smallwood v. Hatton*, 4 Md. Ch. 95; *Lawson's Concordance of Words, Phrases and Definitions*, tit. "More—or Less." A deficiency of eight acres in a contract for 552 acres is no more than a purchaser who buys for more or less can reasonably expect. *Nelson v. Matthews*, 2 Hen. & M. 164.

tracts.¹ But, unless there is something in the context to dictate a more positive signification, such words as "say," or "say about," when used to specify quantity, ought not to be construed as words of warranty.² Thus, a contract to sell all the naphtha that the vendor might make during a certain period, "say from one thousand to one thousand two hundred gallons per month," was held not to impose an absolute obligation to supply that number of gallons.³ In a similar connection, the words "say about" afford a contractor as much latitude as the words "say from."⁴ On the other hand, an agreement to furnish "say not less than" a certain quantity leaves no uncertainty as to the minimum.⁵ And a contract to load "a full and complete cargo of iron, say about one thousand one hundred tons," where the ship could carry one thousand two hundred and ten tons, was not fulfilled by loading one thousand and eighty tons.⁶

¹ *McConnel v. Murphy*, L. R. 5 Priv. C. App. 203, 217.

² *McConnel v. Murphy*, L. R. 5 Priv. C. App. 203, 217.

³ *Gwillim v. Daniell*, 2 Crompt. M. & R. 61.

⁴ *McConnel v. Murphy*, L. R. 5 Priv. C. App. 203, 217, holding that 496 will satisfy "say about 600."

⁵ *Leeming v. Snaith*, 16 Q. B. 275, declared in *McConnel v. Murphy*, cited in the preceding note, not to be inconsistent with *Gwillim v. Daniell*, 2 C. M. & R. 61.

⁶ *Morris v. Levison*, L. R. 1 C. P. D. 155, where Brett, J., premising that the words "full and complete cargo" were a material factor in the construction, continued: "What, then, is the meaning of the word 'about?' This is partly matter of fact and partly matter of law. I think the direction to the jury has always been that the de-

viation must not be very large. The difference must be such as people would ordinarily consider as included in the word 'about.' There can be no exact rule of law as to the percentage of difference allowed, but I have known juries often allow in practice three per cent. Here we are placed in the position of a jury and are entitled to find the facts and we think that three per cent. above 1100 tons is somewhere about the right quantity to fix upon. If so, the undertaking was to load a full and complete cargo, but the ship-owner undertook to be content with 1133 tons as a fulfillment of the contract. Only 1080 tons were loaded and consequently defendant was 53 tons short." In the same case Archibald, J., said that "the nature of the subject-matter must be considered in determining what meaning is to be attributed to such expressions."

CHAPTER IV.

CONDITIONS.

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| <p>§ 87. Kinds of covenants.</p> <p>88. Time of performance.</p> <p>89. Covenants construed as dependent.</p> <p>90. Mutual promises.</p> <p>91. Conditions in insurance policies.</p> <p>92. The same subject continued—Suicide.</p> <p>93. Examples of conditions precedent—Vendor and purchaser.</p> <p>94. Condition of arbitration—Waiver.</p> <p>95. Vendor and purchaser.</p> <p>96. Sales of goods.</p> <p>97. The same subject continued.</p> <p>98. Sale of goods to arrive.</p> <p>99. The same subject continued.</p> <p>100. Architect's or engineer's certificate of approval.</p> <p>101. The same subject continued—Illustrations.</p> <p>102. The same subject continued.</p> <p>103. Promise conditional upon approval of promiser.</p> <p>104. Right of approval to be exercised reasonably.</p> <p>105. Right of approval not to vary contract.</p> <p>106. Limitations upon the right to reject.</p> <p>107. Performance of conditions precedent.</p> <p>108. The same subject continued—Illustrations.</p> <p>109. Further illustrations--Waiver.</p> <p>110. Building contracts.</p> <p>111. The result of the cases.</p> <p>112. Substantial performance of building contracts.</p> | <p>§113. Substantial performance—Delay.</p> <p>114. Insufficient performance.</p> <p>115. The same subject continued--A contrary view.</p> <p>116. Doctrine of the Supreme Court of the United States.</p> <p>117. Sales—Incomplete delivery.</p> <p>118. The New York doctrine.</p> <p>119. Personal services.</p> <p>120. The same subject continued.</p> <p>121. The same subject continued—A contrary view.</p> <p>122. Delivery by installments.</p> <p>123. <i>Mersey Steel Co. v. Naylor</i>.</p> <p>124. Insolvency of buyer.</p> <p>125. Subscriptions to stock.</p> <p>126. (a) Waiver.</p> <p>127. (b) Recitals.</p> <p>128. Subscriptions before incorporation--How far absolute.</p> <p>129. The subject-matter of conditions in subscription to stock.</p> <p>130. How the condition must be stated.</p> <p>131. Performance.</p> <p>132. Performance — Full performance waived.</p> <p>133. Time of performance—Reasonable time.</p> <p>134. Pleading.</p> <p>135. Conditional sales.</p> <p>136. Form of contract of conditional sale.</p> <p>137. Transfer of rights under conditional sale.</p> <p>138. Rights of the parties on default.</p> <p>139. Rights of buyer.</p> <p>140. Waiver of forfeiture and title.</p> <p>141. Destruction of property.</p> |
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§142. Recording.

143. Miscellaneous matters.

144. Condition subsequent in deed—
Subsequent defeasance.§145. Surety's bond signed under con-
dition.146. Refunding dues, etc., to with-
drawing members.

§ 87. Kinds of covenants.—There are three kinds of covenants: 1. Such as are called mutual and independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor; and where it is no excuse for the defendant to allege a breach of the covenant on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and, therefore, until this prior condition is performed, the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and in these, if one party was ready, and offered to perform his part, and the other neglected, or refused, to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other, although it is not certain that either is obliged to do the first act. The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and, however transposed they may be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance.¹

§ 88. Time of performance.—The following rules of construction as to the intention of the parties have been deduced from the times appointed for the performance of the respective promises: If a day be appointed for payment of money or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act, before

¹ Kingston v. Preston, cited in Jones Powell, 2 Smith L. C. 1; Stavers v. v. Barkley, 2 Doug. 684; Pordage v. Curling, 3 Bing. N. C. 355. Cole, 1 Wms. Saund. 320; Cutter v.

performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act.¹ When a day is appointed for the payment of money, and the day is to happen after the thing which is the consideration of the money is to be performed, no action can be maintained for the money before performance.² Where two acts are to be done at the same time, as where A. covenants to convey an estate to B. on such a day, and, in consideration thereof, B. covenants to pay A. a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, his part, although it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sales.³

§ 89. Covenants construed as dependent.—Whether or not a stipulation or covenant is dependent or independent must be determined from the terms of the contract, the rule being that such stipulation or covenant will be construed as dependent unless a contrary intention appears by the terms of the contract.⁴ Although an agreement for the sale and shipment of a

¹ *Pordage v. Cole*, 1 Wms. Saund. 320.

² *Pordage v. Cole*, 1 Wms. Saund. 320.

³ *Pordage v. Cole*, 1 Wms. Saund. 320; *Thorpe v. Thorpe*, 1 L. Raym. 662; *Campbell v. Jones*, 6 T. R. 570; *Terry v. Duntze*, 2 H. Bl. 389; *Dicker v. Jackson*, 6 C. B. 103; *Judson v. Bowden*, 1 Ex. 162; *Rolt v. Cozens*, 18 C. B. 673; *Peeters v. Opie*, 2 Wms. Saund. 350; *Doogood v. Rose*, 9 C. B. 132; *Giles v. Giles*, 9 Q. B. 164.

⁴ *Davis v. Jeffris* (S. Dak. 1894), 58 N. W. Rep. 815. In this case in a contract for the construction of a creamery and cold-storage building—the contractors agreeing to furnish all material and labor, and the cold-storage being constructed under the McCray patent—a stipulation by which the contractors “agree to furnish with

said contract a patent deed from the McCray Refrigerator Company, * * * conveying all the rights under said patents,” is a dependent stipulation; and the contractors can not recover the amount agreed to be paid by the subscribers to the contract, in the absence of proof that said patent deed has been furnished or tendered to the subscribers. *Carson, P. J.*, said: “In the early case of *President, etc., v. Hagner*, 1 Pet. 455, the Supreme Court of the United States states the rule as follows: ‘Admitting, then, that a contract was entered into between the parties, the inquiry arises whether the plaintiffs have shown such a performance on their part as will entitle them, in a court of law, to sustain an action for the recovery of the purchase-money. In contracts of this description the

certain amount of coke is expressly conditioned on the ability of the seller to induce operators to build ovens and make the coke, and it provides for notice by the seller to the buyer, at specified times, as to how much of the entire quantity of coke can be supplied during certain periods, the seller is bound thereby so soon as he induces operators to build ovens and make the coke, and hence the agreement is mutual.¹ The rule as to dependent covenants requires only that a tender of the deed precede an action for the purchase-money.² Whether the requirements of a contract are conditions precedent which must be strictly complied with, or are independent stipulations the failure to completely perform which may be compensated in damages, is to be determined by an examination and fair interpretation of the entire contract.³ Accordingly where the owner

undertakings of the respective parties are always considered dependent unless a contrary intention clearly appears. A different construction would in many cases lead to the greatest injustice, and a purchaser might have payment of the consideration money enforced upon him, and yet be disabled from procuring the property for which he paid it. Although many nice distinctions are to be found in the books upon the question whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent, yet it is evident the inclination of the courts has strongly favored the latter construction, as being obviously the most just. The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return. Hence, in such cases, if either a vendor or a vendee wish to compel the other to fulfill his contract, he must make his part of the agreement precedent, and can not proceed against the other without an actual performance of the agreement on his part, or a tender and refusal; and an averment to that effect is always made in the declaration upon contracts containing

dependent undertakings, and that averment must be supported by proof, and that the one now before the court must be considered a contract of this description can not admit of a doubt." The principles there enunciated have since been generally followed by the courts of this country. For a very full review of the English and American decisions upon this question, see *Lester v. Jewett*, 11 N. Y. 453. See, also, *Kane v. Hood*, 13 Pick. 281; *Swan v. Drury*, 22 Pick. 485; *Williams v. Healey*, 3 Denio, 363; *Grant v. Johnson*, 5 N. Y. 247; *Parker v. Parmele*, 20 Johns. 130; *Galvin v. Prentice*, 45 N. Y. 162; *Dunham v. Pettee*, 8 N. Y. 508; *Smith v. Lewis*, 26 Conn. 110; *Clark v. Weis*, 87 Ill. 438; *Coos Bay Wagon Co. v. Crocker*, 4 Fed. Rep. 577.

¹ *Sheffield Furnace Co. v. Hull Coke Co.*, 101 Ala. 446; 14 So. Rep. 672.

² *Suydam v. Dunton* (1895), 84 Hun, 506.

³ *Keller v. Reynolds* (Ind. App. 1895), 40 N. E. Rep. 76 and 280, *Gavin, J.*: "Counsel for appellants claim the first paragraph of complaint to have been bad on demurrer for want of facts, because it fails to allege by either specific or general averment the performance by appellee or her agent, E. L.

of land makes an executory contract to convey when one-half the price is paid, in monthly installments, and the vendee makes default, the owner may declare a forfeiture and sue to recover the land, as such payment is a condition precedent to the vesting of title in the vendee.¹

§ 90. Mutual promises.—When, upon consideration of the whole instrument, it is clear that the one party relied upon his remedy, and not upon the performance of the condition by the other, such performance is not a condition precedent. On the other hand, where it is clear that the intention was to rely on the performance of the condition, and not on the remedy, the performance is a condition precedent.² But the parties to a contract may, if they think proper, agree that any matter shall

Reynolds, of all the various matters to be by them performed in the course of conducting the business under said contract, upon the theory that some of these matters, such as keeping \$3,000 invested in stock, are conditions precedent, and some concurrent stipulations upon the performance of which appellants' obligations were dependent. Whether or not the performance of those things to be done by appellee is to be regarded as a condition precedent is to be determined from an examination of the entire contract, giving to it a reasonable and fair interpretation. Those matters as to which appellee has failed to aver performance constitute but a part of the consideration for the agreement of appellants to pay to her the amounts named; and since the agreement has been in an essential feature performed by appellee, and the benefit of such performance received by appellants, and any loss to appellants from the failure to completely perform may be compensated by damages, such stipulations will be regarded as independent, and not as constituting conditions precedent. *Pickens v. Bozell*, 11 Ind. 275; *Harman v. Moore*, 112 Ind. 221; 13 N. E. Rep. 718; *Cum-*

mings v. Pence, 1 Ind. App. 317; 27 N. E. Rep. 631; *Boone v. Eyre*, 1 H. Bl. 273, note; 2 *Parsons on Contracts* (5th ed.), 525-529. There are, of course, many contracts in which the requirements must be regarded as conditions precedent or as covenants interdependent, performance of which must be alleged; but, when fairly construed, this contract is not of that character. It would be manifestly iniquitous to say that appellants should receive and keep appellee's \$3,000 because she had not kept the investment up to that amount continually, or because she had failed to perform some other matters called for in this contract. The appellee furnished appellants this \$3,000, which they invested in teeth, sold them, and collected the money, which it then became their duty, under the contract, to pay over to her with its profits, or to otherwise satisfactorily account to her therefor. The complaint alleges a clear breach of this obligation, and is therefore good upon demurrer."

¹ *Pell v. Chandos* (Tex. App. 1894), 27 S. W. Rep. 48; *Moore v. Giesecke*, 76 Texas, 543.

² *Roberts v. Brett*, 18. C. B. 561.

be a condition precedent; and, if words are used in the contract so precise, express and strong, that such intention, and such intention only, is compatible with the terms employed, however inconsistent it may be with general principles of reasoning, a court can only give effect to such declared intention of the parties. The only question in every particular case is, whether such intention is so declared.¹ Parties may think some matter, apparently of very little importance, essential, and, if they sufficiently express an intention to make the literal fulfillment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance, and, *prima facie*, a condition precedent, is not really vital, and may be compensated for in damages; and, if they sufficiently express such intention, it will not be a condition precedent.²

§ 91. Conditions in insurance policies.—The conditions expressed in an insurance policy are a part of the contract and the insured is bound to take notice of them.³ And the fact that he did not read them or know of the conditions is immaterial.⁴ But after liability actually attaches under the policy, the entire relation between the parties is changed from that of insurer and insured to that of debtor and creditor; and clauses in the policy which provide that certain acts or omissions shall invalidate it are inoperative.⁵ If an insurance company is in the

¹ *Stavers v. Curling*, 3 Bing. N. C. 355.

² *Bettini v. Gye*, L. R. 1 Q. B. D. 183. See following cases for instances of the application of the rules above given: *Ritchie v. Atkinson*, 10 East, 306; *Greaves v. Legg*, 11 Ex. 642; *Ellen v. Topp*, 6 Ex. 424; *Seeger v. Duthie*, 8 C. B. (N. S.) 45; *London Gas Co. v. Chelsea*, 8 C. B. (N. S.) 215; *Poussard v. Spiers*, L. R. 1 Q. B. D. 410.

³ *Quinlan v. Providence Ins. Co.* (1892), 133 N. Y. 356; *O'Brien v. Commercial, etc., Ins. Co.*, 63 N. Y. 108; *Bell v. Lycoming, etc., Ins. Co.*, 19 Hun, 238; *Blossom v. Lycoming, etc., Ins. Co.*, 64 N. Y. 162; *McDermott v. Lycoming, etc., Ins. Co.*, 12 J. & S. 221; *Edwards v. Lycoming, etc., Ins.*

Co., 75 Pa. St. 378; *Railway, etc., Co. v. Burwell*, 44 Ind. 460.

⁴ *Quinlan v. Providence Ins. Co.*, 133 N. Y. 356; *Herndon v. The Triple Alliance*, 45 Mo. App. 426; *Snider v. Adams Express Co.*, 63 Mo. 376; *Palmer v. Continental Ins. Co.*, 31 Mo. App. 467; *Robinson v. Jarvis*, 25 Mo. App. 421; *Rothschild v. Frensdorf*, 21 Mo. App. 318; *Brown v. Wabash, etc., R. Co.*, 18 Mo. App. 568; *Taylor v. Fox*, 16 Mo. App. 527.

⁵ *Seyk v. Millers Ins. Co.*, 74 Wis. 67; 3 *Lawyers' Rep. Ann.* 523; *Harrington v. Fitchburg Ins. Co.*, 124 Mass. 126; *Brown v. Roger, etc., Ins. Co.*, 5 R. I. 394; *Browning v. Home, etc., Ins. Co.*, 71 N. Y. 508; *Dogge v. Northwestern Ins. Co.*, 49 Wis. 501;

habit of demanding payment of premiums, its failure to do so will estop it to take advantage of a condition forfeiting a policy for non-payment, although the policy provides for the payment at certain times.¹ And if a company take notes in payment of premiums this prevents it from forfeiting the policy, although the policy expressly stipulates that it is to become void for non-payment of premiums.² Where a condition in a policy provided that the company would not be liable for a loss by "riot," it was held that the breaking of five masked men into a house, who compelled the owner to leave and then burned the building, was a "riot" within the meaning of the policy.³ Receiving what is due as a premium, after the condition as to payment has been broken, is a waiver of forfeiture.⁴

§ 92. The same subject continued — Suicide.—Insurance companies have recently inserted in the conditions of their policies words of limitation touching suicide, so that the company will not be liable in case the insured died by his own hand, sane or insane. This takes the subject from the domain of controversy, and precludes all liability by reason of the death of the insured by his own act, whether he was at the time a responsible moral agent or not.⁵ Thus one who shows intelligence enough to employ a rope and hang himself can not be said to be so unconscious of the result as to prevent the operation of the condition to his policy which nullifies it if he commits suicide, sane or insane;⁶ and such conditions preclude a recovery, although the insured acts in obedience to an insane

Alkan v. New Hampshire Ins. Co., 53 Wis. 136.

¹ *Equitable Ins. Co. v. Van Etten*, 40 Ill. App. 232; *Ross v. Hawkeye Ins. Co.*, 83 Iowa, 586; 50 N. W. Rep. 47; *McDougall v. Provident, etc., Co.*, 64 Hun, 515; 19 N. Y. Supl. 481.

² *Michigan Ins. Co. v. Bowes*, 42 Mich. 19.

³ *Germania Ins. Co. v. Deckard*, 3 Ind. App. 361; 28 N. E. Rep. 868.

⁴ *Arnott v. Prudential Ins. Co.*, 63 Hun, 628; 17 N. Y. Supl. 710; *Continental Ins. Co. v. Miller*, 4 Ind. App. 553; 30 N. E. Rep. 718; *De Frece v. Na-*

tional Life Co., 19 N. Y. Supl. 8; *Morrow v. Des Moines Co.*, 84 Iowa, 256; 51 N. W. Rep. 3; *Daft v. Drew*, 40 Ill. App. 266.

⁵ *Bigelow v. Berkshire Ins. Co.*, 93 U. S. 284; *Pierce v. The Travellers' Ins. Co.*, 34 Wis. 389; *Breasted v. Farmers', etc., Co.*, 4 Hill, 73. But see, also, *Mutual Life Ins. Co. v. Leubrie* (1896), 71 Fed. Rep. 843, for the rule where the policy does not contain a "sane or insane" clause.

⁶ *Sabin v. The Senate*, 90 Mich. 177; *Streeter v. Western, etc., Society*, 65 Mich. 199.

impulse which has overcome his will.¹ But the condition does not apply where the death is accidental, and where the insured dies under mysterious circumstances which suggest suicide. In such a case the burden of proof is on the company to prove suicide, the presumption being that accident caused death.² If the condition as to suicide omits to provide for an insane act, then suicide, while insane, does not prevent recovery.³ But the word "insane" need not necessarily be used. Thus the words "suicide felonious, or otherwise" are equivalent to "suicide sane or insane," and exempt the company in case of insane suicide.⁴ The word "suicide" is synonymous with "dying by one's own hand," in insurance policies.⁵

§ 93. Examples of conditions precedent—Vendor and purchaser.—Where a lot was orally donated to a person for the purpose of erecting a boarding-house thereon, with an express oral stipulation that there should be no liquor sold on the premises, after the boarding-house is erected and the party demands a conveyance, although there was no agreement that

¹ *Billings v. Accident Ins. Co.*, 64 Vt. 78. See, also, *Cooper v. Mass. Mut. Ins. Co.*, 102 Mass. 227; *Terry v. Life I. Co.*, 1 Dillon, 403; *Life Ins. Co. v. Terry*, 15 Wall. 580; *De Gogorza v. Knickerbocker Co.*, 65 N. Y. 232; *Adkins v. Col. Ins. Co.*, 70 Mo. 27; 35 Am. Rep. 410; *Scarth v. Security, etc., Society*, 75 Iowa, 346; *Chapman v. Rep. Ins. Co.*, 6 Bissell, 238; *Riley v. Hartford, etc., Ins. Co.*, 25 Fed. Rep. 315. "This is the better rule, in that it gives effect to the contract made by the parties, and the logical conclusion of the better considered cases." Per Taft, J., in *Billings v. Accident Co.*, *supra*.

² *Ingersoll v. Knights of the Golden Rule*, 47 Fed. Rep. 272; *Home Benefit Assn. v. Sargent*, 142 U. S. 691; 55 Fed. 711. See as to effect of a statute touching suicide: *Knights Templar, etc., Co. v. Berry*, 50 Fed. Rep. 511, and *Berry v. Knights Templar, etc., Co.*, 46 Fed. Rep. 439, which sustains validity of statute making void a condition of forfeiture for suicide.

³ *Mutual Life Ins. Co. v. Leubrie* (1896), 71 Fed. Rep. 843; *Michigan, etc., Ins. Co. v. Naugle*, 130 Ind. 79; *Breasted v. Farmers', etc., Co.*, 8 N. Y. 299; *Phadenhauer v. Germania Ins. Co.*, 7 Heisk. 567; *Phillips v. Louisiana Ins. Co.*, 26 La. Ann. 404; *Connecticut Ins. Co. v. Groom*, 86 Pa. St. 92; *Schultz v. Ins. Co.*, 40 Ohio St. 217; *Life Ins. Co. v. Terry*, 15 Wall. 580; *Insurance Co. v. Haven*, 95 U. S. 242; *Manhattan Ins. Co. v. Broughton*, 109 U. S. 121; 21 Central Law Journal, 378; *Northwestern Ins. Co. v. Hazlett*, 105 Ind. 212; *Equitable, etc., Society v. Paterson*, 41 Geo. 338; *Mallory v. Travellers' Ins. Co.*, 47 N. Y. 52; *Penfold v. Universal Ins. Co.*, 85 N. Y. 317; *Edwards v. Travellers' Co.*, 20 Fed. Rep. 661.

⁴ *Bigelow v. Berkshire, etc., Ins. Co.*, 93 U. S. 284; *Pierce v. Travellers', etc., Ins. Co.*, 34 Wis. 389.

⁵ *Bigelow v. Berkshire Ins. Co.*, 93 U. S. 284; *Barradaile v. Hunter*, 5 Man. & Gr. 639.

the stipulation touching the sale of liquor should be inserted in the conveyance, it was held that the conveyance should contain such condition, and that the sale of liquor should be enjoined until the party should accept such a conveyance.¹ Where a written option is given to sell certain real estate for a specified price, conditioned that the purchaser will pay his note given to the vendor for merchandise within six months, and also pay the purchase price within a given time, it is a condition precedent that the note be paid within the time before the offer of sale can be accepted.² In contracts for the sale of land, the conveyance of the estate and the payment of the purchase-money are, in general, concurrent acts and dependent promises; whether a particular day be appointed for completion or not; and readiness and willingness to complete on either side is a condition precedent to liability to complete on the other.³ Under such contracts the vendor can recover the purchase price when he tenders a deed of the land.⁴

§ 94. Condition of arbitration—Waiver.—A provision in a contract for the payment of money upon a contingency that the amount to be paid shall be submitted to arbitration, and that such award shall be final as to that amount, is a valid stipulation.⁵ And there are many cases which hold that, if the contract further provides that no action shall be main-

¹ *Bad River Lumbering Co. v. Kaiser*, 82 Wis. 166.

² *Schiels v. Horback*, 30 Neb. 536; 46 N. W. Rep. 629.

³ *Marsden v. Moore*, 4 H. & N. 500; *Manby v. Cremonini*, 6 Ex. 808; *Laird v. Pim*, 7 M. & W. 474; *Heard v. Wadham*, 1 East, 619; *Gilman v. Brown*, 1 Mason, 191; *Ransom v. Brown*, 63 Tex. 188; *Baum v. Grigsby*, 21 Cal. 172; *Bayley v. Greenleaf*, 7 Wheat. 46; *Phillips v. Skinner*, 6 Bush, 662; *McDole v. Purdy*, 23 Iowa, 277.

⁴ *Banbury v. Arnold*, 91 Cal. 606; *Smith v. Mohn*, 87 Cal. 489, an averment that the vendor duly performed all of the conditions of the contract to be performed by him up to the time of bringing suit is a sufficient averment of

the performance of conditions precedent; *Wilcoxson v. Stitt*, 65 Cal. 596; *Lyman v. Gedney*, 114 Ill. 388; *Boston v. Nichols*, 47 Ill. 353; *Lynch v. Jennings*, 43 Ind. 276. Of course in case the vendor recovers the price this operates as a specific performance. The proceeding to recover the price where a deed is tendered is an equitable suit by vendor for specific performance. See *Beach on Modern Equity Jurisprudence*, § 566 *et seq.*, where many cases are collected.

⁵ *Wood on Insurance*, p. 757; *May on Insurance*, § 493; *Wolf v. Liverpool Ins. Co.*, 50 N. J. Law, 453; 14 Atl. Rep. 561; *United States v. Robeson*, 9 Pet. 319.

tained upon it until after such an award, then the award becomes a condition precedent to the right of action.¹ But when no such condition is expressed in the contract, or can be necessarily implied from its terms, the authorities are agreed that the provision for submitting the amount to arbitration is collateral and independent; that, while a breach of such condition will support a separate action, it can not be pleaded in bar to an action on the principal contract.² There is some conflict in the authorities as to when such conditions are precedent or merely optional.³ But the authorities are agreed that whether such conditions be absolute and precedent, or merely optional, they may be waived. Thus in an action on a policy providing that, in case of disagreement as to the loss, it should be ascertained by appraisers, and that no action should be maintained until after full compliance with the policy, it appeared that, the appraisers having failed to agree, the company adjusted the loss, and requested plaintiffs to make proof thereof in such amount, which request was complied with. It was held a waiver by the company of the provisions for appraisal.⁴

§ 95. Vendor and purchaser.—In the absence of an express stipulation to the contrary, it is not a condition precedent that the vendor furnish an abstract of title. In America, contrary

¹ *Hamilton v. Liverpool Ins. Co.*, 136 U. S. 242; 10 Sup. Ct. 945; *Martinsburgh, etc., R. Co. v. March*, 114 U. S. 549; 5 Sup. Ct. 1025; *United States v. Robeson*, 9 Pet. 319.

² *Hamilton v. Home Ins. Co.*, 137 U. S. 370; 11 Sup. Ct. 133.

³ *Kahnweiler v. Phoenix Ins. Co.*, 57 Fed. Rep. 562; *Wright v. Susquehanna, etc., Ins. Co.*, 110 Pa. St. 29; 20 Atl. Rep. 716; *Nurney v. Fireman's, etc., Ins. Co.*, 63 Mich. 633; 30 N. W. Rep. 350; *Phoenix Ins. Co. v. Badger*, 53 Wis. 283; 10 N. W. Rep. 504; *Wood on Insurance*, § 1015.

⁴ *Manchester Assur. Co. v. Koerner* (Ind. 1895), 40 N. E. Rep. 1110, per Lotz, J.: "In the policy before us, arbitration is not made absolute in the first instance. It is only when the

parties fail to agree that it must be resorted to. Whether or not arbitration became a condition precedent to the right to maintain the action on the failure to agree we need not determine. It appears from the averments that no award was made. It does not appear who was responsible for the failure of the arbitrators to agree or make an award; but it does appear that, after the failure of the arbitrators to agree, the company adjusted the loss on the building, and prorated a part to the policy in suit, and requested the plaintiffs to make proof of their loss in that amount, which the plaintiffs did. These facts, we are of the opinion, constitute a waiver of the arbitration."

to the English rule, the purchaser furnishes his own abstract from the public records.¹ After a conveyance the vendor can sue at law to recover the purchase price.² And the mere recital of the receipt of the purchase price in the conveyance is not contractual in its character, and is only *prima facie* evidence of the payment of the purchase-money, which may be rebutted by parol evidence.³ If a purchaser secures possession of a deed by fraud and claims under it, the vendor may ratify the deed and bring an action for the purchase price.⁴ As long as a contract for sale of land remains executory, a purchaser may reclaim the money that he has paid for the property if the title proves defective, or he may defend against a claim for the purchase-money. But when it is once executed and the deed delivered, then the purchaser has received full consideration for his promise. That consideration is such title as the vendor can convey to him, and no other, and he is absolutely without remedy either at law or in equity, unless the deed contains covenants of title. He can not reclaim money that he has paid and he can not defend against a claim for the purchase price.⁵ Thus where the purchaser sought to recoup against the purchase note "damages to the title to the wharf property by the cloud placed on it by the late decision of the supreme court" it was held no proper matter of counter-claim.⁶ Where "at the time of the purchase of a piece of real estate it was contemplated by the purchaser that certain municipal improvements then going on might cause damage to the property; therefore a conditional note for part of the purchase-money was given, payable, 'provided no damage be done' to the property at any time prior to a specified date," it was held that it was incumbent on the vendor to show affirmatively that no damage was done to the property by the improvements; that

¹ Easton v. Montgomery, 90 Cal. 307; Carr v. Roach, 2 Duer, 20; Espy v. Anderson, 14 Pa. St. 308; Warvelle on Vendors, 291.

² Smith v. Arthur, 110 N. C. 400; Laird v. Pim, 7 M. & W. 474.

³ Smith v. Arthur, 110 N. C. 400; Barbee v. Barbee, 108 N. C. 581; Rice v. Carter, 11 Ired. 298; Choat v.

Wright, 2 Dev. 289; Warvelle on Vendors, Ch. 34.

⁴ Smith v. Arthur, 110 N. C. 400.

⁵ Bletz v. Willis, 19 D. C. 449; Refeld v. Woodfolk, 22 How. 318; Noonan v. Lee, 2 Black, 499; Patton v. Taylor, 7 How. 132.

⁶ Bletz v. Willis, 19 D. C. 449.

if damage was done, but on the whole the property was increased in value at the expiration of the period during which the note was to run, the plaintiff, the vendor, was entitled to recover, and the general rise of property in the neighborhood was not to be considered in deciding whether the property was really damaged or benefited.¹ If the purchase-money is to be paid upon an appointed day, and the time appointed for the conveyance will not, or may not, arrive until after that day, the conveyance is not a condition precedent to the payment, and it is sufficient that the vendor be able and willing to convey according to the contract to entitle him to claim the purchase-money.²

§ 96. Sales of goods.—In executing contracts for the sale of goods the delivery of the goods and payment of the price are presumptively intended to be concurrent acts. The law is that nothing to the contrary appearing the presumption is that a cash sale is intended.³ Readiness and willingness on both sides at the proper time for completion to perform their respective parts of the contract are mutual conditions precedent.⁴ It is not necessary that the buyer should actually tender the money, or that the seller should tender the goods, in order to satisfy the condition of readiness and willingness to complete.⁵ But if the contract expressly provides that payment is to be after delivery, an actual delivery, and not mere readiness and willingness to deliver, is a condition precedent.⁶

¹ *Bletz v. Willis*, 19 D. C. 449.

² *Porlage v. Cole*, 1 Wms. Saun. 319i; *Yates v. Gardiner*, 20 L. J. Ex. 327; *Dicker v. Jackson*, 6 C. B. 103.

³ *Whitman, etc., Assoc. v. National, etc., Assoc.*, 45 Mo. App. 90; *Southwestern Cotton Press Co. v. Stanard*, 44 Mo. 71; *Morris v. Rexford*, 18 N. Y. 552; *Palmer v. Hand*, 13 John. 434; *Haggerty v. Palmer*, 6 John. Ch. 437; *Keeler v. Field*, 1 Paige, 312; *Fletcher v. Cole*, 23 Vt. 114; *Ryder v. Hathaway*, 21 Pick. 298. See Benjamin on Sales, title "Payment," Bennett's ed.

⁴ Benjamin on Sales (6 Am. ed. Bennett), § 707, and cases cited.

⁵ *Aultman v. Henderson*, 32 Ill. App. 331; *Hull v. Pitrat*, 45 Fed. Rep. 94; *Upham Manufacturing Co. v. Sanger*, 80 Wis. 34; 49 N. W. Rep. 28; *Bolling v. Kirby*, 90 Ala. 215; 7 So. Rep. 914; *Thompson v. Leslie*, 14 N. Y. Supl. 472; *Morgan v. East*, 126 Ind. 42; *Daugherty v. Fowler*, 44 Kan. 628; *Byam v. Hampton*, 57 Hun, 585; 10 N. Y. Supl. 372; *Waterhouse v. Skinner*, 2 B. & P. 447; *Boyd v. Lett*, 1 C.B. 222; *Rawson v. Johnson*, 1 East, 203; *Jackson v. Allaway*, 6 C. B. 942.

⁶ *Eppens v. McGrath*, 3 N. Y. Supl. 213; Benjamin on Sales (Bennett's 6 Am. ed.), § 677.

§ 97. **The same subject continued.**—Where personal property is contracted to be sold upon condition that it shall be delivered at a particular place, it is subject to attachment at the suit of the creditors of the vendor until it is delivered in accordance with the condition of the contract.¹ And where property is sold on approval it is a condition precedent that the buyer signify his approval before the title passes.² Where goods are sold by weight they must be weighed before delivery and no delivery can take place sufficient to pass title till they are weighed, although the duty of weighing is on the buyer.³ And where goods are to be delivered at a particular place by the seller, delivery to a carrier to take to that place is delivery to him as the seller's bailee or agent to perform for him the act of delivery in execution of his contract. Meanwhile and until delivery is consummated in such a manner as to be effectual between seller and buyer, the goods are at seller's risk.⁴ In a contract of sale by sample it is a condition precedent implied that the buyer shall have a fair opportunity, by examining the goods, to satisfy himself that they are in accordance with the contract.⁵ And under a shipment of goods by a carrier the consignee is entitled to inspect and examine the goods to ascertain whether they correspond with the invoice, and to a reasonable time within which to receive and remove the goods. For that purpose a reasonable time within usual business hours must be allowed, and during that period the liability of the carrier as carrier remains undischarged.⁶

¹ *Johnson v. Bailey*, 17 Colo. 59.

² *Glasscock v. Hazell*, 109 N. C. 145.

³ *Ross v. Hannan*, 19 Can. S. C. R. 227.

⁴ *McNeal v. Braun*, 53 N. J. Law, 617; *Benjamin on Sales* (Bennett's Ed.), § 566.

⁵ *McNeal v. Braun*, 53 N. J. Law, 617; *Benjamin on Sales*, § 910; *Ishewood v. Whitmore*, 11 M. & W. 347; *Startup v. MacDonald*, 6 C. B. 593; *Croninger v. Crocker*, 62 N. Y. 151.

⁶ *McNeal v. Braun*, 53 N. J. Law, 617; *Bradstreet v. Heron*, Abb. Adm.

209; *Salmon Falls Co. v. Bark Tanger*, 1 Clifford, 396; *Dibble v. Morgan*, 1 Wood, 406; *The Tybee*, 1 Wood, 358; *The Barque Iddo Kimball*, 8 Ben. 297; *The Eddy*, 5 Wall. 481; *Price v. Powell*, 3 N. Y. 322; *Dunham v. Boston & A. R. Co.*, 46 Hun, 245; *Miller v. Steam Navigation Co.*, 10 N. Y. 431; *Hedges v. Hudson R. Co.*, 6 Robt. 119; *Moses v. Boston & M. R. Co.*, 32 N. H. 23; *Graves v. Hartford Steamboat Co.*, 38 Conn. 143; *Richardson v. Goddard*, 23 How. 28; *Bourne v. Gatcliffe*, 3 M. & G. 643.

§ 98. **Sale of goods to arrive.**—Contracts for the sale of goods are sometimes expressed to be made subject to the terms “to arrive by,” or “on arrival by,” or “expected to arrive by,” a certain ship named. It has uniformly been held that contracts of this description are conditional, the words “to arrive,” or other equivalent words, not importing a warranty that the goods will arrive, and the obligation to perform the contract by an actual transfer of the property being therefore, in the absence of other words showing a contrary intent, contingent upon its arrival. The condition is a double one, the arrival of the ship, with the goods on board.¹ The words “to arrive” and “on arrival” are synonymous terms.² If the ship has goods on board consigned to another person, but of the same description, the condition is not satisfied and there is no sale.³ The goods must answer the description, and if they do not substantially do this, although of the kind and quantity, the buyer may reject.⁴ If the buyer takes any portion and consumes it before discovering that the goods are not the same in quality bargained for, while he may rescind the contract, he must pay for the portion consumed.⁵ This rule has been applied in Ohio⁶ and New Jersey⁷ in leading and illustrative cases. In the former case there was a sale of salt “to arrive by the 15th of November.” This was held to create a condition precedent, that if the salt did not arrive there was no sale, although not to come by ship. The latter case exempts the seller who contracted to deliver coal “provided he could secure it” from a railroad company by a certain date. His failure to obtain it within the time was a defense.

§ 99. **The same subject continued.**—But where the language of the contract asserts the goods to be on board of the vessel

¹ *Rogers v. Woodruff*, 23 Ohio St. 632; *Shields v. Pettee*, 2 Sand. 262; *Russell v. Nicoll*, 3 Wend. 112; *Boyd v. Siffkin*, 2 Camp. 326; *Idle v. Thornton*, 3 Camp. 274; *Lovatt v. Hamilton*, 5 M. & W. 639; *Alewyn v. Pryor*, *Ryan & Moody*, 406; *Benedict v. Field*, 16 N. Y. 595.

² *Johnson v. Macdonald*, 9 M. & W. 600.

³ *Garrissen v. Perrin*, 2 C. B. (N. S.) 681.

⁴ *Shields v. Pettee*, 2 Sandf. 262; *Vernede v. Weber*, 1 H. & N. 311.

⁵ *Shields v. Pettee*, 2 Sandf. 262.

⁶ *Rogers v. Woodruff*, 23 Ohio St. 632.

⁷ *Nelson v. Smith*, 36 N. J. Law, 148.

named, there is a warranty that the goods are on board, and if the vessel arrives, the seller's duty to deliver is fixed. Thus a sale of goods described as "now on passage and expected to arrive by" a named ship, is an absolute contract to deliver such goods upon arrival of the ship.¹ A sale of goods "on arrival of" a ship named is an absolute one, and must be complied with, although the goods are not on board.² In sales of goods "to arrive" the condition is often made that the vendor shall give notice of the name of the ship on which the goods are expected to arrive as soon as it becomes known to him; the naming of the ship is then a condition precedent to the liability of the buyer to accept the goods.³ In contracts to ship a cargo of sugar where the amount of the cargo is specified to be from seven hundred to eight hundred tons, the sellers, the price of sugar having advanced after the sale, may select the alternative which is the least burdensome to themselves, and deliver seven hundred tons, only, although the vessel was loaded with eight hundred and forty-nine tons.⁴

§ 100. Architect's or engineer's certificate of approval.—

An architect's or engineer's certificate of approval is often made a condition precedent to the payment of work done. And when this is so, the procurement of the certificate required by the contract is necessary to sustain a claim for compensation.⁵ But if the architect refuse to give to the contractor his certificate, as required, if based upon an unreasonable requirement, then the owner can not justify a refusal to pay for

¹ *Garrissen v. Perrin*, 2 C. B. (N.S.) 681.

² *Dike v. Reitlinger*, 23 Hun, 241; *Hale v. Rawson*, 4 C. B. (N. S.) 85.

³ *Busk v. Spence*, 4 Camp. 329, holding a delay of eight days after knowledge of name by vendor discharged buyer from contract; *Graves v. Legg*, 9 Exch. 709; *Gilkes v. Leonino*, 4 C. B. (N. S.) 485.

⁴ *Standard Sugar Refinery v. Castano*, 43 Fed. Rep. 279.

⁵ *O'Brien v. Mayor, etc., of New*

York, 47 N. Y. St. R. 258; *Crouch v. Gutman*, 45 N. Y. St. R. 470; *Ohio and Mississippi R. Co. v. Crumbo*, 4 Ind. App. 456; 30 N. E. Rep. 434; *Roy v. Boteler*, 40 Mo. App. 213; *Neenan v. Donoghue*, 50 Mo. 493; *Yeats v. Balentine*, 56 Mo. 530; *Dinsmore v. Livingston Co.*, 60 Mo. 241; *McCone v. Williams*, 37 Ill. App. 591; *Michaelis v. Wolf*, 136 Ill. 68; 26 N. E. Rep. 384; *Barney v. Giles*, 120 Ill. 154; *Lloyd's Law of Building and Buildings*, § 20, and cases cited.

lack of a certificate.¹ And an unreasonable refusal by the architect to give the certificate will dispense with its production.²

§ 101. The same subject continued—Illustrations.—The certificate must be substantially such as the contract calls for. Where the contract requires the certificate to show that the job has been completed to the satisfaction of the architects, a certificate only stating the balance due the contractor is insufficient.³ A mere payment is no waiver. Thus where payments were made without requiring the certificate, this was held no waiver of the certificate for the remaining installments;⁴ and the certificate is not conclusive on the owner who may dispute its correctness as to amount due.⁵ Where the contract gives the owner the election to finish the building at the contractor's expense in case of his refusal to complete the work, if the owner elects to complete the work, the contractor is entitled to the certificate of the architect.⁶ The certificates must be for each payment, although the building is completed. Thus where there was to be payment in six installments, the last two to be made after the completion of the building, obtaining a certificate for the fifth installment does not do away with the necessity

¹ *Thomas v. Stewart*, 132 N. Y. 580; 248; *Brown v. Winehill*, 3 Wash. St. Flaherty v. Miner, 123 N. Y. 382; 524; *Linch v. Paris Lumber Co.*, 80 Smith v. Alker, 102 N. Y. 87; Nolan Texas, 23; 14 S. W. Rep. 701; 15 S. v. Whitney, 88 N. Y. 648; Bowery, W. Rep. 208; *Anderson v. Imhoff*, 34 etc., *Bank v. Mayor*, 63 N. Y. 339; Neb. 335; 51 N. W. Rep. 854.

² *Flaherty v. Miner*, 123 N. Y. 382, where the jury was permitted to say as a question of fact whether the refusal to give the certificate was justified. *Davis v. Badders*, 95 Ala. 348; 10 So. Rep. 422; *McCone v. Williams*, 37 Ill. App. 591; *Keating v. Nelson*, 33 Ill. App. 357; *Thomas v. Fleury*, 26 N. Y. 26; Bowery, etc., *Bank v. Mayor*, 63 N. Y. 339; *Nolan v. Whitney*, 88 N. Y. 648; *Smith v. Alker*, 102 N. Y. 87; *Doll v. Noble*, 116 N. Y. 230; *Thomas v. Stewart*, 132 N. Y. 580; *Highton v. Dessau*, 19 N. Y. Supl. 395; *Braun v. Winans*, 37 Ill. App.

³ *Roy v. Boteler*, 40 Mo. App. 213; *Michaels v. Wolf*, 136 Ill. 68. But the form of the certificate is not essential. *O'Brien v. New York*, 15 N. Y. Supl. 520, and a parol approval will satisfy the condition of a certificate unless a written one is expressly stipulated for. *Roberts v. Watkins*, 14 C. B. (N. S.) 592.

⁴ *Brown v. Winehill*, 3 Wash. St. 524.

⁵ *Schuler v. Eckert*, 90 Mich. 165; 51 N. W. Rep. 198.

⁶ *Crouch v. Gutman*, 45 N. Y. S. R. 470.

to obtain one for the sixth installment.¹ If the contractor destroys or returns a certificate he must obtain another before he can recover.² The owner may show negligent performance in the work despite the certificate to the contrary.³ Where a certificate is necessary to obtain part payment as the work progresses, this is not construed to mean that the certificate is necessary to obtain final payment upon completion.⁴ Where the owner is charged with the duty of obtaining the certificate the lack of the certificate is no defense.⁵ Where the board of public improvements are charged with the duty of inspecting the work and certifying it in a street paving contract, their certificate of approval is conclusive on the city.⁶ And when an architect is made judge between the parties, by the articles of contract, his decision and certificate are final in the absence of fraud or gross mistake.⁷ But his decision is not an arbitration, and the certificate is not an award.⁸

§ 102. The same subject continued.—In a well considered Massachusetts case, where a building contract provided that the payments should be made on the architect's certificate, and that the second payment would be due when all the work was completed, and the final payment thirty days later, with the further stipulation that no certificate given, except that for the final payment, should be conclusive evidence of the performance of the contract, it was held that a certificate for the second payment did not dispense with the necessity for the final certificate, and that one who assumes a building contract, and agrees to pay all sums due or to become due from

¹ *Michaelis v. Wolf*, 136 Ill. 68.

² *Bournique v. Arnold*, 33 Ill. App. 303.

³ *Davidson v. Provost*, 35 Ill. App. 126; *Bond v. Mayor, etc., of Newark*, 19 N. J. Eq. 376; *Newman v. Fowler*, 37 N. J. Law, 89. See article on conclusiveness of architects' certificates in 5 *Lawyers' Rep. Ann.* 270.

⁴ *Braun v. Winans*, 37 Ill. App. 248.

⁵ *McKone v. Williams*, 37 Ill. App. 591.

⁶ *Fitzgerald v. Walker*, 55 Ark. 148.

⁷ *Crumlish v. Wilmington R. Co.*, 3 Del. Ch. 270; *Ewing v. Fiedler*, 30 Ill. App. 202; *St. Paul R. Co. v. Bradbury*, 42 Minn. 222; 44 N. W. Rep. 1; *Sweet v. Morrison*, 116 N. Y. 19; *Langdon v. Northfield*, 42 Minn. 464; 44 N. W. Rep. 984; *Kennedy v. United States*, 24 Ct. Cl. 122; *Sanders v. Hutchinson*, 26 Ill. App. 633.

⁸ *Wadsworth v. Smith*, L. R. 6 Q. B. 332; *Sharpe v. San Paulo R. Co.*, L. R. 8 Ch. 597.

the owner thereunder, "according to the tenor thereof," is entitled to the benefit of a provision in the contract that the final payment would not be due till thirty days after the completion of the work, and would be paid only on the certificate of the architect, although the work was completed when the contract was assumed, and the agreement to assume stated that there was then due a sum of money from the owner to the contractor.¹

¹ *Beharrell v. Quimby* (1895), 162 Mass. 571; 39 N. E. Rep. 407, per Allen, J.: "The several payments were to be made 'provided that in each of the said cases the architect shall certify in writing that all the work upon the performance of which the payment is to become due has been done to his satisfaction.' 'No certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, against any claim of the owner.' The owner 'hereby contracts to pay the same at the time, in the manner, and upon the conditions above set forth.' No later certificate was given than that for the second payment. The plaintiff therefore was not entitled to recover, against Orcutt, the final payment, unless sufficient reason or excuse for not furnishing such a certificate was shown. What would amount to such sufficient reason or excuse has been often considered, both in England and in this country, as appears by the authorities cited for the plaintiff and for the defendant, to which may be added *Clarke v. Watson*, 18 C. B. (N. S.) 278; *Batterbury v. Vyse*, 2 Hurl. & C. 42; *Nolan v. Whitney*, 88 N. Y. 648; *United States v. Robeson*, 9 Pet. 319, 327. *Hudson on Building Contracts*, 265, 297-301; The plaintiff contends that there was evidence from which the court would

have been amply justified in finding that the provision requiring a certificate, if it ever constituted a condition precedent, had been waived, and also that the evidence showed that the certificate had been wrongfully and fraudulently withheld. All that is open to us on this part of the case is to determine whether, at the trial, and upon the evidence introduced,—that is, upon the auditor's report,—the presiding justice was bound to find that there was a sufficient reason or excuse for not producing such a certificate. He found for the defendant; and his finding must stand unless we can say, upon the evidence, that it was wrong. There was evidence which certainly tended to show that the architect might well have given a final certificate; that he changed his mind, to some extent, shortly after giving the certificate for the second payment; and that he wrongfully withheld it. There was also some evidence of circumstances tending more or less to show that Orcutt interfered to prevent the architect from giving the final certificate, and, if this latter proposition had been made out, the plaintiff, clearly, would have been relieved from the necessity of producing such a certificate. Whether such a result would follow from the mere wrongful refusal of the architect alone is a question upon which, elsewhere, there has been some difference of opinion. *Hudson on Building Con-*

§ 103. Promise conditional upon approval of promiser.—A contract may be made to pay for work upon condition of the work being done to the satisfaction or approval of the promiser.¹ Thus where one contracts to work for a year provided his work is to the satisfaction of the employer, he may be discharged at any time without the need of the employer assigning any reason therefor.² And where the object of the contract is to gratify taste, serve personal convenience, or satisfy individual preference, the party for whom the work is done may properly determine for himself whether it shall be accepted. Thus where a tailor agreed to make a satisfactory suit of clothes and they were rejected as not satisfactory, no recovery was allowed.³ A sculptor who agrees to make a bust to the

tracts, 301; *Nolan v. Whitney*, 88 N. Y. 648. We need not now determine it. There was nothing to show that the plaintiff ever asked the architect to give a final certificate, or complained to Orcutt that the architect was acting unfairly. The report of the auditor upon this whole subject is rather vague and unsatisfactory, but it was accepted by the parties, and neither of them offered to produce further evidence, except that of the documents. The certificate for the second payment was dated April 16, 1892, but the auditor reports that it was given April 23, 1892. The action was begun May 31, 1892. It is stated that at the hearing before the auditor the architect did not appear, and that it was admitted that he had been absent from Lowell, in parts unknown, for several months. We have no means of knowing the date of the hearing before the auditor. There is no averment or suggestion, and we can not infer that the architect went away before the commencement of the action. The auditor expressly finds that it was not alleged or proved that the architect had fraudulently or capriciously withheld a final certificate, and, although he reports some facts tending to show the con-

trary, yet they are not conclusive, and they do not enable us to say, as matter of law, that a sufficient reason or excuse for failing to produce a final certificate from the architect was made out. Nor were the payments which were made to be deemed, as matter of law, a waiver of a further certificate."

¹ *Doll v. Noble*, 116 N. Y. 230; *Russell v. Allerton*, 108 N. Y. 288; *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387; *Church v. Shanklin* (1892), 95 Cal. 626; *Brown v. Foster*, 113 Mass. 136; *Gibson v. Cranage*, 39 Mich. 49; *Hartford, etc., Manufacturing Co. v. Brush*, 43 Vt. 528.

² *Spring v. Ansonia Clock Co.*, 24 Hun, 175.

³ *Brown v. Foster*, 113 Mass. 136: "If the plaintiff saw fit to do work upon articles for the defendant and to furnish the materials therefor, contracting that the articles when manufactured should be satisfactory to the defendant, he can recover only upon the contract as it was made; and even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other to reject them as unsatisfactory." *Per De-wees, J.*

satisfaction of a buyer can not recover, even where its rejection is caused by unreasonable dissatisfaction, and although the bust is a masterpiece.¹ A painter or artist, if he agrees to paint a picture to one's satisfaction, has no cause of action for the price unless the buyer is satisfied, however good the picture is.² A contract to employ an agent for a year, if he "could fill the place satisfactorily," may be terminated by the employer when in his judgment the agent fails to meet that requirement.³

§ 104. Right of approval to be exercised reasonably. —

Where the object of the contract is not to gratify taste, or satisfy individual preference, a recovery can not be defeated by arbitrarily and unreasonably declaring that the work is not done to the satisfaction of the promiser.⁴ Thus, where the contract provided that the work was to be done in the best workman-like manner to the entire satisfaction of the owner, it was held that the mechanic could recover, although the owner was dissatisfied, if he should have been satisfied.⁵ A charter party provided that the ship owners should furnish ventilation to the approval of the charterer, a cattle shipper. This did not confer upon the charterer the right to refuse to load, if all that could reasonably be required for ventilation was furnished, merely because he elected arbitrarily not to approve.⁶ A contract provided that a passenger elevator "warranted sat-

¹ *Zaleski v. Clark*, 44 Conn. 218.

² *Gibson v. Cranage*, 39 Mich. 49; *Hoffman v. Gallaher*, 6 Daly, 42.

³ *Tyler v. Ames*, 6 Lans. (N. Y.) 280, and for further instances see the following cases: *McCarren v. McNulty*, 7 Gray, 139; *Moore v. Goodwin*, 43 Hun, 534; *Singerly v. Thayer*, 108 Pa. St. 291; *Hartman v. Blackburn*, 7 Pittsburgh Leg. Jour. 140, where a dentist agreed to furnish a satisfactory set of teeth; *Gray v. Central R. Co.*, 11 Hun, 70, the case of a steamboat; *McClure v. Briggs*, 58 Vt. 82, where an organ was allowed to be rejected.

⁴ *Doll v. Noble*, 116 N. Y. 230; *Russell v. Allerton*, 108 N. Y. 288; *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387; *Silsby Manfg. Co. v. Chi-*

co, 24 Fed. Rep. 893; *Wood, etc., Machine Co. v. Smith*, 50 Mich. 565; *Singerly v. Thayer*, 108 Pa. St. 291; *McClure v. Briggs*, 58 Vt. 82; *Varian v. Johnston*, 108 N. Y. 645; *Sinclair v. Tallmadge*, 35 Barb. 602; *Smith v. Brady*, 17 N. Y. 173; *Johnson v. DePeyster*, 50 N. Y. 666; *Phillip v. Gollant*, 62 N. Y. 256; *Woodward v. Fuller*, 80 N. Y. 312; *Nolan v. Whitney*, 88 N. Y. 648; *Bowery Bank v. Mayor*, 63 N. Y. 336; *Smith v. Alker*, 102 N. Y. 87.

⁵ *Doll v. Noble*, 116 N. Y. 230.

⁶ *Russell v. Allerton*, 108 N. Y. 288, and it is not necessary to show that the shipper's refusal to load was in actual bad faith.

isfactory in every respect" should be put in a building. The elevator can not be rejected for mere caprice.¹ Where the purchaser is in fact satisfied, but fraudulently and in bad faith declares that he is not satisfied, there is a fulfillment of the contract on the part of the workman.² Where the contract called for the erection of a furnace in a good and workman-like manner, and to guarantee the furnace to work "satisfactorily" in melting iron, the word "satisfactorily" as used in the contract does not mean that the workman obligates himself, in erecting the furnace, to satisfy any whim or caprice of the other party, but it means that he should do the work reasonably well.³ And generally in contracts which provide for work to be done to the satisfaction of one party, such satisfaction is not an arbitrary or capricious one. It has its measure by which it can be fulfilled. That which the law shall say a contracting party ought, in reason to be satisfied with, that the law will say he is satisfied with. "The law will determine for the defendant when he ought to be satisfied."⁴

¹ *Singerly v. Thayer*, 108 Pa. St. 291. In this case it was held that the words "warranted satisfactory in every respect" meant the promiser's satisfaction; that is, the buyer.

² *Silshy Manfg. Co. v. Town of Chico*, 24 Fed. Rep. 893, and to show the party's satisfaction, his declarations admitting satisfaction are admissible.

³ *Pope Iron Co. v. Best*, 14 Mo. App. 502. This case also holds that the meaning of the term "satisfactorily" when used alone is satisfactory to a reasonable and fair-minded man, who is an expert in such matters, which meaning is rejected by the following cases and held to mean satisfactory to plaintiff: *Campbell Printing Co. v. Thorp*, 36 Fed. Rep. 414; *Taylor v. Brewer*, 1 Maule & Selw. 290; *McCormick, etc., Machine Co. v. Chesrown*, 33 Minn. 32; *Singerley v. Thayer*, 108 Pa. St. 291.

⁴ *Folliard v. Wallace*, 2 Johns. 395, per Kent, Ch. See following cases where the question was raised as to

whether or not the defendant capriciously refused to be satisfied. *Logan v. Berkshire Assn.*, 18 N. Y. Supl. 164; *Stockton, etc., R. Co. v. Stockton*, 51 Cal. 328; *Wood v. Strother*, 76 Cal. 545; *People v. Alameda Co.*, 45 Cal. 395; *Heron v. Davis*, 3 Bosw. 336; *Exhaust Ventilator Co. v. Chicago, etc., R. Co.*, 66 Wis. 218, which holds, also, that the chattel must be properly tested and tried before the buyer can reject for dissatisfaction; *Manny v. Glendinning*, 15 Wis. 50; *Hartford, etc., Co. v. Brush*, 43 Vt. 528; *Daggett v. Johnson*, 49 Vt. 345. "Indeed, to such import are really all of the authorities, which hold simply that to be dissatisfied in such a case is sufficient reason to refuse the purchase; for to be dissatisfied is a fact, and must be a verity, and not a pretext. It is not 'I will not accept it—will not have it'—but—'It is not satisfactory,' or 'I am really and honestly dissatisfied with it.' This is implied in the very statement

§ 105. **Right of approval not to vary contract.**—But while there can be no refusal to pay for benefits received, or for work and labor done, by merely capriciously declaring that it is not to one's satisfaction, still the weight of authority is that the parties must stand to their contract as they have made it, and, if the one party has agreed to do something that shall be satisfactory to the other, he constitutes the latter the sole arbiter of his own satisfaction.¹ Thus, where the vendor of a harvesting machine gave a warranty that the contract of purchase should be of no effect unless the machine worked to the buyer's satisfaction, it was held that the purchaser had reserved the absolute right to reject the machine, and that his reasons for doing so could not be investigated.² The agreement was that a certain grain binder should do good work and "give satisfaction." It was held that, unless the defendant was satisfied with the machine, although it did good work, he was not bound to purchase.³ Where there was a guaranty that a corn binder would work satisfactorily, it was held that, in case, upon reasonable trial, it did not work satisfactorily, it was unnecessary to return it, but it was sufficient for the buyer, within a reasonable time, to notify the seller that it did not work to his satisfaction, and that he declined to accept it.⁴ The same ruling was made with regard to a steamboat;⁵ with regard to a machine for generating gas;⁶ with regard to a fanning mill;⁷ with regard to a passenger elevator;⁸ and the same rule was applied in the case of a printing press.⁹ Certain cases, however, establish a reasonable modification of this

of the principle," per Orton, J., in *Exhaust Elevator Co. v. Chicago, etc., R. Co.*, 66 Wis. 218.

¹ *White v. Randall*, 153 Mass. 394; *Campbell Printing Press Co. v. Thorp*, 36 Fed. Rep. 414; *Taylor v. Brewer*, 1 Maule & S. 290; *Rossiter v. Cooper*, 23 Vt. 522; *Tyler v. Ames*, 6 Lans. 280; *Spring v. Ansonia Clock Co.*, 24 Hun, 175; *Hart v. Hart*, 22 Barb. 606; *Ellis v. Mortimer*, 1 Bos. & P. (New R.) 257.

² *Wood, etc., Machine Co. v. Smith*, 50 Mich. 565.

³ *Plano Manufacturing Co. v. Ellis*,

68 Mich. 101; 35 N. W. Rep. 841. See, also, *Platt v. Broderick*, 70 Mich. 577; 38 N. W. Rep. 579.

⁴ *McCormick, etc., Machine Co. v. Chesrown*, 33 Minn. 32.

⁵ *Gray v. Central R. Co.*, 11 Hun, 70.

⁶ *Aiken v. Hyde*, 99 Mass. 183.

⁷ *Goodrich v. Van Nortwick*, 43 Ill. 445.

⁸ *Singerley v. Thayer*, 108 Pa. St. 291; *Howard v. Smedley*, 140 Pa. St. 81.

⁹ *Campbell Printing Press Co. v. Thorp*, 33 Fed. Rep. 414.

rule, to the effect that the dissatisfaction must be real, and not feigned, and that the party is not at liberty to say he is dissatisfied when, in reality, he is not.¹ The same cases, however, declare the rule that, while he is bound to act honestly, it is not enough to show that he ought to have been satisfied, and that his discontent was without good reason.²

§ 106. Limitations upon the right to reject.—But to permit a party under all circumstances to refuse to pay because dissatisfied and at the same time to retain the fruits of the agreement is an unwarrantable extension of the doctrine applied to machines or articles of manufacture which can be rejected. Therefore in all cases if the party relies upon dissatisfaction as a defense he must rescind the agreement and restore the *status quo*. If he does not do this, or is unable to, then he must be satisfied if in reason he ought to be. Thus, where a printing press was unable to be restored the buyer was precluded from setting up as a defense the fact of his dissatisfaction.³ A furnace after being built into a house is subject to a like rule, and the buyer's only remedy is to recoup for damages.⁴ But where a party having the power to rescind the contract and restore the chattel elects to keep it, he must pay the contract price and can not recoup damages, because of his failure to be satisfied therewith, in an action for the price.⁵

§ 107. Performance of conditions precedent.—Conditions precedent must be performed in order to make the conditional promise absolute. But after the one party has performed the contract in a substantial part, and the other party has accepted

¹ Hartford Manufacturing Co. v. Brush, 43 Vt. 528; Daggett v. Johnson, 49 Vt. 345; McClure v. Briggs, 58 Vt. 82; Exhaust Elevator Co. v. Chicago R. Co., 66 Wis. 218.

² See, also, Lynn v. Baltimore, etc., R. Co., 60 Md. 404; Baltimore, etc., R. Co. v. Brydon, 65 Md. 198; Silsby Manufacturing Co. v. Chico, 24 Fed. Rep. 893; and see the remarks of Mr. Justice Brown in Campbell Printing Press Co. v. Thorp, 36 Fed. Rep. 414, where all the cases are examined, and

the only ones at variance with the text are the New York cases where it is distinctly held that there must be cause for dissatisfaction. See cases collected in Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387.

³ Campbell Printing Co. v. Thorp, 36 Fed. Rep. 414.

⁴ Pope Iron Co. v. Best, 14 Mo. App. 502; Shupe v. Collender, 56 Conn. 489; 15 Atl. Rep. 405.

⁵ Campbell Printing Co. v. Thorp, 36 Fed. Rep. 414.

and had the benefit of the part performance, the latter may thereby be precluded from relying upon the performance of the residue as a condition precedent to his liability; in such case he must perform the contract on his part, and must rely upon his claim for damages in respect of the defective performance. "It is remarkable that according to this rule the construction of the instrument may be varied by matter *ex post facto*; and that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less. This is no objection to the soundness of the rule, which has been much acted upon. But there is often a difficulty in its application to particular cases, and it can not be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration, and the residue of the consideration has been had by the defendant. That residue must be the substantial part of the contract."¹

§ 108. The same subject continued—Illustrations.—Where a building is erected upon and becomes a part of the realty of the owner, and, although defective in some respects, is of real and substantial value to the owner, the contractor can recover the value of his work, less the damages to the other party, for a failure to comply with the terms of the agreement.²

¹Ellen v. Topp, 6 Exch. 424. See, also, Graves v. Legg, 9 Exch. 709; Behn v. Burness, 3 B. & S. 751; Oxford v. Provand, L. R. 2 P. C. 135; White v. Beeton, 7 H. & N. 42; Carter v. Scargill, L. R. 10 Q. B. 564; Ritchie v. Atkinson, 10 East, 295, where a ship owner having contracted to load a complete cargo, sailed with only part, it was held that the freighter must pay freight, and recover damages sustained by cross action. Glaholm v. Hays, 2 M. & G. 257, holding that conditions in charter-parties that the ship shall be ready for loading at a certain day or a certain place, which are originally conditions precedent to the obligation of the charterer to load are converted into mere subsidiary stipulations, remediable in damages, after

the loading and sailing of the ship; Havelock v. Geddes, 10 East, 555; Davidson v. Gwynne, 12 East, 381, holding that a promise to sail by the first convoy, although at first a condition precedent, was not such after the voyage had actually been performed, although not by the first convoy, and the freighter was held liable. Pust v. Dowie, 5 B. & S. 20.

²School District No. 2 v. Boyer, 46 Kan. 54; Barnwell v. Kempton, 22 Kan. 314; Duncan v. Barker, 21 Kan. 99; Usher v. Hiatt, 21 Kan. 548; The Aetna Iron Works v. Kossuth County, 79 Iowa, 40; Wolf v. Gerr, 43 Iowa, 339, contract to build a railroad; Jemison v. Gray, 29 Iowa, 537; McClay v. Hedge, 18 Iowa, 66; Pixler v. Nichols, 8 Iowa, 106; Carroll v. Welch, 26

§ 109. Further illustrations—Waiver.—A formal acceptance of the work, or an acquiescence in the breach, is not essential to recovery in a building contract. The benefits arising from the services rendered, the materials furnished, and labor performed in erecting the buildings, are the owner's without acceptance. He has no choice but to use and enjoy those benefits, although but a part performance of the contract. The benefits derived from the services he can not restore. The building becomes a part of the realty. And it is for these reasons that a recovery can be had on a *quantum meruit* where the contractor confers benefits on the owner, although he has not complied with his contract.¹ Where a person contracted to build a gas tank for a company, and complete it by a day specified, under a certain penalty per day for failure so to complete, provided the company would have the foundation ready by a day specified, it was held that the completion of the foundation by the company on the day mentioned was a condition precedent, in default of which the company could not

Texas, 147, "the doctrine of the earlier decisions to the effect that, where the contract in cases like the present is entire, the performance by the employe is a condition precedent, and he has no remedy until he has fully performed his part, is not now the recognized doctrine of this court. According to the modern decisions, and the decisions of this court, the rule appears to be, that if the employe abandons his contract, the employer shall be charged with only the reasonable worth, or the amount of benefit he has received upon the whole transaction." *Hillyard v. Crabtree*, 11 Texas, 264. Compare *Linch v. Paris Lumber Co.*, 80 Texas, 23; 14 S. W. Rep. 701; 15 S. W. Rep. 208; *Nelson Manufacturing Co. v. Mitchell*, 38 Mo. App. 321, building a boiler in a house; *Fleischmann v. Miller*, 38 Mo. App. 177, a valuable case. "It is plain that this was in the nature of a building contract, and that it is consequently governed by the rule in *Yeats v. Balentine*, 56 Mo. 530. Under this rule,

although the plaintiff may not have performed the contract precisely in accordance with the terms of the agreement, he can recover the reasonable value of the work done, less the damages which the defendant may have sustained through his failure to complete the contract in accordance with its terms," per Thompson, J., 181, and compare *Gruetzner v. Aude Co.*, 28 Mo. App. 263, and *Fox v. Pullman Co.*, 16 Mo. App. 122; *Gove v. Island City, etc., Co.*, 19 Ore. 363, excepts voluntary abandonment.

¹ *Aetna Iron Works v. Kossuth Co.* (1890), 79 Iowa, 40. *Contra*, *Elliott v. Caldwell*, 43 Minn. 357; holding that where a builder fails to complete, or completes in a manner not substantially conforming to the contract, the mere fact that it remains on the land, and the owner enjoys the benefit of it, he having no option to reject it, is not such an exception as will imply a promise to pay for it. *Allen v. Curles*, 6 Ohio St. 505.

claim the penalty as liquidated damages.¹ And where a bond is given towards the endowment of a professorship, the establishment and endowment of such professorship is not a condition precedent to the collection of the bond.² A stipulation in a bond to "secure" land for a railroad company for its depot requires the securing of a good title to the land, and the construction of a depot is not a condition precedent to the company's right to recover on the bonds for defendant's failure to secure the land.³ And a complaint alleging that, after plaintiffs became the owners of the note in suit, defendant admitted to them that it was due, and agreed that, in consideration of an extension of time for thirty days, he would pay it, and that he failed to do so, shows a waiver by defendant of the performance of a condition precedent in the note.⁴

¹ *Standard Gas Co. v. Wood* (1894), 61 Fed. Rep. 74. The promise to complete on November 15th, and to pay \$100 for each day's default thereafter, expressly hinged upon the gas company's completion of its part of the work by June 15th. When the condition upon which the promise depended was unperformed through the default of the gas company, the promise to complete by a certain day was no longer obligatory; but, if the contractors entered upon the work, they were under an obligation to finish within a reasonable time. The gas company had, by its default, waived or abandoned the right to call upon the contractors for strict performance as to time, who, if they entered forthwith upon the work, had the right to a reasonable time for performance. *Dannat v. Fuller*, 120 N. Y. 554; 24 N. E. Rep. 815; *Mansfield v. New York Cent. R. Co.*, 102 N. Y. 205; 6 N. E. Rep. 386; *Dermott v. Jones*, 23 How. 220. The evidence on the part of the defendants in error, that, having been thrown over into the winter in consequence of the gas company's delay, they were delayed from prompt completion of the work by the inclemency

of the weather, tended to show that they were complying with their duty as to time.

² *Barnett v. Franklin College*, 10 Ind. App. 103; 37 N. E. Rep. 427, per Reinhard, J.. "The endowment of the James Forsyth professorship, like the application of the funds, is a trust assumed by the acceptance of the bond, and such trusts, as we have already seen, may be enforced upon the failure of the trustee to perform them. That the performance of the trust is not a condition precedent, see *Northwestern Conference v. Myers*, 36 Ind. 375."

³ *Frey v. Fort Worth R. Co.*, 6 Texas Civil App. 29; 24 S. W. Rep. 950.

⁴ *Johnson v. Bucklen*, 9 Ind. App. 154; 36 N. E. Rep. 176, per Lotz, J.. "The performance of a condition precedent may be waived in many ways. A person who made a subscription to the capital stock of a railway company on the express condition that the road should be constructed on a certain line, and to within a certain distance of a given place, after the road had been constructed on another line, gave his note for the amount of his subscription. This was held to be a

§ 110. **Building contracts.**—There is great conflict and much confusion in the authorities upon the subject of the performance of building contracts. Some authorities hold that the contractor, in order to recover, must substantially perform his contract, and that if he fails in this regard he can not recover in any form of action for what he has done under the contract, no matter how beneficial it may be to the owner. Under this rule it is possible for a land-owner to contract for the erection of a building (the contractor after having built a portion of it abandoning the contract without excuse), and have the benefit of a partial performance without paying anything therefor. Such seems to be the weight of authority in America. This rule obtains in New York,¹ Ohio,² Massachusetts,³ New Hampshire,⁴ Michigan,⁵ Minnesota,⁶ Pennsylvania⁷ and California.⁸ In Illinois⁹ a substantially equivalent rule

waiver of the condition. *Evansville, etc., R. Co. v. Dunn*, 17 Ind. 603. Where money is stipulated to be paid upon a condition expressed, and subsequently a promissory note is given for the amount, payable without condition, the condition precedent is waived. *Swank v. Nichols*, 20 Ind. 198; *Swank v. Nichols*, 24 Ind. 199. See, also, *Hunter v. Leavitt*, 36 Ind. 141; *Masonic, etc., Association v. Beck*, 77 Ind. 203, 207. It was at the option of the pleader to aver performance of the condition precedent, or to aver a waiver of the condition. *Indiana Insurance Co. v. Capehart*, 108 Ind. 270, 273; 8 N. E. Rep. 285. We think the only purpose of the averments with reference to the extension of the time of the maturity of the note is to show that the appellant waived a strict performance of the condition. The facts alleged do constitute a waiver."

¹ *Flaherty v. Miner*, 123 N. Y. 382; *Whelan v. Ansonia Clock Co.*, 97 N. Y.

293; *Nolan v. Whitney*, 88 N. Y. 648; *Heckmann v. Pinkney*, 81 N. Y. 211; *Glacius v. Black*, 50 N. Y. 145.

² *Goldsmith v. Hand*, 26 Ohio St. 101; *Allen v. Curles*, 6 Ohio St. 505.

³ *Wiley v. Athol*, 150 Mass. 426. "It seems that the performance must be of a substantial part of the contract, and that the acceptance must be under such circumstances as to show that the party accepting knew, or ought to have known, that the contract was not being fully performed." *Per Field*, 436.

⁴ *Bailey v. Woods*, 17 N. H. 365, but *quære*. The same rule is not applied in cases of contracts for personal services. See *Britton v. Turner*, 6 N. H. 481.

⁵ *Scheible v. Klein*, 89 Mich. 376.

⁶ *Elliott v. Caldwell*, 43 Minn. 357.

⁷ *Moore v. Carter*, 146 Pa. St. 492.

⁸ *Harlan v. Stufflebeem*, 87 Cal. 508; *Griffith v. Happersberger*, 86 Cal. 605.

⁹ *Illingsworth v. Slosson*, 19 Ill. App. 612.

prevails. The same rule likewise obtains in Connecticut,¹ New Jersey,² Maryland,³ and Nevada.⁴

§ 111. **The result of the cases.**—In some of the states in which the contractor can not recover the value of his services, where he has failed substantially to comply with the contract, the courts have to some extent modified the hardship of this rule. The weight of authority is now clearly in favor of allowing compensation for services rendered and materials furnished under a special contract, but not in entire conformity with it, provided that the deviation from the contract was not willful, and the other party has availed himself of, and been benefited by, such labor and materials; and as a general rule the amount of such compensation is to depend upon the extent of the benefit conferred, having reference to the contract price for the entire work.⁵ In those states where it is necessary that the contractor should “substantially perform” the condition precedent, to wit, erect the building, before he can recover anything, substantial performance means that there has been no willful departure from the terms of the contract, and no omission of any of its essential parts, and that the contractor has in good faith performed all of its substantive terms. If so, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed. If the omission is so slight that it can not be regarded as an integral or substantive part of the original contract, and the other party can be compensated therefor by a recoupment for damages, the contractor does not lose his right of action; and this rule is peculiarly applicable in a case where the other party has received the benefit of what has been done, and is enjoying the fruits of the work.⁶

¹ *Smith v. Scott*, 20 Conn. 312.

² *School Trustees v. Bennett*, 27 N. J. Law, 513.

³ *Gill v. Vogler*, 52 Md. 663.

⁴ *Virginia R. Co. v. County Commissioners*, 6 Nev. 68.

⁵ *Pinches v. The Swedish Church*, 55 Conn. 183, citing *Hayward v. Leonard*, 7 Pick. 181; *Smith v. First Congregational Meeting-house*, 8 Pick. 178;

Moulton v. McOwen, 103 Mass. 587; *Kelly v. Town of Bradford*, 33 Vt. 35; *Corwin v. Wallace*, 17 Iowa, 374; *White v. Oliver*, 36 Me. 92; *Blakeslee v. Holt*, 42 Conn. 226; *Lucas v. Godwin*, 3 Bing. (N. C.) 737.

⁶ *Harlan v. Stufflebeem*, 87 Cal. 508. See following cases where it was held that performance was sufficient: *Van Clief v. Van Vechten*, 130 N. Y. 571;

§ 112. **Substantial performance of building contracts.**—It is the sound and settled rule that the right of a party to enforce a contract will not be forfeited or lost by reason of technical, inadvertent, or unimportant omissions or defects. A substantial performance must be established, in order to entitle the party claiming the benefit of the contract to recover; but this does not mean a literal compliance as to details that are unimportant. There must be no willful or intentional departure, and the defects of performance must not pervade the whole, or be so essential as substantially to defeat the object which the parties intended to accomplish. Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact.¹ Thus where the plaintiff delivered slit steel of a gauge slightly differing from the order, and upon its return by defendant promptly replaced the shipments with goods of the proper grade, and the proof tended to show it was well known to the trade that it was nearly impossible to roll cold steel so as to have a uniform thickness and weight, and that defendant did not suffer any particular damage, it was held that a finding of substantial performance was warranted.² And to recover the purchase price under a building contract only a substantial compliance with the contract need be shown. Where the owner accepts the building, the contractor is entitled to its value as constructed although not in all respects as contracted for.³ Substantial compliance with the building con-

Highton v. Dessau, 19 N. Y. Supl. 395; *Crouch v. Gutmann*, 134 N. Y. 45; 31 N. E. Rep. 271; *Oberlies v. Bullinger*, 132 N. Y. 598; *Valk v. McKeize*, 16 N. Y. Supl. 741; *Munsell v. Baldwin*, 56 Conn. 522, a map of a city of substantial accuracy, although not absolutely accurate; *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19, holding that one who invokes the protection of the equitable doctrine of substantial performance, in order to show a right to recover, must present a case in which there has been no willful omission or departure from the terms of the con-

tract; he must have endeavored to perform it in all particulars.

¹ *Miller v. Benjamin* (1894), 142 N. Y. 613; 37 N. E. Rep. 631; *Glacius v. Black*, 50 N. Y. 145; *Phillip v. Gallant*, 62 N. Y. 256; *Woodward v. Fuller*, 80 N. Y. 312; *Heckmann v. Pinkney*, 81 N. Y. 211; *Dauchey v. Drake*, 85 N. Y. 407; *Van Clief v. Van Vechten*, 130 N. Y. 571; 29 N. E. Rep. 1017; *Crouch v. Gutmann*, 134 N. Y. 45; 31 N. E. Rep. 271.

² *Miller v. Benjamin* (1894), 142 N. Y. 613.

³ *Jennings v. Willer* (Tex. App. 1895), 32 S. W. Rep. 24 and 375.

tract is therefore sufficient to support a recovery for the contract price less the expense of full completion.¹ Accordingly where plaintiff contracted to build a house for defendant "and charge everything at the exact cost, for which I will get vouchers," for a consideration to be paid upon completion of the building, it was held that vouchers furnished to defendant were *prima facie* evidence sufficient to show performance, and plaintiff was not bound to prove that every item of material and labor was expended in the building.²

§ 113. Substantial performance—Delay.—Where it appeared that the plaintiff made every reasonable effort to perform a building contract in the required time, but failed to do so in some minor particulars, and the defendant took possession of the building when completed, and used it for the intended purpose, for which it was adequate, it was held that plaintiff could recover the contract price, less compensation to defendant for the minor imperfections and omissions; and that the plaintiff was not liable for delay in the completion of the building where it was due to the fact that defendant's architect either changed the plans and specifications, or failed to furnish necessary lines and levels; but was liable where the delay resulted from the condemnation of materials which he furnished, and on which the architect was required to pass under the contract.³ Accordingly where an architect is, by the building contract, made the sole arbiter between the parties, of matters concerning materials and character of work, the exercise of his judgment on such matters will be binding on both parties, unless fraud is pleaded and proved. And where the architect is present, and has knowledge of the character of the materials being used, and does not object at the time, it will be an approval of the same, which can not be revised, to the injury of the contractor. And where a building contract, in which there is a damage clause for non-performance by a certain time, provides for payment by the owner of monthly estimates, any de-

¹ *Toher v. Lappine*, 60 N. Y. St. Rep. 853; *Hamburger v. Rottenberg*, 61 N. Y. St. Rep. 102.

² *Blazo v. Gill* (1894), 143 N. Y. 232.

³ *White v. Braddock School Dist.* (1893), 159 Pa. St. 201; 28 Atl. Rep. 136.

lays caused by the wrongful withholding of the same are excusable.¹ So, also, it is held that the provision of a building contract for forfeit of ten dollars for each day that building remained unfinished after the day fixed does not apply to delay necessitated by changes in the material ordered by the owners, although the contract provided that any change in the plans, "either in quantity or quality of the work," should be executed by the contractor, "without holding the contract as violated or void in any other respect."²

§ 114. Insufficient performance.—The doctrine of "substantial compliance" of building contracts does not apply when the omissions or departures from the contract are intentional, and so substantial as not to be capable of remedy and that an allowance out of the contract price would not give the owner essentially what he contracted for. In such a case it seems the contractor is remediless.³

¹ *Wright v. Meyer* (Tex. App. 1894), 25 S. W. Rep. 1122. In a building contract, it was stipulated that, in case of the failure or unreasonable delay of the contractor to provide the necessary labor and materials to complete the work by a certain time, in the judgment of two architects named, then the other party to the contract might, after three days' notice, provide other labor and materials, and complete the work. It was held that the contractor could not be lawfully stopped from proceeding with his work in constructing said buildings, upon the judgment of said architects, where the judgment of one was based solely upon what the other had informed him, and not upon his own examination of the premises and a proper inquiry into the facts constituting such default on the part of the contractor. He was entitled to the benefit of the joint judgment of the architects, based upon a full knowledge by each one of the facts which constituted such default, especially where the examination of the condi-

tion of affairs called for a personal examination of them, as a condition precedent for the exercise of the discretion and judgment of each architect. *Benson v. Miller*, 56 Minn. 410; 57 N. W. Rep. 943.

² *Lilly v. Person*, 168 Pa. St. 219; 32 Atl. Rep. 23, per Fell, J.: "In *Mahe v. Davis Lumber Co.* (1893), 86 Wis. 530; 57 N. W. Rep. 357, defendant contracted in writing to pay plaintiff a certain amount for drawing lumber to defendant's lumber yard, to furnish a wagon for such purpose, and to pay 25 cents additional on every 1000 feet if all should be delivered in a specified time. It was held, that plaintiff was entitled to recover the additional pay, although he did not deliver the lumber in the required time, if the delay was caused by defendant's refusal to furnish a wagon, and his failure to furnish requisite facilities for unloading the lumber in the yard."

³ *Elliott v. Caldwell* (1890), 43 Minn. 357. "It may seem a harsh doctrine to hold that a man who has built a house shall have no pay for it, but

§ 115. **The same subject continued—A contrary view.**—Many cases on the contrary hold that notwithstanding the contractor has, either willfully or without sufficient excuse, abandoned his contract, he may recover on a *quantum meruit* the value of his services, leaving the owner to recoup damages for his failure to perform his contract. And these authorities apply the rule absolutely in all cases, no matter how little the contractor has done. And a formal acceptance of the work or an acquiescence in the breach is not essential to recovery. The benefits arising from the services rendered, the materials furnished, and labor performed in erecting the buildings being the owner's, without acceptance. He has no choice but to use and enjoy those benefits, though but a part performance of the contract. The benefits derived from the services he can not restore, nor can he restore the benefits that come to him from the buildings, for they have become incorporated into, and a part of, the realty upon which they stand. The courts of the following states adhere to this rule and allow the contractor to recover the value of his work less damages occasioned the

the other party can well say: 'I never made any such agreement. I agreed to pay you if you would build my house in a certain manner, which you have not done.' This fault is with the one who voluntarily violates his contract. * * * The acceptance of the benefit of a partial performance, or of performance in a way different from that contracted for, where the party has the option of returning or rejecting the consideration performed, will usually be sufficient to imply a promise to pay a compensation commensurate with the benefit accepted. But the mere fact that a part performance has been beneficial is not enough to render the party benefited liable to pay for the advantage.

It must appear that he has taken the benefit under circumstances sufficient to raise an implied promise to pay for the work done, notwithstanding the non-performance of the special contract. Therefore, in a case of a building on land under a contract which the builder fails to complete, or which he completes in a manner not conforming to the contract, so that the owner can not be charged with the contract price, the mere fact of the building remaining on the land, and that the owner resumed possession and enjoys the fruits of the labor, is not such an acceptance as alone will imply a promise to pay for it." Per Mitchell, J., 360, 361, 362. See, also, *Leeds v. Little*, 42 Minn. 414.

owner by default, to wit: Indiana,¹ Missouri,² Wisconsin,³ Texas,⁴ Kansas,⁵ Iowa,⁶ Nebraska,⁷ Maine,⁸ and Alabama.⁹

§ 116. Doctrine of the Supreme Court of the United States.—The following rules touching building contracts have been laid down by the supreme court: While the special contract remains executory, the contractor must sue upon it. When it has been fully executed according to its terms, and nothing remains to be done but the payment of the price, he may sue on the contract, or *indebitatus assumpsit*, and rely upon the common counts. In either case, the contract will determine the rights of the parties. When the contractor has been guilty of fraud, or has willfully abandoned the work, leaving it unfinished, he can not recover in any form of action. Where he has in good faith fulfilled, but not in the manner or not within the time prescribed by the contract, and the other party has sanctioned or accepted the work, the contractor may recover upon the common counts.¹⁰

§ 117. Sales—Incomplete delivery.—If the seller has delivered a portion of the articles agreed to be furnished, which the buyer has used and had the enjoyment of, and the seller then makes default in the further performance of the contract, he may recover the value of the articles so delivered, subject to recoupment by the buyer of the damages sustained by reason of such non-performance.¹¹

¹ *Cummings v. Pence*, 1 Ind. App. 317; *Masonic Association v. Beck*, 77 Ind. 203.

² *Fleischmann v. Miller*, 38 Mo. App. 177.

³ *Taylor v. Williams*, 6 Wis. 363; but the rule does not obtain in contracts of personal service, no recovery in that case being allowed. See *Diefenback v. Stark*, 56 Wis. 462.

⁴ *Linch v. Paris Lumber Co.*, 80 Texas, 23; *Carroll v. Welch*, 26 Texas, 147.

⁵ *School District v. Boyer*, 46 Kan. 54.
⁶ *Ætna Iron Works v. Kossuth County*, 79 Iowa, 40.

⁷ *West v. VanPelt*, 34 Neb. 63.

⁸ *White v. Oliver*, 36 Me. 92.

⁹ *Davis v. Badders*, 95 Ala. 348; 10 So. Rep. 422.

¹⁰ *Dermott v. Jones*, 2 Wall. 1.

¹¹ *Gage v. Meyers*, 59 Mich. 300; *Shimp v. Siedel*, 6 Houston (Del.), 421; *Smith v. Keith*, 36 Mo. App. 567; *Elliott v. Espenhain*, 59 Wis. 272, while the question is not discussed it is assumed that the vendor can recover, subject to set-off; *Wolf v. Gerr*, 43 Iowa, 339, not a sale case, but principle the same. *Byerlee v. Mendel*, 39 Iowa, 382; *Polhemus v. Heiman*, 45 Cal. 573; *Richards v. Shaw*, 67 Ill. 232. See, also, *Phillips Construction Co. v. Seymour*, 91 U. S. 646; *Mitchell v. Scott*, 41 Mich.

§ 118. **The New York doctrine.**—Where goods are received and used by the vendee under a contract for the delivery of specified quantities at stated intervals, if the quantity delivered is less than that required by the contract, such breach is a bar to an action by the vendor for the price of the goods delivered.¹ The buyer under such a contract has a right to use the goods delivered, as required in his business, without waiting for the expiration of the time to see whether the vendor will fully perform his contract, and such use is no waiver of his defense in case of the vendor's breach of contract.² But while as a general rule no action lies on the part of a vendor upon a contract for the sale and delivery of a specified quantity of goods, until the whole quantity is delivered, yet where the whole delivery is to be at one and the same time and the vendee elects to receive a portion and appropriates the same to his own use, and by his acts evinces that he waives the condition precedent of a complete delivery, the vendor may recover for the portion delivered.³ But in order that acceptance of a part should be a waiver of the residue there must be a complete delivery and the buyer must in accepting it know that the vendor intends no further delivery.⁴ And if the buyer does not waive a complete delivery, he need not return the portion of the goods actually delivered, nor is he liable for their value.⁵

108; *Moon v. Harder*, 38 Mich. 566; *Begole v. McKenzie*, 26 Mich. 470; *McGueen v. Gamble*, 33 Mich. 344. "If, on the other hand, the delivery is of a quantity less than that sold, it may be refused by the purchaser; and if the contract be for a specified quantity to be delivered in parcels from time to time, the purchaser may return the parcels first received, if the later deliveries be not made, for the contract is not performed by the vendor's delivery of less than the whole quantity sold. But the buyer is bound to pay for any part that he accepts; and after the time for delivery has elapsed he must either return or pay for the part received, and can not

insist on retaining it without payment until the vendor makes delivery of the rest." Benjamin on Sales, § 690; *Champion v. Short*, 1 Camp. 53; *Shipton v. Casson*, 5 B. & C. 378; *Oxendale v. Wetherell*, 9 B. & C. 386.

¹ *Nightingale v. Eiseman*, 121 N. Y. 288; *Catlin v. Tobias*, 26 N. Y. 217; *Champlin v. Rowley*, 18 Wend. 187; *Visscher v. Greenbank, etc., Co.*, 11 Hun, 159.

² *Catlin v. Tobias*, 26 N. Y. 217.

³ *Avery v. Willson*, 81 N. Y. 341; *Flanagan v. Demarest*, 3 Robt. 173.

⁴ *Nightingale v. Eiseman*, 121 N. Y. 288.

⁵ *Levene v. Rabitte*, 2 N. Y. Supl. 389. See *Shields v. Pettee*, 2 Sand. 262. See,

§ 119. Personal services.—The question whether one who has agreed to work for a certain time, and has abandoned his work without cause, can still recover the value of his services rendered, is one in relation to which there is much contrariety of view. And some courts which allow a recovery on a *quantum meruit* in a building contract where the contractor willfully abandons his contract, still refuse to allow a recovery in contracts for personal services, unless the condition is substantially performed.¹ Some courts declare that the weight of authority at the present time is against the doctrine that where a contract is entire, and consequently not apportionable, and has been only partially performed, the failing party is not entitled to recover or receive anything for what he has actually done. And it is held that if the doctrine has been overturned with respect to all contracts except that for personal services, it should be overturned with reference to that also. The acquiring of a benefit, which is the reason there is a recovery in other cases of contract, is the same in case of personal services.² Other courts, with equal confidence declare that the weight of authority is to the effect that there can be no recovery, and

also, *Kein v. Tupper*, 52 N. Y. 550; *Hill v. Heller*, 27 Hun, 416; *Brown v. Norton*, 50 Hun, 248; *Smith v. Brady*, 17 N. Y. 173; *Baker v. Higgins*, 21 N. Y. 397. And see the following cases where recovery was refused for a portion of goods actually delivered because of failure to deliver the stipulated quantity. *Holden Co. v. Westervelt*, 67 Maine, 446; *Witherow v. Witherow*, 16 Ohio, 238; *Haslack v. Mayers*, 26 N. J. Law, 284. In Massachusetts recovery would probably be denied where there was an incomplete delivery and the buyer had not accepted or waived his rights. *Wiley v. Athol*, 150 Mass. 426. "It seems that the performance must be of a substantial part of the contract, and that the acceptance must be under such circumstances as to show that the party accepting knew, or ought to have known, that the contract was not be-

ing fully performed." Per *Field, J.*, 436. See *Keyes v. Stone*, 5 Mass. 391; *Hayward v. Leonard*, 7 Pick. 181; *Snow v. Ware*, 13 Metc. 42; *Gleason v. Smith*, 9 Cush. 484; *Bassett v. Sanborn*, 9 Cush. 58; *Veazie v. Hosmer*, 11 Gray, 396; *Bee Printing Co. v. Hichborn*, 4 Allen, 63; *Cardell v. Bridge*, 9 Allen, 355; *Thompson v. Purcell*, 10 Allen, 426; *Veazie v. Bangor*, 51 Maine, 509.

¹ *Hanel v. Freund*, 17 Mo. App. 618; *Taylor v. Williams*, 6 Wis. 363; *Diefenback v. Stark*, 56 Wis. 462. See *Story on Contracts*, § 33.

² *Duncan v. Baker*, 21 Kan. 99; *McMillan v. Malloy*, 10 Neb. 228; *Parcell v. McComber*, 11 Neb. 209: "And so I think the law may be considered to be pretty generally settled throughout the western states." Per *Cobb, J.*, 212.

that the reasons for a recovery in case of partial performance of other contracts do not exist in case of contracts for personal services.¹ Some courts declare that the principles decided in the case of *Britton v. Turner*² have been gradually gaining credit, and are right in principle, however it may be upon the technical and more illiberal rules of the common law as found in the older cases. With the natural disposition of courts and juries to disfavor the cause of him who has broken his contract, and yet seeks a recovery, and with the limitation that the employer is entitled, if he so elect, to put the breach of contract in defense, for the purpose of reducing the damages, the application of this rule will not be found practically to work injustice to the employer.³ Other courts declare that to allow suit in such cases upon a *quantum meruit* without full performance, and recoupment of damages, would in most cases be quite inadequate to indemnify the employer under the ordinary rule of such damages.⁴

§ 120. The same subject continued.—With the authorities in this hopeless state of confusion, a mention may be made of a few states in which the question has arisen, the results arrived at being absolutely and diametrically opposite. The doctrine, that a party can not recover upon a contract for personal services, when he has failed to perform his part thereof, where the adverse party has neither waived, prevented nor dispensed with such performance;—but that he may recover for services performed under such contract upon the *quantum meruit*, the employer having the right to set up against the same any damages sustained by reason of such non performance—has been approved and recovery allowed in New Hampshire,⁵ North

¹ *Diefenback v. Stark*, 56 Wis. 462.

² *Britton v. Turner*, 6 N. H. 481—the pioneer case allowing recovery in such cases.

³ *McClay v. Hedge*, 18 Iowa, 66, *Dillon J.*; *Duncan v. Baker*, 21 Kan. 99.

⁴ *Diefenback v. Stark*, 56 Wis. 462; *Eldridge v. Rowe*, 7 Ill. 91; *Lantry v. Parks*, 8 Cow. 63.

⁵ *Britton v. Turner*, 6 N. H. 481, a celebrated and leading case. A farm laborer agreed to work from March, 1831, to March, 1832, and his employer was to give him at the end of the time \$120. The servant abandoned the work without cause in December, 1831. He was allowed to recover on a *quantum meruit* the value of his services.

Carolina,¹ Iowa,² Nebraska,³ Kansas,⁴ Vermont,⁵ Michigan,⁶ Texas,⁷ and Indiana.⁸

§ 121. The same subject continued—Contrary view.—On the other hand, the courts of Wisconsin,⁹ Pennsylvania,¹⁰ Missouri,¹¹ Illinois,¹² and Ohio¹³ allow no recovery *pro tanto* where a contract for personal services is not substantially performed. And in New York,¹⁴ Minnesota,¹⁵ California,¹⁶ Massachusetts¹⁷ and Connecticut¹⁸ the courts also deny the right to recover in such cases.¹⁹

¹ *Chamblee v. Baker*, 95 N. C. 98. "The inclination of the courts is to relax the stringent rule of the common law, which allows us no recovery upon a special unperformed contract, nor for the value of the work done, because the special excludes an implied contract to pay. In such case if the party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. Accordingly, restrictions are imposed upon the general rule, and it is confined to contracts entire and indivisible, and when by the nature of the agreement, or by express provision, nothing is to be paid till all is performed." Per Smith, C. J., 101, 102.

² *McClay v. Hedge*, 18 Iowa, 66. The opinion is by Judge Dillon and is a masterpiece of judicial statement. *Pixler v. Nichols*, 8 Iowa, 106.

³ *West v. Van Pelt*, 34 Neb. 63. *Parcell v. McComber*, 11 Neb. 209, this opinion declares the weight of authority in the western states is in favor of allowing recovery. See *McMillan v. Malloy*, 10 Neb. 228.

⁴ *Duncan v. Baker*, 21 Kan. 99, contains an elaborate review of *Britton v. Turner*, 6 N. H. 481.

⁵ *Fenton v. Clark*, 11 Vt. 557.

⁶ *Allen v. McKibbin*, 5 Mich. 449, but *quære*.

⁷ *Hollis v. Chapman*, 36 Texas, 1.

⁸ *Cummings v. Pence*, 1 Ind. App.

317, but *quære*. See, also, *Phenix Ins. Co. v. Boyer*, 1 Ind. App. 329; *Masonic Association v. Beck*, 77 Ind. 203. *Pickens v. Bozell*, 11 Ind. 275.

⁹ *Diefenback v. Stark*, 56 Wis. 462.

¹⁰ *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19, but *quære*.

¹¹ *Hanel v. Freund*, 17 Mo. App. 618; *Earp v. Tyler*, 73 Mo. 617; *Downs v. Smit*, 15 Mo. App. 583; *White v. Wright*, 16 Mo. App. 551.

¹² *Thrift v. Payne*, 71 Ill. 408.

¹³ *Larkin v. Buck*, 11 Ohio St. 561.

¹⁴ *Goldstein v. White*, 16 N. Y. Supl. 860. See, also, *Lawrence v. Miller*, 86 N. Y. 131; *Cunningham v. Jones*, 20 N. Y. 486; *Smith v. Brady*, 17 N. Y. 173; *Waters v. Davies*, 55 N. Y. Super. Ct. 39. "Unless there is a special agreement to the contrary, work, whether measured by the job or by time, must be finished in order that there shall be a right to pay for it." Per Bookstaver, J., in *Goldstein v. White*, *supra*, 861.

¹⁵ *Peterson v. Mayer*, 46 Minn. 468; *Nelichka v. Esterly*, 29 Minn. 146; *Kohn v. Fandel*, 29 Minn. 470.

¹⁶ *Hartman v. Rogers*, 69 Cal. 643, but *quære*.

¹⁷ *Stark v. Parker*, 2 Pick. 267. See, also, *Wiley v. Athol*, 150 Mass. 426.

¹⁸ *Dayton v. Dean*, 23 Conn. 99, affirms principle, but evidence showed waiver by employer.

¹⁹ Contracts for personal services means simply a contract for hiring

§ 122. Delivery by installments.—In contracts for the sale and delivery of goods by installments at stated periods, the seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity or to require him to select part out of a greater quantity; and a default in delivery of an installment, in respect of quantity or quality, gives the buyer the right to repudiate the whole contract.¹ The readiness of the buyer to accept an installment is

services, or for work and labor simply. *Diefenback v. Stark*, 56 Wis. 462, 466; See following cases more or less discussing the right of parties to recover on a *quantum meruit* when they have not fulfilled their contracts: *Kruger v. Leppel*, 42 Minn. 6; 43 N. W. Rep. 484; *Griffith v. Happersberger*, 86 Cal. 605; *Boteler v. Roy*, 40 Mo. App. 234; *Oberlies v. Bullinger*, 132 N. Y. 598; *Moore v. Carter*, 146 Pa. St. 492; *Walden v. Eldred*, 58 Hun, 605; 11 N. Y. Supl. 856; *Globe Light Co. v. Doud*, 47 Mo. App. 439; *Dennis v. Walsh*, 16 N. Y. Supl. 257; *Ponce v. Smith*, 84 Maine, 266. In England in contracts for work and labor, the work is a condition precedent, and must be completed before the payment for it can be claimed. *Morton v. Lamb*, 7 T. R. 121; *Peeters v. Opie*, 2 Wms. Saund. 346.

¹*Norrington v. Wright*, 115 U. S. 188 (1885), a leading case in which all the authorities are reviewed. A contract had been made to sell 5,000 tons of iron rails, the same to be shipped from Europe delivered at Philadelphia, at the rate of about 1,000 tons per month. One month 400 tons were shipped and another 885 tons were shipped. It was held that this was a sufficient breach of the contract by the seller that the buyer could repudiate the whole contract. "In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival with a view of providing funds to pay for the

goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract." *Per Gray, J.*, 203. *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255; *Greenbrier Lumber Co. v. Ward*, 36 W. Va. 573; 15 S. E. Rep. 89, this case also holds that the first installments may be returned by the seller if the latter deliveries are not sufficient in quantity to fulfill the contract requirement; *Pope v. Porter*, 102 N. Y. 366, a sale of iron to arrive, "500 tons of Coultness pig iron to be due in April next; 500 tons of Caulder's pig iron to be due here in March next," plaintiffs made default in the March installment, but were ready to perform the April one. Held defendants had a right to rescind. *Hill v. Blake*, 97 N. Y. 216; *Russell v. Nicoll*, 3 Wend. 112; *Catlin v. Tobias*, 26 N. Y. 217, holding that not only justifies repudiation of contract by buyer, but that such breach is a bar to an action by the vendor for the price of the goods delivered, where the buyer expends the goods delivered in his business, thinking that the seller will comply with the terms of the contract, a certain quantity a month. *The Elting Woolen Co. v. Martin*, 5 Daly,

a condition precedent to the delivery of subsequent installments, and his failure to accept one installment will discharge the seller from delivering subsequent installments.¹ The parties can, by express provision, stipulate that a default as to one delivery shall not put an end to the contract.² But a default in payment for an installment delivered does not discharge the seller from future deliveries under the contract, if the buyer continue ready and willing to accept and pay for them.³ If, however, a default in payment be made, with the declared intention of repudiating the contract, the seller is discharged.⁴ Where an agreement is made to furnish an article of a given description, if the article delivered is not of the description of the one ordered, the purchaser has a right to reject it and to rescind the contract *in toto*. Thus, where an order is given for a monument with certain inscriptions, among which is the name, date of death and age of the deceased, and the manufacturer omits from the inscription the age, the orderer has the right to reject the monument and absolutely rescind the agreement.⁵

§ 123. **Mersey Steel Company v. Naylor.**—The leading case in point is *Mersey Steel Company v. Naylor*,⁶ decided by the

417; *King Phillip Mills v. Slater*, 12 R. I. 82; *Winchester v. Newton*, 2 Allen, 492; *Mersey Steel Co. v. Naylor*, 9 App. Cas. 434; *Bollman v. Burt*, 61 Md. 415. *Contra*, *Jonassohn v. Young*, 4 B. & S. 296; *Coddington v. Paleologo*, L. R. 2 Ex. 192; *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 351; *Shinn v. Bodine*, 60 Pa. St. 182; *Morgan v. McKee*, 77 Pa. St. 228; *Scott v. Kittingan Coal Co.*, 89 Pa. St. 231; *Blackburn v. Reilly*, 47 N. J. Law, 290.

¹ *Haines v. Tucker*, 50 N. H. 307; and see cases in preceding note, which support the converse of this proposition. *Hoare v. Rennie*, 5 H. & N. 19. *Contra*, *Simpson v. Crippin*, L. R. 8 Q. B. 14; *Roper v. Johnson*, L. R. 8 C. P. 167.

² *Simpson v. Crippin*, L. R. 8 Q. B. 14.

³ *Erwin v. Harris*, 87 Geo. 333; *Mersey Steel Company v. Naylor*, L. R. 9 App. Cas. 434; *Freeth v. Burr*, L. R. 9 C. P. 208.

⁴ *Stocksdale v. Schuyler*, 8 N. Y. Supl. 813; *Stephenson v. Cady*, 117 Mass. 6; *Starr Glass Co. v. Morey*, 108 Mass. 570; *Winchester v. Newton*, 2 Allen, 492; *Webb v. Stone*, 24 N. H. 282; *Fletcher v. Cole*, 23 Vt. 114; *Bloomer v. Bernstein*, L. R. 9 C. P. 588, where it is held that it is a question of fact whether the circumstances of non-payment are such as to give the seller reasonable ground for believing that the buyer will be unable to pay for future deliveries, and if so the seller may rescind.

⁵ *American, etc., Co. v. Gillette*, 88 Mich. 231.

⁶ 9 App. Cas. 434.

House of Lords, to the effect that the failure of the buyer to pay for the first installment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract and to decline to make further deliveries under it; and this case was, as to the point actually decided, cited with approval by the United States Supreme Court in *Norrington v. Wright*.¹ But the judgments of the Lords, incidentally in deciding the case, in substance lay down the rule that defaults by one party in making particular payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract or a design no longer to be bound by its terms. This rule leaves the party complaining of a breach to recover damages for his injury on the normal principle of compensation, without allowing him the abnormal advantage that might enure to him from an option to rescind the bargain. It also accords with the ancient doctrine laid down by Sarjeant Williams in his notes to *Pordage v. Cole*,² that where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the contract without averring performance. It is inapplicable where the parties have expressed their intention to make performance of a stipulation touching a part of the bargain a condition precedent to the continuing obligation of the contract; and peculiar cases might arise where the courts would infer such an intention from the nature and circumstances of the bargain itself, cases in which the courts would see that the partial stipulation was so important, so went to the root of the matter, to use a phrase of Lord Blackburn,³ as to make its performance a condition of the obligation to proceed in the contract. Accordingly the rule as laid down by this case has been approved by some of the American courts, which hold that if the contract is not entire, a failure in one delivery will not, without more, justify

¹ 115 U. S. 188.

² 1 Saund. 320.

³ *Poussard v. Spiers*, L. R., 1 Q. B. D. 410.

rescission.¹ But the weight of authority in America is that the doctrine of this case is inapplicable in cases of deliveries by installment, it being held that default either in delivery or acceptance of one installment gives cause of discharge from contract.²

§ 124. Insolvency of buyer.—If the buyer becomes insolvent the seller may refuse to deliver any installments until past installments are paid for.³ But the mere insolvency of one of the parties to a contract of sale is not equivalent either to a rescission or a breach. It simply relieves the seller from his agreement to give credit, and payment may be substituted.⁴ In such a case the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered, as well as the price of those still to be delivered.⁵ If goods are sold on credit, it is an implied condition of the contract that the buyer shall keep his credit good, and the seller is not bound to deliver the goods if the buyer is insolvent; and the fact that the buyer has given his note for the price is immaterial.⁶ To justify a seller in refusing to give credit and to deliver installments the buyer must be insolvent. By the term “insolvent” is meant inability to pay debts as they become due in the ordinary course of business.⁷ But a man can not be said

¹ *Allen v. McKibbin*, 5 Mich. 449. *Bradley v. King*, 44 Ill. 339; *Cole v. Cheovenda*, 4 Colo. 17; *Coleman v. Hudson*, 2 Sneed, 463; *Dibol v. Minott*, 9 Iowa, 403; *Drake v. Goree*, 22 Ala. 409; *Dugan v. Anderson*, 36 Md. 567; *Dwinel v. Howard*, 30 Maine, 258; *Dunlap v. Petrie*, 35 Miss. 590; *More v. Bonnet*, 40 Cal. 251, and see other cases collected in *Norrington v. Wright*, 115 U. S. 188, 198.

² *Norrington v. Wright*, 115 U. S. 188. See cases in preceding notes

and also compare *Blackburn v. Reilly*, 47 N. J. Law, 290.

³ *Pardee v. Kanady*, 100 N. Y. 121; *New England Iron Co. v. Gilbert R. Co.*, 91 N. Y. 153; *Freeth v. Burr*, L. R. 9 C. P. 208; *Bloomer v. Bernstein*, L. R. 9 C. P. 588.

⁴ *Pardee v. Kanady*, 100 N. Y. 121. *Contra*, *Morgan v. Bain*, L. R. 10 C. P. 15.

⁵ *Ex parte Chalmers*, L. R. 8 Ch. 289.

⁶ *Diem v. Koblitz*, 49 Ohio St. 41; 29 N. E. Rep. 1124.

⁷ *Toof v. Martin*, 13 Wall. 40; *Clarion*

to be insolvent merely because he has not money enough on hand to meet his liabilities as they fall due in the course of trade.¹

§ 125. Subscriptions to stock.—Whether conditions in a subscription to stock be precedent or subsequent is a question purely of intent, to be determined by considering the words both of the clause containing the condition and of the whole contract.² When subscriptions are made to take stock in an existing corporation, upon a condition precedent, as for example upon condition that a specified amount of subscriptions shall hereafter be obtained, the contract of the subscribers is twofold in character. It is a contract between the several subscribers and it is also a continuing offer to the corporation to take and pay for the amount of stock subscribed, upon the terms proposed, whenever the specified amount of subscriptions shall have been obtained. The obtaining of the amount specified within a reasonable time is an acceptance of the offer by the corporation and the contract of each subscriber then becomes absolute.³ A subscriber can not withdraw his subscription even though it be conditional, unless unreasonable delay occurs in performing the condition.⁴ When the company obtains solvent subscribers for the amount specified, that becomes an effectual acceptance of the offer of all those who have previously subscribed. Their subscriptions are no longer conditional, but become absolute and are thereafter payable, according to the terms of the contract, on the call of the board of directors.⁵ The subscribers are then entitled to all the rights

Bank v. Jones, 21 Wall. 325; *Cunningham v. Norton*, 125 U. S. 77; *Buchanan v. Smith*, 16 Wall. 277; *Wager v. Hall*, 16 Wall. 584; *Dutcher v. Wright*, 94 U. S. 553; *May v. Le Claire*, 18 Fed. Rep. 164; *In re Bininger*, 7 Blatch. 262; *In re Phoenix Bessemer Steel Co.*, L. R. 4 Ch. Div. 108.

¹ *Smith v. Collins*, 94 Ala. 394; 10 So. Rep. 334.

² *Beach on Private Corporations*, § 532, citing *Bucksport R. Co. v. Brewer*, 67 Maine, 295; *Chamberlain v. Painesville R. Co.*, 15 Ohio St. 225.

³ *Cravens v. Eagle Cotton Mills Co.*,

120 Ind. 600; *Minneapolis, etc., Co. v. Davis*, 40 Minn. 110.

⁴ *Johnson v. Wabash, etc., Plank Road Co.*, 16 Ind. 389; *Lake Ontario, etc., R. Co. v. Mason*, 16 N. Y. 451; *McClure v. People's, etc., R. Co.*, 90 Pa. St. 269.

⁵ *Beach on Private Corporations*, § 532, citing *New Albany, etc., R. Co. v. Pickens*, 5 Ind. 247; *Estell v. Knightstown, etc., Turnpike Co.*, 41 Ind. 174; *Beckner v. Riverside, etc., Turnpike Co.*, 65 Ind. 468; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Cravens v. Eagle Cottons Mills Co.*, 120 Ind. 600.

and privileges of stockholders, and they come under the correlative obligations and duties of holders of stock in a corporation.¹

§ 126. Waiver.—In the absence of a statute to the contrary, the rule is that, where the charter, or articles of a corporation, or the terms of subscription to its capital stock, do not provide otherwise, payment of a subscription can not be required until the whole capital stock is subscribed.² But the subscriber may waive that defense. Acts done by him, as stockholder or director, which constitute a part of the business for which the corporation is formed, and which, from their nature, assume it to be ready for business, and evince a willingness to enter upon that business, with the stock already subscribed, will amount to a waiver.³ But a subscription to stock before incorporation must be paid, although the stock is not all taken, if the amount of stock is prescribed by a subsequently-adopted charter.⁴ But the minimum of stock having been subscribed is not sufficient to render the subscriber liable, unless that amount has been fixed as the capital.⁵

§ 127. Recitals.—Recitals in the charter, or in the prospectus, or in the subscription paper, that the capital stock of a company which, at the time, has not commenced active operations, shall be a certain amount, is an implied condition that the amount of stock specified shall be taken before the subscribers shall become liable on their contracts,⁶ unless a contrary intention appear in the charter, enabling act, articles of association or contract of subscription.⁷ Where a corporation, incorporated under the general law requiring that the amount of

¹ *Butler University v. Schoonover*, 114 Ind. 381.

² *Masonic Association v. Channell*, 43 Minn. 353.

³ *Masonic Association v. Channell*, 43 Minn. 353.

⁴ *Belton Compress Co. v. Saunders*, 70 Texas, 699.

⁵ *Beach on Private Corporations*, § 536, citing *Pike v. Bangor*, etc., R. Co., 68 Maine, 445.

⁶ *Haskell v. Worthington*, 94 Mo.

560; *Bray v. Farwell*, 81 N. Y. 600; *Memphis R. Co. v. Sullivan*, 57 Geo. 240; *Temple v. Lemon*, 112 Ill. 51; *Contoocook R. Co. v. Barker*, 32 N. H. 363; *Rockland, etc., Steamboat Co. v. Sewall*, 80 Me. 400.

⁷ *Peoria R. Co. v. Preston*, 35 Iowa, 115; *Musgrave v. Morrison*, 54 Md. 161; *Schloss v. Montgomery Co.*, 87 Ala. 411; *Beach on Private Corporations*, § 535.

its stock be stated in the certificate of incorporation, enters into active business with less capital stock subscribed than the amount thus stated, a subscriber can not be held to his subscription.¹ And equally under an act of incorporation providing that the number of shares shall not exceed a certain limit, and shall be determined from time to time by the directors, no assessment can be laid until the number is so determined.²

§ 128. Subscription before incorporation—How far absolute.—Where one subscribes to the stock of a corporation prior to the procurement of its charter, such subscription is to be regarded as absolute and unqualified, and any condition attached thereto is void.³ But, after incorporation, a person may, in his subscription, voluntarily assume any other obligation not forbidden by law. He may impose any conditions not contrary to public policy or contrary to some statute.⁴

§ 129. The subject-matter of conditions in subscriptions to stock.—Anything which may be legally done by the corporation may be made a condition to a subscription for stock.⁵ The subscription may be legally conditioned as to the time, manner and means of payment.⁶ In New York, where the

¹ *Haskell v. Worthington*, 94 Mo. 560. See, also, *Hager v. Cleveland* 36 Md. 476; *Hughes v. Antietam Co.*, 34 Md. 316; *Sedalia R. Co. v. Abell*, 17 Mo. App. 645; *Cabot, etc., Bridge v. Chapin*, 6 Cush. 50; *Stoneham, etc., Railroad v. Gould*, 2 Gray, 277; *Topeka Bridge Co. v. Cummings*, 3 Kan. 55.

² *Troy R. Co. v. Newton*, 8 Gray, 596.

³ *Boyd v. Peach Bottom R. Co.*, 90 Pa. St. 169; *Caley v. Philadelphia R. Co.*, 80 Pa. St. 363; *Troy R. Co. v. Tibbits*, 18 Barb. 297; *Chamberlain v. Painesville R. Co.*, 15 Ohio St. 225; *Morrow v. Iron and Steel Co.*, 87 Tenn. 262.

⁴ *Skowhegan R. Co. v. Kinsman*, 77 Maine, 370; *Kennebec R. Co. v. Jarvis*, 34 Maine, 360; *Bucksport R. Co. v. Buck*, 65 Maine, 537; *Proprietors of*

City Hotel v. Dickinson, 6 Gray, 586; *Lexington R. Co. v. Chandler*, 13 Metc. 311; *Penobscot R. Co. v. Bartlett*, 12 Gray, 244; *Boston, Barre & Gardner R. Co. v. Wellington*, 113 Mass. 79; *New Albany R. Co. v. McCormick*, 10 Ind. 499; *McMillan v. Maysville R. Co.*, 15 B. Monroe, 218; *Union Hotel Co. v. Hersee*, 79 N. Y. 454; *Burrows v. Smith*, 10 N. Y. 550; *Ashtabula R. Co. v. Smith*, 15 Ohio St. 328.

⁵ *Penobscot R. Co. v. Dunn*, 39 Maine, 587; *Hanover Junction R. Co. v. Grubb*, 82 Pa. St. 36; *Ticonic R. Co. v. Lang*, 63 Maine, 480; *Ashtabula R. Co. v. Smith*, 15 Ohio St. 328; *Milwaukee R. Co. v. Field*, 12 Wis. 340.

⁶ *Smith v. Tallahassee, etc., Co.*, 30 Ala. 650; *People v. Chambers*, 42 Cal. 201; *Mitchell v. Rome R. Co.*, 17 Ga. 574; *Swatara R. Co. v. Brune*, 6 Gill, 41; *Beach on Private Corporations*, § 537;

general turnpike act did not authorize the commissioners to accept conditional subscriptions, it has been held that a subscription conditioned upon a certain location of the road is void as against public policy.¹ But this rule does not seem to have been generally applied to the location of railroads.² Conditions that a road go by a certain town, or over a designated course, are usually held valid in stock subscriptions.³

§ 130. How the condition must be stated.—All conditions in the subscription must be written in the subscription itself.⁴ The doctrine that an agreement between one subscriber to the stock of a corporation and the company, made concurrently with the making of the subscription, which purports to annul its obligation, or materially limit and change the liability of the subscriber to the detriment of the company, is invalid and void, is founded upon the construction that a subscription to the stock of a corporation, whose stock is open for general subscription, is not only an undertaking between each subscriber and the company, but also between him and all the other subscribers to the common enterprise; and that each subscriber has the right to suppose that the subscription of every other subscriber is a *bona fide* undertaking according to its terms.⁵ Their

VanAllen v. Illinois Cent. R. Co., 7 Bosw. 515; Highland Co. v. McKean, 11 Johns. 98; Milwaukee R. Co. v. Field, 12 Wis. 340.

¹ Beach on Railways, § 109, citing Fort Edward, etc., Co. v. Payne, 15 N. Y. 583; Butternuts, etc., Turnpike Co. v. North, 1 Hill, 518; Macedon, etc., Plank Road Co. v. Snediker, 18 Barb. 317.

² Beach on Railways, § 109.

³ Jacks v. Helena, 41 Ark. 213; Moore v. Hanover R. Co., 94 Pa. St. 324; Caley v. Philadelphia R. Co., 80 Pa. St. 363; Cumberland Valley R. Co. v. Baub, 9 Watts, 458; Woonsocket R. Co. v. Sherman, 8 R. I. 564; Paris R. Co. v. Henderson, 89 Ill. 86; Wear v. Jacksonville R. Co., 24 Ill. 594; Bucksport R. Co. v. Brewer, 67 Maine, 295; Jewett v. Lawrenceburgh R. Co., 10 Ind. 539;

Detroit R. Co. v. Starnes, 38 Mich. 698; Cooper v. McKee, 53 Iowa, 239; Chamberlain v. Painesville R. Co., 15 Ohio St. 225; West Cornwall R. Co. v. Mowatt, 15 Q. B. 521.

⁴ Meyer v. Blair, 109 N. Y. 600; White Mountains R. Co. v. Eastman, 34 N. H. 124; Phoenix Co. v. Badger, 6 Hun, 293; Graff v. Pittsburgh R. Co., 31 Pa. St. 489; Robinson v. Pittsburgh R. Co., 32 Pa. St. 334; Downie v. White, 12 Wis. 176; County of Crawford v. Pittsburgh R. Co., 32 Pa. St. 141; Jewell v. Rock River Co., 101 Ill. 57.

⁵ White Mountains R. Co. v. Eastman, 34 N. H. 124. See, also, White v. Kuntz, 107 N. Y. 518, the case of a secret arrangement between debtor and creditor held void as against the terms of the composition.

respective subscriptions are contributions or advances for a common object. The action of each in his subscription may be supposed to be influenced by that of the others, and every subscription to be based on the ground that the others are what upon their face they purport to be.¹ But a contract by the incorporators with a subscriber that they will take the stock off his hands after a certain time is valid as between the parties, although unknown to other subscribers.² If there be no evidence as to when the condition was made it will be presumed to have been made at the time of subscribing.³ It can not be subsequently annexed without the consent of all the parties in interest.⁴

§ 131. **Performance.**—The subscriber is no member of the corporation until the conditions prescribed by him are performed by the company.⁵ Notice must, it seems, be given of the performance of a condition, to the subscriber;⁶ and whether a condition has been performed is a question of fact,⁷ but the condition must be performed within a reasonable time, and what is reasonable time is a question of law.⁸ And a substantial performance is all that is necessary.⁹ This rule applies particularly to time of completion, to location, to termini, and to the method of building.¹⁰

¹ *Graff v. Pittsburgh R. Co.*, 31 Pa. St. 489; *Miller v. Hanover R. Co.*, 87 Pa. St. 95; *Melvin v. Lamar Co.*, 80 Ill. 446.

² *Meyer v. Blair*, 109 N. Y. 600; *Morgan v. Struthers*, 131 U. S. 246.

³ *Robinson v. Pittsburgh R. Co.*, 32 Pa. St. 334; *Wood on Railway Law*, § 30.

⁴ *Beach on Private Corporations*, § 538, citing *New Hampshire R. Co. v. Johnson*, 30 N. H. 390.

⁵ *Montpelier R. Co. v. Langdon*, 46 Vt. 284; *Philadelphia R. Co. v. Hickman*, 28 Pa. St. 318; *Monadnock Ry. Co. v. Felt*, 52 N. H. 379; *Ash-tabula R. Co. v. Smith*, 15 Ohio St. 328; *Burrows v. Smith*, 10 N. Y. 550.

⁶ *Chase v. Sycamore R. Co.*, 38 Ill. 215. *Contra*, *Spartanburg R. Co. v.*

De Graffenreid, 12 Rich. L. 675; *Nichols v. Burlington Ry. Co.*, 4 Greene, 42.

⁷ *St. Louis Ry. Co. v. Eakins*, 30 Iowa, 279; *Toledo Ry. Co. v. Johnson*, 49 Mich. 148. *Contra*, *Brand v. Lawrenceville Ry. Co.*, 77 Geo. 506. ⁸ *Blake v. Brown*, 80 Iowa, 277; 45 N. W. Rep. 751; *Stevens v. Corbitt*, 33 Mich. 458; *Chartiers R. Co. v. Hodgins*, 85 Pa. St. 501; *Chicago R. Co. v. Schewe*, 45 Iowa, 79.

⁹ *Des Moines R. Co. v. Graff*, 27 Iowa, 99; *Paris R. Co. v. Henderson*, 89 Ill. 86; *Springfield Ry. Co. v. Sleeper*, 121 Mass. 29.

¹⁰ *Beach on Private Corporations*, § 540, citing *Missouri Pac. Ry. Co. v. Tygard*, 84 Mo. 263; *Des Moines Valley Ry. Co. v. Graff*, 27 Iowa, 99; *Moore v. Hanover Junction Ry. Co.*,

§ 132. Performance—Full performance waived.—Where, in ejectment, the defense is possession under contract of purchase, indebtedness of plaintiff to defendant for salary and money paid in excess of the payments required may be considered as a performance of the contract, under the California code, which provides that, where cross demands have existed between persons under such circumstances that, if one sued the other a counter-claim could have been set up, the two demands shall be deemed compensated so far as they equal each other.¹ And when one who is under contract to furnish lamps of the most approved form, made by a certain company, in good faith furnishes lamps made by it having a new kind of burner, the purchaser can not recover damages on the ground that this burner was a failure, and that it would cost three dollars per lamp to exchange it for the old kind, when there is no evidence that it ever made any such change, or paid any money therefor, or sold the lamps for any less price on account of the burner, or how much less the lamps were worth with the new burner than with the old.² So, also, the acceptance of contract work bi-weekly as it progresses, by the superintendent of a corporation, as done to his "satisfaction," in compliance with the terms of the contract, and a final acceptance of the whole in writing, is conclusive on the company as to performance, in the absence of fraud or mistake on the part of the superintendent.³ A contract of hiring, by which the employe guar-

94 Pa. St. 324; Cayuga R. Co. v. Kyle, 5 Thomp. & C. 659; People v. Holden, 82 Ill. 93; Detroit R. Co. v. Starnes, 38 Mich. 698; Michigan R. Co. v. Bacon, 33 Mich. 466.

¹Jacob v. Carter (Cal. 1894), 36 Pac. Rep. 381, per Vanclef, J.. "Under this answer defendant was entitled to prove any facts showing that plaintiff had no right of entry or possession at the time the action was commenced, Semple v. Cook, 50 Cal. 26; Roberts v. Columbet, 63 Cal. 22; and, even if this were not so, I think those facts alleged in the cross-complaint which constitute a defense to the action at law, if proved, might have been

properly considered as such defense, whether sufficient to entitle defendant to equitable relief or not; namely, the alleged facts that defendant was in possession by plaintiff's consent, under a contract to purchase which defendant had fully performed on his part, up to the time of the commencement of the action of ejectment. Meeker v. Dalton, 75 Cal. 154; 16 Pac. Rep. 764."

²Cincinnati, etc., Gas Co. v. Western, etc., Co., 152 U. S. 200; 14 Sup. Ct. Rep. 523.

³Sheffield, etc., Iron Co. v. Gordon (1894), 151 U. S. 285, per Brown, J.: "It is difficult to see what effect should

antees to give "satisfaction," vests the employer with full power to determine whether the work is satisfactory, and the reasonableness of the grounds of dissatisfaction can not be inquired into by the court in an action by the servant for his discharge.¹

be given the acceptance of the work by the superintendent, if not to foreclose the parties from thereafter claiming that the contract had not been performed according to its terms. *Martinsburg R. Co. v. March*, 114 U. S. 549; 5 Sup. Ct. Rep. 1035." In *Brady v. Cassidy* (1895), 145 N. Y. 171, plaintiffs, whose testator had carried on a manufacturing business, executed a bill of sale to defendants of "the entire manufactured stock * * * on hand at foundry and store rooms" at prices specified. Portions of the property covered by the bill of sale were delivered to and taken possession of by defendants. Another portion was omitted from the inventory taken immediately after the execution of the bill of sale and was delivered to other parties under a claim made by plaintiffs that, at the time of such execution, the articles so omitted had been sold to those parties. In an action to recover the contract prices for the goods delivered, defendants alleged a breach of the contract of sale in the failure to deliver the articles omitted from the inventory, and that this was a condition precedent to a right of action. Plaintiffs thereupon amended their complaint setting up a waiver of the condition that all the goods were to be delivered. On the trial, plaintiffs were permitted to prove, under objection and exception, that during the negotiation which resulted in the sale it was spoken of and understood between the parties that plaintiffs had sold or agreed to sell a portion of the goods included in the bill of sale, and that these sales were assented to and acquiesced in by defendants; that just

prior to the execution of said bill, certain of the goods were piled up and marked as sold to other parties; that, subsequent to the delivery of the bill, defendants assisted in making delivery of some of the goods to the vendees thereof, and that they acquiesced in such sales. Plaintiffs also gave evidence to the effect that the delivery of the goods mentioned in the inventory was received by defendants as a fulfillment of the requirements of the bill, and that they acquiesced in the partial delivery, only claiming damages for the omission to deliver all the goods. It was held that the evidence was properly received, and justified a finding of a waiver of full performance of the contract; and that plaintiffs were entitled to recover the contract prices for the goods delivered, deducting defendants' damages resulting from a failure to deliver the balance.

¹ *Allen v. Mutual Compress Co.* 101 Ala. 574; 14 So. Rep. 362, Coleman, J.: "The questions presented in the record for consideration arise from the construction of a provision in a written contract of employment. The defendant employed the plaintiff for a period of five months, at two dollars per day, to sew and tie cotton bales for the compress. After serving a little over one month, the defendant paid the plaintiff for the time of service rendered, and discharged him, claiming that, under the contract, it had the right to discharge the defendant whenever it became dissatisfied with the services of the defendant, and that it was the sole judge of the sufficiency of the cause. The provis-

§ 133. Time of performance—Reasonable time.—Where an option is to be exercised or a condition to be performed in a time not limited by the agreement, such option must be acted upon and the condition performed or abandoned within a reasonable time.¹ But while one party has time and opportunity to comply with a condition precedent, if the other party does or says anything to put him off his guard, and induce him to believe that the condition is waived, or that strict compliance will not be insisted on, he is afterwards estopped from claiming non-performance of the condition. Thus, where bonds are pur-

ion of the contract under which this right is claimed is as follows: 'We guaranty to give satisfaction in sewing and tying, or any other work that we may be required to do.' The defense to the complaint was that plaintiff failed to give satisfaction. The authorities are not altogether harmonious. In some it is held that a stipulation of similar import in a contract arms the party for whose benefit it was made with unquestioned authority to consult only his own judgment, will or feelings, and the reasonableness of the grounds of dissatisfaction is not a matter of inquiry. *Cline v. Libby*, 46 Wis. 123; 49 N.W. Rep. 832; *Gibson v. Cranage*, 39 Mich. 49; 33 Am. Rep. 351, and authorities cited in note; *McCarren v. McNulty*, 7 Gray, 139; *Tyler v. Ames*, 6 Lans. 280. On the other hand, there are authorities which hold that an employer can not dismiss his servant without actual cause. *Jones v. Graham, etc., Transportation Co.*, 51 Mich. 539; 16 N. W. Rep. 893; *Daggett v. Johnson*, 49 Vt. 345. The latter case grew out of a purchase of milk pans, and the stipulation was that the purchaser was to pay for them 'if satisfied with the pans.' The supreme court held 'that the defendant had no right to say without cause that he was dissatisfied, and would not pay for the pans;' 'that the dissatisfaction must be actual, not feigned;

real, not merely pretended.' It seems to us the latter authorities render nugatory an important provision in the contract. Exclude from the contract the provision, 'satisfaction guaranteed,' or, 'if satisfactory,' and it is clear that 'for cause,' 'actual cause,' 'good cause,' the party would have the right to discharge the employe or reject the article. Parties make their own contracts, and either may stipulate as he may deem it necessary for his own protection, and it is optional whether the other accepts the terms proffered. Having once made the contract, neither can hold the other to a different contract. When, therefore, one guaranties to give satisfaction, he assumes the undertaking to perform the work in such manner as to satisfy the other, and invests the latter with full power to determine the reasonableness of the cause. We can not presume the contract would have been made without such a provision, or on any other terms. This was the construction placed upon the contract by the trial court, and we are of opinion it was correct."

¹ *Catlin v. Green*, 120 N. Y. 441, 445; *Fitzpatrick v. Woodruff*, 96 N. Y. 561; *Wooster v. Sage*, 67 N. Y. 67; *Johnston v. Trask*, 40 Hun, 415; 116 N. Y. 136; *Vyse v. Wakefield*, 6 M. & W. 442.

chased with the understanding that, if the customer does not want to hold them, the broker will take them off his hands at cost price, a delay on the part of the customer to exercise his option does not deprive him of his right to do so, where the broker encourages him to hold on to the bonds by predicting better prices.¹

§ 134. Pleading.—It was a rule at common law that a plaintiff must aver the fulfillment of a condition precedent, and that the allegation must be particular and state in detail the manner of performance.² But now the New York code of procedure, and those codes which follow it, have a provision to the effect that, in pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance; but the party may state generally that he, or the person whom he represents, duly performed all the conditions on his part. If that allegation is controverted, he must, on the trial, establish performance.³

§ 135. Conditional sales.—A sale of personal property on credit, with delivery of possession to the purchaser, under a dis-

¹ *Johnston v. Trask*, 40 Hun, 415.

² *Chitty on Pleading* (16th Am. ed.), 329, and cases cited.

³ New York Code of Civil Procedure, § 533. See following cases in construction of this provision: *Smith v. Mohn*, 87 Cal. 489; *Case v. Phoenix Bridge Co.*, 55 N. Y. Superior, 25; *Les Successeurs D'Arles v. Freedman*, 53 N. Y. Superior, 518; *Porter v. Kingsbury*, 5 Hun, 597; *Garvey v. Fowler*, 4 Sand. 665; *Hosley v. Black*, 28 N. Y. 438; *Rowland v. Phalen*, 1 Bosw. 43; *Oakley v. Morton*, 11 N. Y. 25; *Graham v. Machado*, 6 Duer, 514; *Gay v. Paine*, 5 How. Pr. 107; *Ferner v. Williams*, 14 Abb. Pr. 215; *Union Insurance Co. v. McGookey*, 33 Ohio St. 555, holding that a policy of insurance could be sued on without averring particularly

performance of conditions as to truth of the representations therein; *Crawford v. Satterfield*, 27 Ohio St. 421, applicable to implied as well as express conditions precedent; *Rhoda v. Alameda Co.*, 52 Cal. 350; *Himmelman v. Danos*, 35 Cal. 441, also holding that the provision applies to contracts only, and that conditions prescribed by statute are not included, which must be alleged with the particularity required at common law; *People v. Johnson*, 24 Cal. 630; *Dye v. Dye*, 11 Cal. 167. The following is an approved form under this code provision: "The plaintiff did duly perform all and singular the conditions aforesaid on his part to be performed." *Crawford v. Satterfield*, 27 Ohio St. 421, 423, 424.

tinct agreement that the title shall not pass from seller to buyer until the price is paid, is valid.¹ And the buyer can not convey the title or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed.²

¹ *Segrist v. Crabtree*, 131 U. S. 287; *Harkness v. Russell*, 118 U. S. 663; *Page v. Edwards*, 64 Vt. 124; 23 Atl. Rep. 917; *Nichols v. Ashton*, 155 Mass. 205; 29 N. E. Rep. 519; *Hart v. Carpenter*, 24 Conn. 427; *Pinkham v. Appleton*, 82 Me. 574; *King v. Bates*, 57 N. H. 446; *Skelton v. Manchester*, 12 R. I. 326; *Bean v. Edge*, 84 N. Y. 510; *Cole v. Berry*, 42 N. J. Law, 308; *Williams v. Connaway*, 3 Houston (Del.), 63; *Call v. Seymour*, 40 Ohio St. 670; *McGirr v. Sell*, 60 Ind. 249; *Dewes Brewery Co. v. Merritt*, 82 Mich. 198; *Marquette Co. v. Jeffery*, 49 Mich. 283; *Sumer v. Cottey*, 71 Mo. 121; *Piedmont Land Co. v. Thomson Co. (Ala.)*, 12 So. Rep. 768; *Walsh v. Taylor*, 39 Md. 592; this case justifies a trespass by the seller to obtain possession after breach of condition by buyer; *Kornegay v. Kornegay*, 109 N. C. 188; *Talmadge v. Oliver*, 14 S. Car. 522; *Johnston v. Eichelberger*, 13 Fla. 230; *Jowers v. Blandy*, 58 Geo. 379; *Ketchum v. Brennan*, 53 Miss. 596, "a buyer must beware of purchasing from one who has not title. Possession is not title," per Campbell, J., 607; *Christian v. Bunker*, 38 Texas, 234; *Vaughn v. Hopson*, 10 Bush, 337; *Bradshaw v. Thomas*, 7 Yerg. 497.

² *Segrist v. Crabtree*, 131 U. S. 287; *Harkness v. Russell*, 118 U. S. 663; *Cole v. Berry*, 42 N. J. Law, 308, where all the cases are collected. See, also, *Dresser, etc., Co. v. Waterston*, 3 Metc. 9; *Coggill v. Hartford, etc., Co.*, 3 Gray, 545; 15 Am. L. Rev. 380; *Wadleigh v. Buckingham*, 80 Wis. 230; *Kimball Co. v. Mellon*, 80 Wis. 133. And see cases in preceding note, nearly all of

which arose from seller asserting rights against *bona fide* purchasers from buyer. *Contra*, *Vaughn v. Hopson*, 10 Bush, 337, overruling *Patton v. McCane*, 15 B. Mon. 555; *Forrest v. Nelson*, 108 Pa. St. 481; *Van Duzor v. Allen*, 90 Ill. 499. In Pennsylvania, a distinction is taken between delivery under a bailment, with an option in the bailee to purchase at a named price, and a delivery under a contract of sale containing a reservation of title in the vendor until the contract price is paid, it being held, that in the former instance, property does not pass as in favor of creditors and purchasers of the bailee, but that in the latter instance delivery to the vendee subjects the property to execution at the suit of his creditors and makes it transferable to *bona fide* purchasers. *Chamberlain v. Smith*, 44 Pa. St. 431; *Rose v. Story*, 1 Pa. St. 190; *Martin v. Mathiot*, 14 S. & R. 214; *Haak v. Linderman*, 64 Pa. St. 499. "This distinction is discredited by the great weight of authority, which puts possession under a conditional contract of sale and possession under a bailment, on the same footing—liable to be assailed by creditors and purchasers for actual fraud, but not fraudulent *per se*," per Depue, J., in *Cole v. Berry*, 42 N. J. Law, 308, 315. And as to how difficult it is in Pennsylvania to effect the same object as a conditional sale effects elsewhere, see *Forrest v. Nelson*, *supra*, which inhibits the transaction from being done under the guise of a bailment. Where the mere possession of a conditional buyer is held to warrant a purchaser buying from him, and thereby getting a good

§ 136. Form of contract of conditional sale.—In order to determine whether a transaction is a conditional sale it is essential to ascertain the character of the agreement. To do this courts look to the purpose of the parties as evidenced by the agreement and its provisions, and by applying the law determine the real character of the transaction; the construction of the transaction is a question of law for the court. And its construction and the terms and essence of the contract are the test of its nature, no matter what its framers may denominate it.¹

title, this certainly clothes possession with the attributes of ownership, a very dangerous doctrine.

¹ By the term "conditional sale," as herein used, is meant a sale wherein the seller reserves title in himself until the price is paid, possession in the meanwhile being in the buyer. *Nichols v. Ashton*, 155 Mass. 205; 29 N. E. Rep. 519, a case in which the transaction or written contract recited that the purchaser had borrowed and received certain goods which he could purchase by paying a certain sum in installments, but that no partial payment would entitle the purchaser to keep the goods after demand by seller for default in payment. There was a mortgage back to the seller by the buyer. It was held a conditional sale. "It is impossible by construction of such a contract to turn the transaction between the parties into a sale passing the title to S. and a mortgage or pledge back by him." Per Holmes, J. *Blanchard v. Cooke*, 144 Mass. 207; *Hervey v. Rhode Island L. Works*, 93 U. S. 664; *Page v. Edwards*, 64 Vt. 124; 23 Atl. Rep. 917; *Davenport v. Shants*, 43 Vt. 546; *Buzzell v. Cummings*, 61 Vt. 213; *Wadleigh v. Buckingham*, 80 Wis. 230, held to be a conditional sale although there was a provision that the chattels should be at risk of buyer. That is, if lost or destroyed the buyer bore the loss. *Sanders v. Wilson*, 19 D. C. 555, the contract recited that the buyer had rented a piano and had agreed to pay as rent certain sums until the price was paid and then the piano was to be buyer's. *Held*, a conditional sale. Compare *Bridget v. Cornish*, 1 Mackey, 29; *Cannon v. McMichael*, 6 Mackey, 225; *Farquhar v. McAlevy*, 142 Pa. St. 233, where machinery was delivered under a contract termed a "lease," the lessee promising to pay a certain sum in installments, "as hire in advance for the use of said machinery," and when the whole sum was paid and \$1 additional, the machinery became the buyer's. *Held*, a conditional sale. "It lacked the essential feature of a bailment, viz., a stipulation for a return of the property at the end of the term. * * * It is of the essence of a contract of bailment that the article bailed be returned, in its own or some altered form, to the bailor, so that he may have his own again," *per curiam*, 240; *Stephens v. Gifford*, 137 Pa. St. 219; *Stadteld v. Huntsman*, 92 Pa. St. 53; *Davis v. Giddings*, 30 Neb. 209; *Gross v. Jordan*, 83 Maine, 380; *Collins v. Houston*, 138 Pa. St. 481; *Dearborn v. Raysor*, 132 Pa. St. 231; *Summerson v. Hicks*, 134 Pa. St. 566; *Hays v. Jordan*, 85 Ga. 741; *Shoshonetz v. Campbell*, 7 Utah, 46; 24 Pac. Rep. 672; *Aultman v. Olsen*, 43 Minn. 409; *Fleury v. Tufts*, 25 Ill. App. 101; *Pate v. Oliver*, 104 N. C. 458; *McComb v. Donald*, 82 Va. 903. In all the above cases the parties sought to disguise the real transaction

§ 137. Transfer of rights under conditional sale.—The seller in a conditional sale may transfer his rights to a third person.¹ If notes have been taken for the price upon rescission of the sale the seller must return them to the buyer.² And the seller is bound to account for the notes he may have taken so as to save the buyer harmless, before he can recover the goods or the price for which he sold them. If he has negotiated the notes his rights are entirely transferred to the holder.³ Where an agent of a company dealing in pianos sold an instrument under a written contract of conditional sale, and transferred this contract to the company, but also took from the purchaser negotiable notes which recited that they were secured by the piano for the price, which he transferred to a *bona fide* purchaser for value, it was held that the holder of the notes was entitled to enforce their payment out of the piano, in preference to the piano company, the assignee of the non-negotiable contract.⁴ And where a note is taken for the price of the goods, if the buyer and seller agree that the goods may be disposed of or traded for others which shall stand in their place as security for payment, this transaction is valid, even against a third person, who in good faith purchased from the buyer.⁵

§ 138. Rights of the parties on default.—Upon default in payment of any of the installments the seller may resume possession.⁶ And it is not necessary that there be an express pro-

by calling it "bailment," "borrowing," "lease," and in some instances there was an express recital that it was not to be construed a conditional sale. Nevertheless in all cases it was pronounced a conditional sale.

¹ *Kimball v. Mellon*, 80 Wis. 133; *Norton v. Pilger*, 30 Neb. 860; 47 N.W. Rep. 471; *San Antonio Brewing Co. v. Arctic Ice Co.*, 81 Texas, 99; 16 S.W. Rep. 797.

² *Sumer v. Woods*, 67 Ala. 139; *Heinbockle v. Zugbaum*, 5 Mont. 344; 51 Am. Rep. 59; *Benjamin on Sales*, § 730.

³ *Kimball v. Mellon*, 80 Wis. 133;

Heinbockle v. Zugbaum, 5 Mont. 344; *Benjamin on Sales*, § 730.

⁴ *Kimball v. Mellon*, 80 Wis. 133.

⁵ *Perry v. Young*, 105 N.C. 463, where a mule was sold, the parties agreeing to trade it for a horse, the horse to take the place of the mule as to security. It was held that the seller could enforce payment of the note against the horse, although the buyer had sold him to an innocent purchaser. *Dedman v. Earle*, 52 Ark. 164.

⁶ *Wiggins v. Snow*, 89 Mich. 476; *Snook v. Raglan*, 89 Ga. 251; 15 S.E. Rep. 364; *Campbell Printing Press Co. v. Henkle*, 19 D.C. 95; *Nattin v. Riley*, 54 Ark. 30; *Tufts v. D'Arcambal*, 85

vision authorizing the vendor to retake possession. In every conditional sale this right is implied.¹ Accordingly when the seller resumes possession this operates as a rescission of the sale.² But the seller has the option either to retake possession or to bring an action for the price.³ And when the seller elects to sue, the buyer can not offer to rescind and tender back the goods.⁴

§ 139. Rights of buyer.—In the absence of a statute provision to the contrary, a buyer loses absolutely all installments paid when the sale is rescinded on account of his default.⁵ But a stipulation in a contract for the sale of goods, payable in installments, that if default be made in any of the payments, the vendor may retake them, and all payments to be forfeited, will not be enforced in equity.⁶ And in some states there are statutes providing for an adjustment of the amount of money the seller is to return upon rescission.⁷ And if the

Mich. 185; *Seymour v. Farquhar*, 93 Ala. 292; *Benjamin on Sales* (Ben-
nett's ed.), § 425, and authorities cited.

¹ *Wiggins v. Snow*, 89 Mich. 476; *Tufts v. D'Arcambal*, 85 Mich. 185; *Adams v. Wood*, 51 Mich. 411; *Edwards v. Symonds*, 65 Mich. 348.

² *Hineman v. Matthews*, 138 Pa. St. 204; *Blanchard v. Cooke*, 147 Mass. 215; 17 N. E. Rep. 313; *Summerson v. Hicks*, 134 Pa. St. 566; 19 Atl. Rep. 808; *Wyckoff v. Summerson* (Pa. St.), 19 Atl. Rep. 809; *Weil v. State*, 46 Ohio St. 450; *Hine v. Roberts*, 48 Conn. 267; *Cade v. Jenkins*, 88 Ga. 791; 15 S. E. Rep. 292; *Snook v. Raglan*, 89 Ga. 251; 15 S. E. Rep. 364.

³ *Monroe v. Williams*, 37 S. C. (1892) 81; *Appleton v. Norwalk*, 53 Conn. 4; *Bensinger Co. v. Cain* (Texas App.), 18 S. W. Rep. 136; *Cade v. Jenkins*, 88 Ga. 791; 15 S. E. Rep. 292; *Wing v. Thompson*, 78 Wis. 256; 47 N. W. Rep. 606; *Dederick v. Wolfe*, 68 Miss. 500; 9 So. Rep. 350.

⁴ *Appleton v. Norwalk, etc., Corp.*, 53 Conn. 4; *Bensinger Co. v. Cain* (Texas App.), 18 S. W. Rep. 136.

⁵ *Fleck v. Warner*, 25 Kan. 492; *Singer Co. v. Treadway*, 4 Bradw. (Ill.) 57; *Latham v. Sumner*, 89 Ill. 233; *Brown v. Haynes*, 52 Maine, 578; *Rounds v. Baxter*, 4 Greenl. 454; *Pierce v. Benjamin*, 14 Pick. 356; *Chamberlain v. Shaw*, 18 Pick. 278; *Fowler v. Gilman*, 13 Metc. 267; *Hyde v. Cookson*, 21 Barb. 92; *Bailey v. Hervey*, 135 Mass. 172; *Heinbockle v. Zugbaum*, 5 Mont. 344; *Loomis v. Bragg*, 50 Conn. 228; *Knittel v. Cushing*, 57 Texas, 354.

⁶ *Lincoln v. Quynn*, 68 Md. 299; 11 Atl. Rep. 848.

⁷ *Weil v. State*, 46 Ohio St. 450. A statute of Ohio making it unlawful to retake possession without tendering back the sum paid by him, after "deducting therefrom a reasonable sum for the use of the property," is not invalid on the ground that the amount of such compensation is uncertain, and no method is provided by the act for determining the same. Some courts, in the absence of such a statute, compel an equitable refunding of the payments received. See *Simon v.*

seller has rescinded the sale and taken possession, he can not recover any balance due on the purchase price.¹

§ 140. Waiver of forfeiture and title.—A forfeiture for non-payment may be waived by the seller. If after an installment has become due and remains unpaid, the vendee is still permitted to retain possession, and the vendor receives part payment, this is an assent to delay, and a waiver of any forfeiture, and a recognition of the right of the vendee to acquire title by payment of the residue of the price, which right continues until a request by the vendor for such payment, and a refusal of the vendee.² The law does not favor forfeiture for non-payment of an installment. And to authorize or sustain such a claim of forfeiture, it must be specially provided for by the contract.³ But a waiver of one or more forfeitures is not a circumstance tending to show a waiver of subsequent defaults, and is not relevant evidence therefor.⁴ The taking of negotiable notes in payment of the price is no waiver by seller of his title.⁵ Where property was conditionally sold and mortgaged by the buyer, it was held that there was no waiver of title by seller, although he advised the mortgagees to take the mortgage, stating at the time that he had a claim thereon which he would not waive.⁶ To constitute a waiver of title, there must be not only an act of delivery, but an intent not to insist on immediate payment as a condition of the title passing. Thus where the seller loaded wheat on cars designated by the buyer and noted in the bill that it was to be put "free on board," this did not estop the seller from reclaiming the

Edmundson, 10 Pa. Co. Ct. R. 315; *Snook v. Raglar*, 89 Ga. 251; 15 S. E. Rep. 364; *Wiggins v. Snow*, 89 Mich. 476; *Bennett's note* d to § 320, 4th Am. ed. Benjamin on Sales.

¹ *Campbell Printing Press Co. v. Henkle*, 19 D. C. 95.

² *O'Rourke v. Hadcock*, 114 N. Y. 541; *Hutchings v. Munger*, 41 N. Y. 155; *Fairbank v. Phelps*, 22 Pick. 535; *Lawrence v. Dale*, 3 John. Ch. 23; *Lupin v. Marie*, 6 Wend. 77; *Smith v. Lynes*, 5 N. Y. 41; *Hill v. Townsend*, 69 Ala. 286; *Deyoe v.*

Jamison, 33 Mich. 94. "The vendor may waive his right to a forfeiture for prior neglect to pay, by seeking afterwards to collect the balance due," head note. *Johnston v. Whittemore*, 27 Mich. 463; *Giddey v. Altman*, 27 Mich. 206; *Preston v. Whitney*, 23 Mich. 260.

³ *Hill v. Townsend*, 69 Ala. 286.

⁴ *Hill v. Townsend*, 69 Ala. 286.

⁵ Benjamin on Sales, § 730.

⁶ *Ames Iron Works v. Richardson*, 55 Ark. 642; 18 S. W. Rep. 381.

property from a *bona fide* purchaser from buyer, although he relied on the recital "free on board" in the bill.¹

§ 141. Destruction of the property.—Where there is a conditional sale the accidental destruction of the property by fire or otherwise does not relieve the buyer of the necessity to pay the purchase price.² But the parties may by express agreement determine upon whom the loss shall fall in case of the destruction of the chattels.³

¹ *Globe Milling Co. v. Minneapolis Elevator Co.*, 44 Minn. 153. Compare *Pond Machine Co. v. Robinson*, 38 Minn. 272. The first case cited is interesting as an attempt was made to convert by a local custom a conditional sale into an absolute one. "But a local usage can not be proved to contradict a contract. If by the contract for the sale of the wheat, it was for cash on delivery, the usage could not make it a sale on credit," per Gilfillan, C. J., 158. Compare *Paine v. Smith*, 33 Minn. 495; *Barnard v. Kellogg*, 10 Wall. 383; *Blackett v. Royal Exchange Co.*, 2 Crompt. & J. 244; *Brown v. Foster*, 113 Mass. 136; *Osborne v. Nelson Lumber Co.*, 33 Minn. 285; *Thompson v. Ashton*, 14 Johns. 316; *Dickinson v. Gay*, 7 Allen, 29; *Dodd v. Farlow*, 11 Allen, 426; *Frith v. Barker*, 2 John. 327.

² *Tufts v. Wynne*, 45 Mo. App. 42; *Tufts v. Griffen*, 107 N. C. 47; 12 S. E. Rep. 68; *Burnley v. Tufts*, 66 Miss. 48. Compare, *Snyder v. Murdock*, 51 Mo. 175; *Walker v. Owen*, 79 Mo. 569; *Gould v. Murch*, 70 Me. 288; *Thompson v. Gould*, 20 Pick. 134; *Vincent v. Cornell*, 13 Pick. 294; *Newhall v. Kingsbury*, 131 Mass. 445; *Swallow v. Emery*, 111 Mass. 355. *Contra*, *Randle v. Stone*, 77 Geo. 501.

³ *Wadleigh v. Buckingham*, 80 Wis. 230; *Burnley v. Tufts*, 66 Miss. 48. The reason that the buyer is held to pay the price, although the chattels

are destroyed, is because he has made an absolute promise to pay it. "B. unconditionally and absolutely promised to pay a certain sum for the property the possession of which he received from T. The fact that the property has been destroyed while in his custody, and before the time for the payment of the note last due, on payment of which only his right to the legal title of the property would have accrued, does not relieve him of payment of the price agreed on. He got exactly what he contracted for, viz., the possession of the property and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller had done all that he was to do except to receive the purchase price; the purchaser had received all that he was to receive as the consideration of his promise to pay. The inquiry is not whether if he had foreseen the contingency which has occurred he would have provided against it, nor whether he might have made a more prudent contract, but it is, whether, by the contract he has made, his promise is absolute or conditional. The contract made was a lawful one, and, as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from this obligation the court must make a new agreement for the parties, instead of enforcing the one made, which it

§ 142. **Recording.**—Where statutes exist making it necessary to record conditional sales, in the absence of express words to the contrary, these statutes are construed for the benefit of *bona fide* purchasers and mortgagees, and a failure to record does not invalidate the sale between the parties or effect in any manner the seller's remedies against the buyer.¹ And these statutes are construed strictly. Thus where the statute declared a conditional sale invalid for want of registration as against "subsequent purchasers and mortgagees," it was held that it did not apply in case of a pledge, and that the seller under an unrecorded conditional sale might regain possession from the buyer's pledgee.² The statute making an unrecorded conditional sale void as against *bona fide* purchasers and creditors applies to creditors before the sale as well as after, and a creditor of the buyer may levy on the chattels although his debt was contracted before the sale.³ And the goods are liable to a creditor's claim, although he knew and had actual knowledge that the sale was a conditional one.⁴ The statute must be strictly complied with. Thus where the statute directs that the contract of sale shall be "subscribed by the parties," it is not complied with when only one party—the buyer—signs.⁵ But when the seller brings suit to foreclose his lien on the chattels, this is notice sufficient, and a failure to comply with the regis-

can not do," per Cooper, J., 51; Tufts v. Wynne, 45 Mo. App. 42; see the ingenious argument of defendant's counsel in this case, trying to place the loss upon the party who had title at the time; Tufts v. Griffin, 107 N. C. 47; 12 S. E. Rep. 68; Gould v. Murch, 70 Maine, 288; Thompson v. Gould, 20 Pick. 134.

¹ Kornegay v. Kornegay, 109 N. C. 188; San Antonio Brewing Association v. Arctic Ice Co., 81 Tex. 99; 16 S. W. Rep. 797; Hineman v. Matthews, 138 Pa. St. 204; Mann v. Thompson, 86 Ga. 347; Norton v. Pilger, 30 Neb. 860; 47 N. W. Rep. 471; Morten v. Frick, 87 Ga. 230; 13 S. E.

Rep. 463; Mershon v. Moore, 76 Wis. 502; Wing v. Thompson, 78 Wis. 256; 47 N. W. Rep. 606; Kimball v. Mellon, 80 Wis. 133; 48 N. W. Rep. 1100.

² Canton Dental Co. v. Webb, 16 N. Y. Supl. 932.

³ Collins v. Wilhoit, 108 Mo. 451; 18 S. W. Rep. 839, overruling Coover v. Johnson, 86 Mo. 533.

⁴ Collins v. Wilhoit, 108 Mo. 451; 18 S. W. Rep. 839. *Contra*, Batchelder v. Sanborn (N. H.), 22 Atl. Rep. 535; Morton v. Frick, 87 Ga. 230; 13 S. E. Rep. 463.

⁵ Kimball v. Mellon, 80 Wis. 133; 48 N. W. Rep. 1100; Sheldon v. Mayers, 81 Wis. 627; 51 N. W. Rep. 1082.

try laws can not thereafter be taken advantage of by purchasers or creditors of the buyer.¹

§ 143. Miscellaneous matters.—Where the contract provides for the payment of counsel fees, there must be a demand before suit, and a failure to make demand for payment or return of the goods will render null the agreement as to fees.² Statutes regulating conditional sales, their registry and the amount of money to be refunded by seller upon retaking goods, are to be construed as applying to sales made after their passage. They usually are not retroactive.³ There are in some states penal statutes, punishing the buyer who sells goods without the seller's consent. Where they exist it is not incumbent upon the seller to keep espionage over the buyer and see he does not sell. Even the failure to comply with the registry laws does not serve as an excuse to violate the penal statute.⁴ And the fact that the buyer is actuated by good faith and ignorant of the law is no defense.⁵ If the buyer wants to prevent a forfeiture on the ground that he tendered the price, he must keep his tender good and be ready to pay all the time.⁶ There is one exception to the general rule that chattels may be conditionally sold. Where a manufacturer and wholesale vendor of articles of personal property sells upon credit, and delivers a lot of such articles to a retail dealer therein, for the apparent or applied purpose of resale by such vendee, the doctrine of conditional sales does not apply or govern such a sale, in a controversy as to such articles between the original seller and the purchasers thereof from the original buyer. This transaction can not be made the subject of a conditional sale, because the purposes for which the possession of the property is delivered to the buyer are inconsistent with the continued ownership by the seller, and for this reason the condition upon which the sale and delivery are made is fraudulent as against

¹ *San Antonio Brewing Co. v. Arctic Ice Co.*, 81 Texas, 99; 16 S. W. Rep. 797. E. Rep. 653; *Weil v. State*, 46 Ohio St. 450.

² *Wall v. Johnson*, 88 Ga. 524.

⁵ *Chambers v. State*, 85 Ga. 220; 11 S. E. Rep. 653.

³ *Harrell v. Godwin*, 102 N. C. 330.

⁶ *Summerson v. Hicks*, 134 Pa. St.

⁴ *Chambers v. State*, 85 Ga. 220; 11 S. 566; 19 Atl. Rep. 808.

buyers.¹ But it is competent for the parties as between themselves to make a conditional sale of goods to be retailed. Thus a contract by which a brewing company agrees to ship to a firm all beer ordered by them at an agreed price per barrel, the title to remain in the company until the beer is sold, is valid as to creditors of the firm.²

§ 144. Condition subsequent in deed—Subsequent defeasance.

—To create a condition subsequent in a deed, the intention of the parties to the deed must be clearly expressed in some words importing that the estate is to depend upon a contingency provided for.³ The condition subsequent as expressed in a deed conveying an estate in fee-simple being the payment of a certain annuity by the grantee to the grantor on a given day in each year during the life of the grantor, the condition was not broken so long as the annuity was not in arrears, and until the condition was broken the grantor had no right to re-enter as for a forfeiture, and no cause of action to cancel the deed as a cloud upon his title.⁴ When land is conveyed in payment of

¹ Winchester Co. v. Carman, 109 Ind. 31; Ludden v. Hazen, 31 Barb. 650; Griswold v. Sheldon, 4 N. Y. 581; Fitzgerald v. Fuller, 19 Hun, 180; Leigh v. Mobile R. Co., 58 Ala. 165; Benjamin on Sales, § 319. *Contra*, Lewis v. McCabe, 49 Conn. 141; Rogers v. Whitehouse, 71 Maine, 222; Armington v. Houston, 38 Vt. 448; Burbank v. Crooker, 7 Gray, 158; Sargent v. Metcalf, 5 Gray, 306. In Armington v. Houston, *supra*, the court say: "There is also a material distinction between a general and unrestricted power to sell or dispose of property and a limited privilege to consume it, such as is claimed to have been conferred on the vendee in this case." Compare, Ezzard v. Frick, 76 Ga. 512.

² Dewes Brewery Co. v. Merritt, 82 Mich. 198. Compare, Rawson Co. v. Richards, 69 Wis. 643. See the following articles on conditional sales: 10 Lawyers' Rep. Ann. 233, 314, 620; 12 Lawyers' Rep. Ann. 446, 700.

"Conditional Sales," by Judge A. H. Henn in 24 American Law Review, 64.

³ Baker v. Mott (1894), 78 Hun (N. Y.), 141. In Lyon v. Hersey, 103 N. Y. 264, 270, Ruger, C. J., said: "In the construction of all contracts under which forfeitures are claimed it is the duty of the court to interpret them strictly in order to avoid such a result, for a forfeiture is not favored in the law. Duryea v. Mayor, 62 N. Y. 592; Lorillard v. Silver, 36 N. Y. 578; while no particular form of words is necessary to create a limitation or condition, it is yet essential that the intention to create them shall be clearly expressed in some words importing *ex vi termini* that the vesting or continuance of the estate or interest is to depend upon a contingency provided for. Craig v. Wells, 11 N. Y. 315."

⁴ Denham v. Walker (1893), 93 Ga. 497.

a debt by deed absolute and without any agreement for a defeasance, a subsequent agreement executed by the grantee, stipulating that if he sells the land he will give the grantor the refusal to purchase or to find a purchaser upon the same terms offered to others, or if he sells a portion and realizes enough to pay the debt he will reconvey the property to the grantor, does not convert the fee into a defeasible estate.¹ While in such a case the subsequent agreement may not be read with the conveyance for the purpose of establishing the latter as a mortgage, yet where the two instruments were executed in pursuance of the original agreement and so constitute a part of the same transaction, they may be so read together, although they were not reduced to writing at the same time and do not bear even date.²

§ 145. Surety's bond signed under condition.—Where one signs, as surety, a bond, which in form is a joint obligation, upon condition that others are to sign the same with him, and it is delivered without the condition having been complied with, the instrument is invalid as to the one so signing as surety, unless the obligee, prior to the delivery, had no notice of such condition, or the surety, after signing, waived the condition.³ It is equally well settled that, when such a bond is delivered to the obligee without being signed by all the persons named in the body thereof as obligors, it is sufficient to put the obligee upon inquiry whether those who signed consented to its being delivered without the signatures of the others, and to charge the obligee with notice, if such be the fact, that the person signing did so upon the condition that the others named should also sign.⁴

¹ *Pond v. Harwood* (1893), 139 N. Y. 111.

² *Kraemer v. Adelsberger*, 122 N. Y. 467.

³ *Mullen v. Morris*, 43 Neb. 596; 62 N. W. Rep. 74, per Norval, C. J.: "The bond can not be enforced against the one so signing as surety, unless the obligee had no notice of the condition, or it be established that the surety, after signing, waived the condi-

tion. *Cutler v. Roberts*, 7 Neb. 4; *Sharp v. United States*, 4 Watts, 21; *Fletcher v. Austin*, 11 Vt. 447; *Hall v. Parker*, 37 Mich. 590; *Lovett v. Adams*, 3 Wend. 380; *State v. Pepper*, 31 Ind. 76; *People v. Bostwick*, 32 N. Y. 445."

⁴ *Cutler v. Roberts*, 7 Neb. 4; *State Bank v. Evans*, 15 N. J. Law, 155; *Sharp v. United States*, 4 Watts, 21; *Clements v. Cassilly*, 4 La. Ann. 380;

§ 146. **Refunding dues to withdrawing members.**—The articles of association of a mutual building and loan association, organized under the New York act of 1851, relating to such associations, constitute a contract between it and its members, and a member of such an association is subject not only to regulations existing when he became a member, but to such as may be enacted from time to time by the association, within the scope of the power given it by statute, including the power to enact at any time reasonable by-laws. While under such a power such an association can not destroy a contract created between it and its members by the articles of association, to refund his dues to a withdrawing member, it may enact a by-law more or less affecting the remedy of the member, and existing members will be bound thereby, so far, at least, as they consented to the exercise of such a power when they became members. Thus where the articles provided that a withdrawing member should be repaid his dues when the necessary funds were collected, and the original by-laws empowered the directors to make at any time by-laws which did not interfere with the articles of association, and declared that when enacted "they are equally binding upon all stockholders, as by them subscribed," it was held that a subsequent by-law, to the effect that withdrawing members should be paid in the order of the presentation of their applications, was a reasonable regulation and binding upon all members alike, including those who had

City of Sacramento v. Dunlap, 14 Cal. 421; *People v. Hartley*, 21 Cal. 585; *Wood v. Washburn*, 2 Pick. 24; *Bean v. Parker*, 17 Mass. 591. Is there any presumption that such a bond is incomplete and unfinished until executed by all the parties whose names appear in it as obligors? Upon this point the authorities are not harmonious. The following cases hold that no presumption arises that such a bond was not considered as binding until the signatures of all the obligors named in the body have been obtained, but, on the contrary, its execution is deemed *prima facie* complete,

and it is for the defendants to establish that they signed on the express condition that they were not bound until all the obligors named in the instrument should sign: *Dillon v. Anderson*, 43 N. Y. 231; *Parker v. Bradley*, 2 Hill, 584; *Haskins v. Lombard*, 16 Maine, 140; *Cutter v. Whittemore*, 10 Mass. 442; *Johnson v. Weatherwax*, 9 Kan. 75; *Johnson v. Baker*, 4 Barn. & Ald. 440. Some of the authorities which hold that the presumption is that such instrument was not to be delivered until all had signed are *Sharp v. United States*, 4 Watts, 21; *Clements v. Cassilly*, 4 La. Ann. 380.

become members before its adoption.¹ And in England, where a depositor in a building society gave notice of withdrawal and

¹ *Engelhardt v. Fifth Ward, etc., Loan Association* (1896), 148 N. Y. 281; 42 N. E. Rep. 710, per Andrews, C. J.: "It seems to be very plain that the clause in the articles of association, that the dues paid by withdrawing members 'will be refunded to them when the necessary funds are collected,' operated as a qualification of the liability of the association to withdrawing members. It was essential to the practical working of the scheme and purpose of the organization. The association, if the plan was followed, could have no assets of any considerable amount available for immediate repayment of dues paid in by withdrawing members. It was not a moneyed corporation, in any proper sense, and would not, in the ordinary course of its business, have assets readily convertible into money. Its assets would be represented in the main by loans to members on mortgages payable in small weekly payments. If no restriction existed preventing withdrawing members from immediately maintaining actions to recover their dues and enforcing judgments obtained, it is evident that this and similar associations would have a precarious existence. They would be in peril at almost any moment to have their operations arrested, and to be thrown into a receivership, by the conjoint action of a few withdrawing members. The beneficial purpose of the statute for the encouragement of small savings would be frustrated, and the assets of the association subjected to costs and expenses which would seriously impair the general fund contributed by the members. The articles of association, which showed the scheme of the organization, and defined the obligation of the association and the rights of

members, are binding upon each member thereof. They establish the relation between the association and the stockholders, and constitute a contract between them. The association only bound itself to return the dues owing to a withdrawing member 'when the necessary funds are collected.' The plaintiff knew the probable resources of the association when he became a member, and, by subscribing the articles, consented that the payment by members should be invested in mortgages payable in small weekly payments. He does not stand in the position of a general outside creditor. He paid his dues, and, although, by withdrawing, he has ceased to be a member of the association, his right to receive them back is measured by the contract between him and the association. There can be no doubt, we think, that the condition that the association should refund 'when the necessary funds are collected' was a material and substantive part of the obligation assumed by the association, and that it constitutes a good answer to the suit of a withdrawing member that, neither at the time that he withdrew, nor subsequently, before the action was brought, were there in the treasury of the association any funds collected, out of which the claim could be paid. We, of course, eliminate any element of bad faith, for this is not claimed. Nor is it the case of an association which has discontinued its business or become insolvent. We need not consider what effect these or other facts might have upon the legal remedies of a withdrawing stockholder. There is another question raised, respecting the right of the association to establish a by-law that withdrawing members should be paid in the order in

brought action to recover his deposit, it was held that the insufficiency of the available balance to pay the depositors who

which their applications were filed with the association. Such a by-law was enacted in the fall of 1891, after the plaintiff had purchased his stock, but, so far as appears, before any member had withdrawn, or any withdrawals were in contemplation. It is claimed, in behalf of the plaintiff, that his rights could not be prejudiced by the enactment of such a rule of preference after he had become a member. * * * * The member of an association accepts membership with notice of the statutory powers conferred upon it. He is subject, not only to regulations existing when he becomes a member, but to such as may be enacted from time to time by the association within the scope of the power given by the statute. It may be admitted that the association could not, under this power, destroy the contract between it and the member. But the contract made was in law subject to this power of the association to enact at any time reasonable by-laws. It would not be reasonable to extend the power so as to authorize the association, by a subsequent by-law, to change the essential character of an antecedent agreement between a member and the association; as, for example, that a withdrawing member should not be repaid his dues. But a by-law more or less affecting the remedy of the shareholder may be passed, and existing members will be bound, so far, at least, as they consented to the exercise of such a power when they became members. The recent English cases of *Wilson v. Miles, etc., Society*, 22 Q. B. Div. 381, note; *Rosenberg v. Northumberland, etc., Society*, 22 Q. B. Div. 373; and *Bradbury v. Wild* (1893), L. R. 1 Ch. 377,—are quite full upon this point. We think the by-

law enacted in the present case, that withdrawing members should be paid in the order of the presentation of their application, was a reasonable regulation, and bound the plaintiff, although enacted after he became a member. There is nothing in the articles of association forbidding, directly or by implication, the enactment of such a by-law. It gave no preference to any named stockholder over others. The plaintiff was at liberty at any time to withdraw, and make his application for repayment, but he saw fit to defer doing so until after many others had preceded him. The association, by enacting the rule, did not deny the plaintiff's right to be paid out of collections, but, for convenience, enacted a rule that those who first applied should be first paid; and this, we think, it was competent for the association to do, and that when enacted the rule was binding upon all members alike. The by-laws originally enacted empowered the board of directors to make 'at any time' by-laws which do not interfere with the 'articles of association,' and further declared that, when enacted, 'they are equally binding upon all stockholders, as by them subscribed.' The by-law in question was not an interference with the articles of association. The authorities upon the question herein considered are not altogether harmonious. The case of *United States Bldg. & Loan Assn. v. Silverman*, 85 Pa. St. 394, may be said to be adverse to the view that the plaintiff could not maintain an action until there were funds collected applicable to the payment of his claim. On the other hand, the cases of *Brett v. Monarch Society* (1894), L. R. 1 Q. B. 367; *Barnard v. Tomson* (1894), L. R. 1 Ch. 374;

had given prior notice to withdraw was an answer to the action, as the rules of the society provided in such a case that the withdrawing depositors should be paid in rotation according to the priority of their notices.¹ The Pennsylvania Building Association act of 1859 provided that at no time should more than one-half of the funds in the treasury of the corporation be applied to the demands of withdrawing stockholders. In an action by a stockholder who had given the required notice of his withdrawal to recover the money he had put in, it was held that he was not estopped by the statutory proviso from legal process for the recovery of his money until the treasury has sufficient funds to meet his claim, and also that the association's affidavit of defense was insufficient since it did not aver that its losses and debts in excess of fifty per cent. of its funds were incurred before plaintiff's withdrawal.²

Heinbokel v. National, etc., Association, 58 Minn. 340; 59 N. W. Rep. 1050; and *Texas, etc., Association v. Kerr* (Texas Sup.), 13 S. W. Rep. 1020, tend to support the opposite conclusion, and rest, we think, upon the better reason."

¹ *Brett v. Monarch, etc., Bldg. Soc'y* (1894), L. R. 1 Q. B. 367. And in *Barnard v. Tomson* (1894), L. R. 1 Ch. 374, it was held that where the notices of withdrawing members have matured before the date of the deed of dissolution, entered into pursuant to the act of 1894, the withdrawing members are entitled, notwithstanding the

winding up, to be paid according to the priority of the dates of their notices. An instrument of dissolution under the provisions of the English Building Societies act is not equivalent in its operation to a winding up order made by the court, and upon such an instrument taking effect advanced members who have accounted in accordance with the rules to pay up their advances by installments can not be compelled to pay up forthwith the balances due from them on their securities. *Kemp v. Wright*, L. R. (1894), 2 Ch. 462, 21.

² *United States Bldg., etc., Assn. v. Silverman*, 85 Pa. St. 394.

CHAPTER V.

CONSIDERATION.

- § 147. Consideration defined.
- 148. Sealed instruments.
- 149. Contracts in restraint of trade.
- 150. Statutory abolition of seals.
- 151. The same subject continued.
- 152. Executed and executory considerations.
- 153. Moral obligation.
- 154. The same subject continued—Exceptions.
- 155. Benefits received—Consideration accepted involuntarily.
- 156. Power to return the benefit.
- 157. Existing legal obligation as a consideration.
- 158. The same subject continued.
- 159. Promise to new party.
- 160. Past consideration.
- 161. Consideration moved by previous request.
- 162. Statute of limitations.
- 163. The same subject continued.
- 164. Doing what another is bound to do.
- 165. Where party is already bound.
- 166. The same subject continued.
- 167. Forbearance.
- 168. Extension of time.
- 169. Further illustrations.
- 170. Forbearance to sue—Time.
- 171. Extension — Paying interest — Surety's consent.
- 172. The same subject continued.
- 173. *Nudum pactum*—Promise of indulgence.
- 174. Disputed and doubtful claims.
- § 175. Further illustrations.
- 176. Forbearance—When the right or claim is doubtful.
- 177. Dismissing a suit.
- 178. Mutual promises.
- 179. The same subject continued—College endowment bond.
- 180. Past consideration—Future services.
- 181. Marriage.
- 182. Illustrations.
- 183. Representations.
- 184. Conveyances.
- 185. Promise of third person.
- 186. Illustrations of third person's promise.
- 187. Marriage as the consideration of dower.
- 188. Naming child as a consideration.
- 189. Change of name as a consideration.
- 190. Adequacy of consideration.
- 191. Illustrations.
- 192. Further illustrations.
- 193. Inadequacy in equity.
- 194. The same subject continued.
- 195. Consideration moving from plaintiff.
- 196. Further illustrations.
- 197. The English rule.
- 198. Exceptions to the English rule.
- 199. Limitations upon the American rule allowing third party to sue.
- 200. Limitations.

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| <p>§ 201. Illegality—Rescission.</p> <p>202. Rescission not to affect rights attached.</p> <p>203. Delivery essential to gift—Voluntary trust distinguished.</p> <p>204. Gift of savings bank deposit.</p> <p>205. Gratuitous subscriptions.</p> <p>206. The present doctrine.</p> <p>207. Revocation by death—As a general rule.</p> <p>208. Subscriptions to capital stock—Before incorporation.</p> | <p>§ 209. After incorporation.</p> <p>210. The consideration for such a subscription.</p> <p>211. Sufficient consideration illustrated.</p> <p>212. The same subject continued.</p> <p>213. The same subject continued.</p> <p>214. Insufficient consideration illustrated—Common carrier.</p> <p>215. When grantee is to sell for grantor—The trust as consideration.</p> |
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§ 147. Consideration defined.—Consideration is a necessary element in the creation of a contract. A gratuitous promise is void unless made by deed. And except when made by deed, a promise, whether witnessed by a writing, or resting wholly in parol, must be founded on a sufficient consideration, either of benefit to the one party or of detriment to the other, or of both combined.¹ The “consideration” of a contract is the *quid pro quo*, that which the party to whom a promise is made does or agrees to do in exchange for the promise.² The “motive” for entering into a contract and the “consideration” of the contract are not the same. Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor’s undertaking. Expectation of results

¹ *Drake v. Lanning*, 49 N. J. Eq. 452; 24 Atl. Rep. 378; *Rann v. Hughes*, 7 T. R. 346, n.; *Pillans v. Van Mierop*, 3 Burr. 1663.

² *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183, 197, per Gray, J.: “The expression at the beginning of the policy, that the insurance is made ‘in consideration of the representations made in the application of this policy,’ and of certain sums paid and to be paid for premiums, does not make those representations part of the con-

sideration, in the technical sense, or render it necessary or proper to plead them as such. * * * * In a contract of insurance, the promise of the insurer is to pay a certain amount of money upon certain conditions; and the consideration on the part of the assured is his payment of the whole premium at the inception of the contract, or his payment of part then and his agreement to pay the rest at certain periods while it continues in force.”

will not constitute a consideration.¹ Considerations are either good or valuable. A "valuable consideration" consists either in some right, interest, profit, or benefit accruing to the one party, or some extension of time of payment, detriment, loss, or responsibility given, suffered, or undertaken by the other.² A "good consideration" is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation, being founded on motives of generosity, prudence, and natural duty.³ A "good consideration" imports merely the motive of natural affection toward relations, and excludes the element of compensation or equivalent for the promise which is essential to constitute a legal consideration. But the fact that natural affection forms an element of the consideration does not impair the force of a contract.⁴ A promise supported by a good consideration only is void, and a deed made on good consideration is a voluntary one, which is valid only between the parties, and is not aided in equity; but is void as to creditors and purchasers for value.⁵

§ 148. Sealed instruments.—Want of consideration is not a sufficient answer to an action on a sealed instrument. The seal imports a consideration, or renders proof of consideration unnecessary, because the instrument binds the parties by force of the natural and conclusive presumption that an instrument

¹ *Philpot v. Gruninger*, 14 Wall. 570; *Currie v. Misa*, L. R. 10 Ex. 153; *Hendrick v. Lindsay*, 93 U. S. 143, where Davis, J., said: "Any damage or suspension of a right, or possibility of a loss occasioned to the plaintiff by the promise of another, is a sufficient consideration for such promise, and will make it binding, although no actual benefit accrues to the party promising." See the following cases where consideration is defined: *Cottage Street Church v. Kendall*, 121 Mass. 528; *Piatt v. United States*, 22 Wall. 496; *Pillans v. Van Mierop*, 3 Burr. 1663; *Terrill v. Auchauer*, 14 Ohio St. 85; *Violett v. Patton*, 5 Cranch, 142, con-

tains Chief Justice Marshall's celebrated definition of a contract. *Railroad Co. v. National Bank*, 102 U. S. 14, 46.

² *Railroad Co. v. National Bank*, 102 U. S. 14, 46, per Clifford, J.

³ 2 Blackstone's Commentaries, 297.

⁴ *Puterbaugh v. Puterbaugh*, 131 Ind. 258. The only purpose for which a good consideration is effectual is to support a covenant to stand seized to uses. *Tweddle v. Atkinson*, 1 B. & S. 393.

⁵ *Leake on Contracts*, 615; *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Buckle v. Mitchell*, 18 Ves. 100.

executed with so much deliberation and solemnity is founded upon some sufficient consideration.¹

§ 149. Contracts in restraint of trade.—It thus becomes possible by means of a deed under seal to make a voluntary promise, that is, one that is gratuitous or without any consideration, in a manner which shall be binding on the promisor, although such a promise can not be made binding in the form of a simple contract.² There is, however, an exception to this rule in cases of contracts in restraint of trade. Here

¹*Storm v. United States*, 94 U. S. 76. This was a case where a party was sued on an indemnity bond and set up as a defense that it was not mutually binding and therefore lacked consideration, and Mr. Justice Clifford, after stating the difference between unilateral and bilateral simple contracts, said: "Such a defense could not be sustained, even if the action was upon a simple contract; but the agreement here is under seal, and the action is an action of debt founded on the bond given to secure the performance of the agreement; and it is an elementary rule, that a bond or other specialty is presumed to have been made upon good consideration, so long as the instrument remains unimpeached." *Parker v. Parmele*, 20 Johns. 130, "a mere failure of consideration is no defense at law to an action on a deed or specialty"; *Vrooman v. Phelps*, 2 Johns. 177; *Dorr v. Munsell*, 13 Johns. 430; *Paige v. Parker*, 8 Gray, 211; *Wing v. Chase*, 35 Maine, 260; *Fallowes v. Taylor*, 7 T. R. 471; *Lowe v. Peers*, 4 Burr. 2225; *Pillans v. Van Mierop*, 3 Burr. 1663; *Rann v. Hughes*, 7 T. R. 346, n. "There are two ways of making contracts of agreements; the one is by words, which is the inferior method; the other is by writing (*i. e.* under seal), which is the superior. And because words are sometimes spoken by men

unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. But where the agreement is by deed, there is more time for deliberation. For, when a man passes a thing by deed, first there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation; and afterwards he puts his seal to it, which is another part of deliberation; and lastly he delivers the writing as his deed, which is the consummation of his resolution. So that there is a great deliberation used in the making of deeds, for which reason they are received as a lien final to the party, and are adjudged to bind the party without examining upon what cause or consideration they were made."

²*Aller v. Aller*, 40 N. J. Law, 446; *Morley v. Boothby*, 3 Bing. 107; *Sharlington v. Strotton*, 1 Plowden, 298; *Rann v. Hughes*, 7 T. R. 346, n.; *Jerome v. Ortman*, 66 Mich. 668; 33 N. W. Rep. 759; *Burkholder v. Plank*, 69 Pa. St. 225; *Stanley v. Smith*, 15 Ore. 505; 16 Pac. Rep. 174; *Woodruff v. Woodruff*, 44 N. J. Eq. 349; 16 Atl. Rep. 4. The head note of *Aller v. Aller*, *supra*, is "It is not a good defense to a promise in writing, under seal" to pay a sum of money, for value received, that it was voluntary.

there must be an actual consideration, and the seal does not import one.¹

§ 150. Statutory abolition of seals.—Legislation dealing with the question of seals has taken three forms: The first is where the use of private seals is absolutely abolished;² the second is where all distinction between sealed and unsealed instruments is done away with;³ the third is where a seal is made only presumptive evidence of consideration, which may be rebutted as if the instrument were not sealed.⁴

¹*Gompers v. Rochester*, 56 Pa. St. 194; *Weller v. Hersee*, 10 Hun. 431; *Mitchel v. Reynolds*, 1 P. Wms. 181; *Ross v. Sadgbeer*, 21 Wend. 166; *Draper v. Snow*, 20 N. Y. 331; *Pierce v. Fuller*, 8 Mass. 223. The consideration in this case was one dollar, the promise being not to run a stage on a certain road specified. This sum was held adequate to support the promise. *Ross v. Sadgbeer*, 21 Wend. 166, where it is said: "It is true that a consideration will be implied from the seal, where the parties contract by deed. But the seal only imports that there was some consideration—not that there was a peculiar one, such as this case requires. If we imply a pecuniary consideration, however large it may be in amount, it will not remove the difficulty under which the plaintiff labors. It must appear that he purchased the defendant's works, or a secret which he possessed in the relation to the manufacturing of ashes, or that there was some other good reason for taking this bond. Otherwise it was a contract to deprive a man of his livelihood, and the public of a useful member, without any benefit to the plaintiff, which the law will not permit." *Palmer v. Stebbins*, 3 Pick. 188; *Homer v. Ashford*, 3 Bing. 322; *Hitchcock v.*

Coker, 6 A. & E. 438; *Archer v. Marsh*, 6 A. & E. 959. "An agreement not to carry on a certain business anywhere is invalid, whether it be by parol or specialty." Story on Contracts, § 650. Compare *Bender v. Been*, 78 Iowa, 283; *Sanders v. Bagwell*, 32 S. C. 238; *Hacker's Appeal*, 121 Pa. St. 192; *Lemon v. Graham*, 131 Pa. St. 447.

²The following states have legislation of this sort: Ohio, Indiana, Iowa, Kansas, Nebraska, Tennessee, Texas, Dakota (North), Dakota (South), Montana and Mississippi. Stimson's "American Statute Law," p. 197.

³This obtains in Kentucky, Tennessee, Texas, California, Oregon, and Mississippi; Stimson's "American Statute Law," p. 197. It will be seen that some states have enacted both forms of legislation.

⁴New York, New Jersey, Michigan, Wisconsin, Oregon and Alabama; Stimson's "American Statute Law," p. 455. There is a fourth form of legislation in some states, which enacts that all contracts in writing import a consideration. The following are these states: Iowa, Kansas, Tennessee, Missouri, Texas, California, Dakota, Alabama and Florida. While the language of the statutes may differ they are all referable to one or the other kinds

§ 151. The same subject continued.—But although there are these different forms of legislation upon the subject their effect is substantially the same. Parties may still bind themselves to the performance of a duty, and if such was their intention no consideration for the promise is necessary. The statutes merely make it necessary for the courts to gather the intention of the parties entirely from the instrument. They substitute the intention of the parties for the form of the instrument.¹

stated in the text. Legislation has in a great many states accurately defined "a seal."

¹ *Aller v. Aller*, 40 N. J. Law, 446. This case construed the New Jersey statute allowing a want of sufficient consideration to be shown as a defense, and it was held that, in spite of this statute, a voluntary promise under seal, not supported by a consideration, was valid. After having discussed at length the effect of a common law sealed instrument, Scudder, J., said: "These statements of the law have been thus particularly given in the words of others, because the significance of writings under seal, and their importance in our common law system, seem in danger of being overlooked in some of our later legislation. If a party has fully and absolutely expressed his intention in a writing sealed and delivered, with the most solemn sanction known to our law, what should prevent its execution where there is no fraud or illegality? But because deeds have been used to cover fraud and illegality in the consideration, and just defenses have been often shut out by the conclusive character of the formality of sealing, we have enacted in our state the two recent statutes above quoted. The one allows fraud in the consideration of instruments under seal to be set up as a defense, the other takes away the conclusive evidence of a sufficient consideration heretofore accorded to a sealed writ-

ing, and makes it only presumptive evidence. This does not reach the case of a voluntary agreement, where there was no consideration, and none intended by the parties. The statute establishes a new rule of evidence, by which the consideration of sealed instruments may be shown, but does not take from them the effect of establishing a contract expressing the intention of the parties, made with the most solemn authentication, which is not shown to be fraudulent or illegal," 451, 452. *Jones v. Morris*, 61 Ala. 518; here an instrument which purported to be a deed was so construed, and held that, as the principal did not purport to sign and the agent executed it in his own name, it could not be varied by parol evidence. *Fay v. Richards*, 21 Wend. 626. The head note is: "Where a party obtains what he contracted for, he can not avoid his contract on the ground that what he received is valueless, unless he shows fraud or a misapprehension in respect to the subject-matter of the contract." *Talmadge v. Wallis*, 25 Wend. 107. "A plea of want of seizin in a vendor who has conveyed real estate with covenant of seizin, is no bar to an action of debt on bond given for the purchase-money." *Case v. Boughton*, 11 Wend. 107; *Judy v. Louderman*, 48 Ohio St. 562; *Osborn v. Kistler*, 35 Ohio St. 99; *Avery v. Latimer*, 14 Ohio, 542. These cases recognize the validity of voluntary promises. "It is a grossly inaccurate

§ 152. Executed and executory considerations.—The consideration of a promise is either executed or executory. If the thing is done at the time of the promise it is executed. But if there is only a promise to do something in return for another promise, here the consideration on both sides is executory. In one case the consideration is executed at the time of contracting; in the other it is executory.¹

statement of the law to say 'that equity always required an actual consideration, and permits the want of it to be shown notwithstanding the seal.' The truth is that equity recognized the failure of consideration as a defense to a sealed instrument, but never so recognized the want of a consideration." *Candor's Appeal*, 27 Pa. St. 119. And see further to this effect: *Yard v. Patton*, 13 Pa. St. 278; *Harris v. Harris*, 23 Gratt. 737; *Sherk v. Endress*, 3 W. & S. (Pa.) 255; *Carter v. King*, 11 Rich. L. 125; *Harrell v. Watson*, 63 N. Car. 454; *Walker v. Walker*, 13 Ired. 335; *Wing v. Chase*, 35 Maine, 260; *Kennedy v. Howell*, 20 Conn. 349. See, also, the following cases which deal with the question as to how far consideration can be inquired into, and the effects of statutes abolishing distinctions between sealed instruments and simple contracts. *Stegman v. Hollingsworth*, 14 N. Y. Supl. 465; *Williams v. State*, 25 Fla. 734; *Jacobs v. Daugherty*, 78 Texas, 682; *Waln v. Waln* (N. J.), 22 Atl. Rep. 203; *Frost v. Wolf*, 77 Texas, 455; 14 S. W. Rep. 440; *Stevens v. Philadelphia Ball Club*, 142 Pa. St. 52; 21 Atl. Rep. 797; *Osborne v. Hubbard*, 20 Ore. 318; 25 Pac. Rep. 1021; *Todd v. Union Dime Co.*, 118 N. Y. 337; *McCoy v. Cassidy*, 96 Mo. 429; *Carrington v. Potter*, 37 Fed. Rep. 767; *Conover v. Brown*, 49 N. J. 156; 23 Atl. Rep. 507; *Excelsior Manufacturing Co. v. Wheelock*, — N. M. —; 28 Pac. Rep. 772.

¹ A promise with an executed consideration is a unilateral contract. Where there are two promises, each the consideration of the other, the contract is bilateral. *Farrington v. Tennessee*, 95 U. S. 679, 683; *Richardson v. Hardwick*, 106 U. S. 252, where the court said: "In suits upon unilateral contracts, it is only where the defendant has had the benefit of the consideration for which he bargained that he can be held bound." *Jones v. Robinson*, 17 L. J. Ex. 36; *Mill v. Blackall*, 11 Q. B. 358; *Morton v. Burn*, 7 A. & E. 19; *Kennaway v. Treleavan*, 5 M. & W. 498; *Butler v. Thomson*, 92 U. S. 412, 415; *Frue v. Houghton*, 6 Colo. 318, where the court said: "The class of contracts to which the contract in this case belongs is cited in the authorities as an exception to the general rule. It is styled a conditional or unilateral contract. The promisor binds himself to execute the agreement on his part upon happening of the condition, or upon performance within a stated period of time by the other party, of certain acts or considerations. Up to the time of such performance, these undertakings usually lack the elements of binding contracts. The promisee in many instances not being bound at all, the promisor is at liberty to revoke the promise on his part at any time before acceptance or performance. Upon performance of the condition, however, the contract is said to become absolute and mutual in its obligations. A decree can not then be prevented by

§ 153. Moral obligation.—A moral obligation is not a valuable consideration, and will not support a promise.¹ But a person's moral duty to another may be sufficient to uphold his contract with him, although prior to the contract the other did not have an interest or right which could be enforced at law.²

setting up the original lack of mutuality." *Perkins v. Hadsell*, 50 Ill. 216. A matter executed and past before the time of making the promise is no consideration. The consideration can only be executed at the time of the promise, or subsequently. A bilateral contract is converted into a unilateral one when the consideration ceases to be executory and becomes executed; that is, one of the mutual promises is performed, leaving the other still to be fulfilled.

¹ *Hale v. Rice*, 124 Mass. 292. "If a debt is voluntarily released by the creditor, a subsequent promise to pay it made by the debtor is without consideration." *Cole v. Bedford*, 97 Mass. 326, n.; *Shepherd v. Young*, 8 Gray, 152, the case of a widow who supported a destitute infant grandchild. She can not, upon the death of the child by a railroad accident, and the payment of damages to its administrator by the railroad, maintain an action against the administrator, for the amount of the child's board, even if he has expressly promised to pay it. *Dodge v. Adams*, 19 Pick. 429, where a man's minor children were taken from his house without his consent, and were boarded by his wife's father during the pendency of a suit for divorce. It was held that the father's express promise to pay after the board had been furnished was void. *Loomis v. Newhall*, 15 Pick. 159; *Mills v. Wyman*, 3 Pick. 207, promise to pay for one's infant children's board held void. *Valentine v. Foster*, 1 Metc. 520; *Robinson v. McAfee*, 59 Mich. 375; *Freeman v. Smalley*, 38 N. J. Law, 383, where goods were sold to

a minor child without parent's knowledge or consent. It was held that the parent's subsequent promise to pay was invalid, the court saying: "The principle thus enunciated [that a moral consideration will not support a promise] was approved by Lord Denny in *Eastwood v. Kenyon*, 11 A. & E. 438, and adopted by the judges of the Queen's Bench in *Beaumont v. Reeve*, 8 Q. B. 483, and may now be considered as the settled law in the English courts. It has also been approved and made the basis of the judicial decision quite generally by the courts in this country." *Smith v. Ware*, 13 Johns. 258; *Ehle v. Judson*, 24 Wend. 97; *Geer v. Archer*, 2 Barb. 420; *Cook v. Bradley*, 7 Conn. 57, a promise by a son to pay for necessities which had previously been furnished to his father, who was indigent. *Snevily v. Read*, 9 Watts, 396; *Farnham v. O'Brien*, 22 Maine, 475; *Warren v. Whitney*, 24 Maine, 561; *Parker v. Carter*, 4 Munf. 273; *Hawley v. Farrar*, 1 Vt. 420; *Edwards v. Davis*, 16 Johns. 281. *Contra*, *Hawkes v. Saunders*, Cowp. 289; *Wen-nall v. Adney*, 3 B. & P. 247; *Briggs v. Sutton*, *Spencer (N. J. Law)*, 581, 582; *Holliday v. Atkinson*, 5 B. & C. 501; *Lee v. Muggeridge*, 5 Taunt. 32; *Atkins v. Barnwell*, 2 East, 505.

² *Brown v. Latham* (Ga. 1893), 18 S. E. Rep. 421, per Bleckley, C. J.: "Touching the contract which the parties made after the father's death, there was ample moral consideration to uphold it if the petition be true; for, even if the son was in a position to protect himself against reconveying to the father, he could waive that pro-

Accordingly the moral obligation to provide for an illegitimate child is a sufficient consideration to support a trust declared by a parent for the child.¹ To render a moral obligation a good consideration for an express contract there must have been some pre-existing legal obligation to which it can attach. The mother of an illegitimate child is under the primary duty of supporting it; the father's contract to pay for its support is therefore without consideration, and not enforceable.² The moral obligation resting upon a woman to make good her promise made during coverture is not a sufficient consideration to uphold an affirmation of the promise made after she becomes discovert.³

§ 154. The same subject continued—Exceptions.—Where a person is under a moral and legal obligation to do an act, and another does it for him under such circumstances of urgent necessity that humanity and decency admit of no time for delay, the law will imply a promise to pay.⁴ And in Pennsylvania a

tection, and upon his moral obligation to share the lands with his sister in proportion to her interest as a coheir with himself could contract with her to retain both her interest and his own in some of the lands, convey to her the balance, and pay her a money compensation besides. It is true, another coheir, the widow, might have reason to complain at this, and she might be a proper, if not a necessary, party to the present action; but no objection on account of her not being a party was made. We think the moral duty of the defendant to account to his sister for her interest in the land, although it may not have been a legal interest, or one that could be enforced, would be a sufficient consideration to uphold the contract between them."

¹ *K. X. v. A. Y.* (1894), 34 W. N. Cas. (Pa.) 145.

² *Easley v. Gordon* (1892), 51 Mo. App. 637. In *Greenabaum v. Elliott*, 60 Mo. 25, *Wagner, J.*, said: "A moral obligation by itself is not a good con-

sideration for a promise. To impart to it any binding character there must be some antecedent legal ability to which it can attach."

³ *Musick v. Dodson*, 76 Mo. 624.

⁴ *Force v. Haines*, 17 N. J. Law, 385; *Jenkins v. Tucker*, 1 Hen. Bl. 90, paying a wife's funeral expenses. The husband not being present to bury the wife, he was held liable to reimburse the plaintiff; *Scarman v. Castell*, 1 Esp. 270, doctoring a sick servant. Master held liable. *Simmons v. Wil-mott*, 3 Esp. N. P. 91, where Lord Eldon said: "A person influenced by humanity, may provide instant relief for an indigent, helpless creature overtaken by casualty and misfortune, without waiting for any request. * * * They (the exceptions to the rule) may all be arranged, in fact, under the great head of urgent necessity; such as sickness, casualty, and burial of the dead." *Atkins v. Banwell*, 2 East, 305; *Dunbar v. Williams*, 10 Johns. 249; *Wennall v. Ad-ney*, 3 Bos. & Pull. 247.

moral obligation will constitute a valuable consideration to support a promise.¹

§ 155. Benefits received—Consideration accepted involuntarily.—Any act done for the benefit of another, without his request, is to be deemed a voluntary act, for which no action can be sustained.² The reason of this rule is

¹ *Bentley v. Lamb* (Pa. St.), 25 Am. Law Reg. (N. S.) 632, a suit on a due bill. Defense, a want of consideration. "If it be granted that the agreement to give the due bill imposed no legal obligation, how can it be denied that it created at least a moral obligation to do so? The duty to perform a positive promise which is not contrary to law or to public policy, or obtained by fraud, imposition, undue influence, or mistake, is certainly an obligation in morals, and if so, it is a sufficient consideration for an express promise." In his annotation of this case in the Law Register, Mr. Ewell says: "But the court have, as it seems to us, in laying down the rule that the duty to perform a positive promise which is not contrary to law, or to public policy, or obtained by fraud, imposition, undue influence or mistake, is an obligation in morals, and if so, sufficient consideration for an express promise, gone further than the English or American authorities will support them; or to state our opinion more clearly, it seems to us that this doctrine can find no valid support in common law." See, also, 32 Central Law Journal, 53, on "Moral Obligation," as a consideration.

² *Cincinnati, etc., R. Co. v. Bensley* (1892), 51 Fed. Rep. 738. This case treats the whole subject of benefits received as raising an implied promise to pay. This was an agreement to pay a certain sum for having a building erected on a neighboring lot, it being supposed by defendant that the

value of his property would be enhanced thereby. The court held the agreement could not be enforced because of the failure of plaintiff to comply with the condition as to time, the building not being erected as soon as agreed. The court then discusses defendant's liability to pay for benefits received, and *Brown, J.*, said: "Had the defendant received a benefit from the performance of this contract to which he would not have been entitled had the contract not been made, the result might have been different." *Forbis v. Inman* (1892), 23 Ore. 68; 31 Pac. Rep. 204, work done and materials furnished by mistake; *held*, no recovery, the court saying: "The gist of the action grows out of the request for the performance of the services, and the promise to pay therefor. To make one liable on such a contract it is not enough to allege and show that the defendant had received a benefit, but it must appear that the defendant had either requested the performance of the service, or that, when he knew the service had been performed, he must have promised to pay for the same." *Glenn v. Savage*, 14 Ore. 567; to recover for goods furnished, the court saying: "The great and leading rule of law is to deem an act done for the benefit of another without his request as a voluntary act of courtesy, for which no action can be sustained." *Davidson v. Westchester Co.*, 99 N. Y. 558, the court saying: "A promise to pay for services is sometimes im-

that one man can not make another his debtor without his consent.¹

§ 156. Power to return the benefit.—Where consideration is given without express or implied request, it must be returned if it be in the power of the party to do so.² But if buildings have been erected on land without request they can not be removed, and the use of them by the owner of the land is not such an acceptance of the benefit as raises an implied promise to pay therefor.³

plied by law; but this is done only when the court can see that they were rendered under such circumstances as authorized the party performing to entertain a reasonable expectation of their payment by the party soliciting the performance." In the following case it was held a question of fact for jury as to whether the facts of the case made out request. *Hicks v. Burhans*, 10 Johns. 243; *Van Rensselaer v. Aikin*, 44 N. Y. 126; *Moore v. Moore*, 3 Abb. Dec. (N. Y.), 303; *Robinson v. Raynor*, 28 N. Y. 494; *Force v. Haines*, 17 N. J. Law, 385, the plaintiff fed a slave which would otherwise have perished. It was held that no recovery could be had against master. *James v. O'Driscoll*, 2 Bay, 101; *Bartholomew v. Jackson*, 20 Johns. 28; *Rensselaer Glass Factory v. Reid*, 5 Cow. 587; *Mumford v. Brown*, 6 Cowen, 475, one tenant not allowed to recover from cotenant for repair to land, though proper, without a previous request to repair, the court saying: "I know of no adjudication or principle by which one shall be compelled to pay another for services rendered without request or assent, express or implied." *Lynch v. Bogy*, 19 Mo. 170; *Watson v. Blaylock*, 2 Const. Ct. (S. C.) 351; *Bailey v. Gibbs*, 9 Mo. 45; *Jones v. Wilson*, 3 Johns. 434; *Beach v. Vandenburgh*, 10 Johns. 360; *Young v. Dibrell*, 7 Humph. 270; *Lewis v. Lewis*, 3 Strobb. 530.

¹ *Force v. Haines*, 17 N. J. Law, 385, the court saying: "The world abounds with acts of this kind, done upon no request; but would more abound with ruinous litigation, and the overthrow of personal rights, and civil freedom, if the law was otherwise." And see, also, *Stokes v. Lewis*, 1 T. R. 20; *Jenkins v. Tucker*, 1 Hen. Bl. 90; *Potter v. Potter*, 3 N. J. Law, 9; *Dunbar v. Williams*, 10 Johns. 249; *Everts v. Allen*, 12 Johns. 352; *Bartholomew v. Jackson*, 20 Johns. 28, where a field was afire and a man removed a stack of wheat to save it; no recovery allowed.

² *Cincinnati R. Co. v. Bensley*, 51 Fed. Rep. 738; *Rohr v. Baker*, 13 Ore. 350; *Dawson v. Dawson*, 12 Iowa, 512; *Frear v. Hardenbergh*, 5 Johns. 272; *Balcom v. Craggin*, 5 Pick. 295.

³ *Guernsey v. Wilson*, 134 Mass. 482; *Madigan v. McCarthy*, 108 Mass. 376, the court saying: "If one erects a permanent building, like a dwelling-house, upon the land of another, voluntarily and without any contract with the owner, it becomes a part of the realty, and belongs to the owner of the soil." *Crest v. Jack*, 3 Watts, 238; *West v. Stewart*, 7 Pa. St. 122; *Oakman v. Dorchester*, 98 Mass. 57; *Inhabitants of First Parish, etc., v. Jones*, 8 Cush. 184; *Merriam v. Brown*, 128 Mass. 391, a railroad company laying rails on land. It was held could not remove them.

§ 157. Existing legal obligation as a consideration.—The performance of an act which the party is under a legal obligation to perform can not constitute a consideration for a promise.¹ Thus a promise to surrender stolen property to its owner, being an undertaking to do only what the law exacts, is not a consideration that will support a promise to pay money therefor.² And a promise to remit the extra expenses incurred in building a house, provided the original contract price is paid, is not supported by a consideration.³ So, also, an agreement to pay a witness more than the fees prescribed by law for his attendance at court will not, in an ordinary case, be sustained.⁴

Graham v. Connersville R. Co., 36 Ind. 463; *Farnsworth v. Garrard*, 1 Camp. 38; *Pattinson v. Luckley*, L. R. 10 Ex. 330; *Ranger v. Great Western R. Co.*, 5 H. L. C. 72, 118; *Munro v. Butt*, 8 E. & B. 738; *Ellis v. Hamlen*, 3 Taunt. 52; *Burn v. Miller*, 4 Taunt. 745. Compare *Cincinnati R. Co. v. Bensley*, 51 Fed. Rep. 738, the court saying: "Thus, if a man build a house upon the land of another, with his assent, the law raises an obligation on his part to pay for it, since he has been benefited to that extent, and, if he did not intend to pay for it, it was his duty to forbid its construction, or, at least, to give notice that he would not be chargeable. * * * So, if A. promises to pay B. for a house to be built upon the land of C., provided it be built within a certain time, and the house be not completed within the time named, it is difficult to see how A. could be held liable in any form of action, since he has received no benefit from the subsequent performance of the contract. In such case, however, if C. should accept the house, he would undoubtedly be bound to pay its value; but, if he failed to do so, the builder would have no recourse but to remove the house from the land."

¹ *Robinson v. Jewett*, 116 N. Y. 40; 26 N. Y. St. Rep. 387; 28 Am. & Eng. Corp. Cas. 584; 22 N. E. Rep.

224; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Crosby v. Wood*, 6 N. Y. 369; *Bartlett v. Wyman*, 14 Johns. 259; *Bickhart v. Hoffmann* (Com. Pl. N. Y.), 19 N. Y. Supl. 472; *Bush v. Rawlins*, 89 Ga. 117; 14 S. E. Rep. 886; *Freeman v. Brehm* (Ind. App. 1892), 30 N. E. Rep. 712; 31 N. E. Rep. 545; *Heisch v. Adams*, 81 Texas, 94; 16 S. W. Rep. 790; *Schuler v. Myton*, 48 Kan. 282; 29 Pac. Rep. 163; *Geer v. Archer*, 2 Barb. 420; *Ayres v. Chicago, etc., R. Co.*, 52 Iowa, 478; *Reynolds v. Nugent*, 25 Ind. 328; *Deacon v. Gridley*, 15 C. B. 295; *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578; 15 S. W. Rep. 844; *Widiman v. Brown*, 83 Mich. 241; 47 N. W. Rep. 231; *Wadhames v. Page*, 1 Wash. 420; 25 Pac. Rep. 462; *Worthen v. Thompson*, 54 Ark. 151; 15 S. W. Rep. 192; *Dennis v. Piper*, 21 Ill. App. 169; *Killough v. Payne*, 52 Ark. 174; 12 S. W. Rep. 327; *Sullivan v. Sullivan*, 99 Cal. 187; 33 Pac. Rep. (1893) 862. "A debt owing by defendant's deceased husband to plaintiff, barred by the statute of limitations, is no consideration for her promise."

² *Worthen v. Thompson*, 54 Ark. 151; *Killough v. Payne*, 52 Ark. 174.

³ *Widiman v. Brown*, 83 Mich. 241.

⁴ *Dodge v. Stiles*, 26 Conn. 463; *Sweany v. Hunter*, 1 Murphey (N. C.) 181.

But such an agreement may be valid, where the witness assumes a duty that the law would not impose upon him,—as where he agrees to remain at home at special inconvenience, that he may be found at the sitting of the court, or where he agrees to attend in person when his deposition might have been taken.¹ And where the president of a railway company takes a lease for its benefit in his own name, without the assent of the corporation, he is bound to transfer the lease to it upon demand, and any promise such corporation makes to secure the transfer is void for the reason that the president only does what he is legally bound to do.² A public officer is not allowed to receive, for performing an official duty, any other compensation or reward than that which is prescribed by law.³ But a public officer may perform services in the detection and punishment of crimes and recovery of stolen property which it is not his official duty to perform, and such services will constitute a consideration for a promise.⁴ Thus a sheriff, acting in reliance upon a general offer of a reward for the capture of a criminal, is entitled to the reward the same as though not a peace officer, where he succeeds in making the capture, having no process in his hands.⁵ And the perform-

¹ *Dodge v. Stiles*, 26 Conn. 463.

² *Robinson v. Jewett*, 116 N. Y. 40.

³ *Warner v. Grace*, 14 Minn. 487; *Day v. Putnam Ins. Co.*, 16 Minn. 408; *Stotesbury v. Smith*, 2 Burrow, 924; *Hatch v. Mann*, 15 Wend. 44; *Smith v. Whildin*, 10 Pa. St. 39; *Gilmore v. Lewis*, 12 Ohio St. 281; *Kick v. Merry*, 23 Mo. 72; *Mitchell v. Vance*, T. B. Mon. 528. "It is a principle of the common law that an officer ought not to take money for doing his duty. Hawkins says: 'If once it should be allowed that promises to an officer, to pay more for his services than the law allows, could sustain an action, the people would quickly be given to understand how kindly they would be taken, and happy would that man be who could have his business well done without them.' This is an ancient principle, and it has been steadily adhered to as being

necessary to save the community from extortion and oppression. Once allow an officer to contract for extra compensation for the discharge of his duty, and bribery would become the means by which alone the laws could be executed." *Scott, J.*, in *Kick v. Merry*, 23 Mo. 72, 74.

⁴ *Russell v. Stewart*, 44 Ver. 170; *Davis v. Munson*, 43 Ver. 676; *England v. Davidson*, 39 Eng. Com. Law, 453; *Warner v. Grace*, 14 Minn. 487; *Gregg v. Pierce*, 53 Barb. 387.

⁵ *Davis v. Munson*, 43 Ver. 676, the court saying: "This case is broadly distinguished from *Pool v. Boston*, 5 Cush. 219. The plaintiff in that case was a watchman, employed by the city of Boston. While engaged in the performance of his regular duties under his engagement with the city as watchman, he discovered and arrested an incendiary setting fire to a house. He

ance of any services which a constable, policeman or other public officer is not bound to render may be the consideration of a contract.¹

§ 158. The same subject continued.—An agreement to forbear to sue upon a debt already due and payable, on the payment of part of the debt, is without legal consideration, and can not be availed of by the debtor, either by way of contract or of estoppel.² And to this principle is referable the doctrine that the payment of a smaller sum in satisfaction of a larger is no discharge of the residue.³ The steadfast adhesion

then claimed a reward of \$2,000 which the city had offered for the detection and conviction of any incendiary. The plaintiff having done what he was hired and paid to do, independent of the reward, the court properly held he could not recover. This case would be like that one, if the plaintiff had been employed by the defendant for a fixed compensation by the day to search for these prisoners. If he had thus agreed beforehand upon a fee for his services, he would, of course, have been limited to a recovery of the stipulated compensation." See, also, *Brown v. Godfrey*, 33 Vt. 120.

¹ *England v. Davidson*, 11 A. & E. 856. The plaintiff, a constable, gave information leading to a conviction of a felon, it not being in the line of his duties to furnish such information. It was held he could recover on a promise supported by such a service.

² *Warren v. Hodge*, 121 Mass. 106; *Holliday v. Poole*, 77 Ga. 159; *Pfeiffer v. Campbell*, 111 N. Y. 631; *Turnbull v. Brock*, 31 Ohio St. 649; *Reynolds v. Ward*, 5 Wend. 502; *Gibson v. Renne*, 19 Wend. 389; *Tryon v. Jennings*, 22 How. Pr. 421; *Farmers' Bank v. Blair*, 44 Barb. 641; *Parmelee v. Thompson*, 45 N. Y. 58; *Liening v. Gould*, 13 Cal. 598.

³ *Jaffray v. Davis* (1891), 124 N. Y. 164, the court saying: "One of the elements embraced in the question pre-

sented upon the appeal is, whether the payment of a sum less than the amount of a liquidated debt under an agreement to accept the same in satisfaction of such debt forms a bar to the recovery of the balance of the debt. This single question was presented to the English court in 1602, when it was resolved in *Pinnel's case* (5 Coke, 117) 'that payment of a lesser sum on the day in satisfaction of a greater can not be any satisfaction for the whole,' and that this is so, although it was agreed that such payment should satisfy the whole. This simple question has since arisen in the English courts and in the courts of this country in almost numberless instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness or honesty. No respectable authority that I have been able to find has, after such unanimous disapproval by all the courts, held otherwise than was held in *Pinnel's case*." *Cumber v. Wane*, 1 Str. 426; *Foakes v. Beer*, L. R. 9 App. Cas. 605; *Goddard v. O'Brien*, L. R. 9 Q. B. D. 37; *Down v. Hatcher*, 10 Ad. & El. 121; *American Bridge Co. v. Murphy*, 13 Kan. 35; *Otto v. Klauber*, 23 Wis. 471; *Wheeler v. Wheeler*, 11 Vt. 60; *Bright v. Coffman*, 15 Ind. 371; *Curtis v. Morton*, 20 Ill. 558; *St. Louis R. Co. v. Davis*, 35

to this doctrine by the courts, in spite of the current of condemnation by individual judges while upholding it, demonstrates the force of the doctrine of *stare decisis*. And the doctrine of *stare decisis* is further illustrated by the course of judicial decisions upon this subject, for while the courts still hold to the doctrine, they seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, and to extract, if possible, from the circumstances of each case a consideration for the new agreement, so as to substitute the new agreement in place of the old, and thus, or in some other way, to form a defense to the action brought upon the old agreement.¹ Thus the giving of a negotiable note in full payment is a good satisfaction.² And although the claim is a money demand liquidated and not doubtful, and it can not be satisfied with a smaller sum of money, yet if any other personal property is received in satisfaction it will be good, no matter what the value.³ The giving further security for part of a debt or other security, although for a less sum than the debt, and the acceptance of it in full of all demands,

Kan. 464; *Gates v. Steele*, 58 Conn. 316; *Reynolds v. Reynolds*, 55 Ark. 369; *People v. Board*, 17 N. Y. Supl. 314; *Indianapolis R. Co. v. Hyde*, 122 Ind. 188; *Pasewalk v. Bollman*, 29 Neb. 519; *Griffin v. Petty*, 101 N. C. 380; *Glaze v. Duson*, 40 L. Ann. 692; *Jones v. Grantham*, 80 Ga. 472; *Miller v. Eldridge*, 126 Ind. 461; *Holton v. Noble*, 83 Cal. 7; *Jones v. Wilson*, 104 N. C. 9; *Capital City Ins. Co. v. Detwiler*, 23 Ill. App. 656; *Hills v. Sommer*, 53 Hun, 392; *Jaffray v. Davis*, 48 Hun, 500; *Helling v. United Order*, 29 Mo. App. 309; *Duluth Chamber Commerce v. Knowlton*, 22 Minn. 229; 44 N. W. Rep. 2; *Day v. Gardner*, 42 N. J. Eq. 199; 7 Atl. Rep. 365; *Bryant v. Brazil*, 3 N. W. Rep. 117; *Kooker v. Hyde*, 6 Wis. 204; 21 N. W. Rep. 52; *Harriman v. Harriman*, 12 Gray, 341; *Hayes v. Davidson*, 70 N. C. 573; *Daniels v. Hatch*, 21 N. J. Law, 391; *Smith v. Phillips*, 77 Va. 548; *Ryan v. Ward*, 48 N. Y. 204; *Bunge v. Koop*,

48 N. Y. 225; *Bliss v. Shwartz*, 65 N. Y. 444; *Redfield v. Holland, etc., Co.*, 56 N. Y. 354; *Miller v. Coates*, 66 N. Y. 610.

¹ *Kellogg v. Richards*, 14 Wend. 116, "The rule that the payment of a less sum of money, although agreed by the plaintiff to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, is technical, and not very well supported by reason. Courts therefore have departed from it upon slight distinctions."

² *Goddard v. O'Brien*, L. R. 9 Q. B. D. 37; *Huddleston, B.*, approved the language of the opinion in *Sibree v. Tripp*, 15 M. & W. 23, "that a negotiable security may operate, if so given and taken, in satisfaction of a debt of a greater amount."

³ *Bull v. Bull*, 43 Conn. 455; *Foakes v. Beer*, L. R. 9 App. Cas. 605, "but the gift of a horse, hawk or robe in satisfaction is good."

extinguishes the whole.¹ And if a debtor gives his creditor a note indorsed by a third party for a less sum than the debt (no matter how much less), but in full satisfaction thereof, and it is received as such, this transaction furnishes the consideration to support a promise to remit the excess.² So, also, it has been held where, by some mode or time of part payment, different from that provided for in the contract, a new benefit is or may be conferred or a burden imposed, a new consideration arises out of the transaction, and gives validity to the agreement of the creditor.³ And if payment of less than the whole debt is made before it is due or at a different place from that stipulated, if received in full, this is a good satisfaction.⁴ But the payment of the smaller sum, without any release, will not constitute a satisfaction of the residue. It must be accepted as payment in full.⁵ And the mere retention by the creditor of money to which he is entitled unconditionally will not amount to a release, or constitute an accord and satisfaction, although he knows that it is tendered as such.⁶ The rule upon this subject, under the modification of later decisions, both in England and America, seems to be that a creditor can not bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum pactum* because the debtor only does what he is legally bound to do; but if there be any benefit or even any legal possibility of benefit to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support a promise to forego the balance.⁷

¹ *La Page v. McCrea*, 1 Wend. 164; *Knowlton*, 42 Minn. 229; *People v. Boyd v. Hitchcock*, 20 Johns. 76. *Board of Supervisors*, 40 Hun, 353.

² *Varney v. Conery*, 77 Maine, 527; *7 Jaffray v. Davis* (1891), 124 N.Y. 164; *Steinway v. Magnus*, 11 East, 390. *Fisher v. May*, 2 Bibb. 448; *Reed v. Bartlett*, 19 Pick. 273; *Union Bank v. Geary*, 5 Peters, 99; *Brooks v. White*, 2 Metc. 283; *Hall v. Smith*, 15 Iowa, 584; *Babcock v. Hawkins*, 23 Vt. 561; *Jones v. Perkins*, 29 Miss. 139; *Allison v. Abendroth*, 108 N. Y. 470, the court saying: "But it is held that where there is an independent consideration, or the creditor receives any benefit or is put in a better position, or one from which

³ *Rose v. Hall*, 26 Conn. 392.

⁴ *Jones v. Bullitt*, 2 Lit. 49; *Ricketts v. Hall*, 2 Bush, 249; *Smith v. Brown*, 3 Hawks (N. C.), 580; *Jones v. Perkins*, 29 Miss. 139; *Schweider v. Lang*, 29 Minn. 254.

⁵ *Duluth Chamber of Commerce v. Knowlton*, 42 Minn. 229; 44 N. W. Rep. 2.

⁶ *Duluth Chamber of Commerce v.*

the court saying: "But it is held that where there is an independent consideration, or the creditor receives any benefit or is put in a better position, or one from which

§ 159. **Promise to new party.**—Liability to a new party in respect of a debt or obligation already incurred will not form a sufficient consideration to support a promise by the new creditor; thus a promise to pay a mail contractor for performing his contract with the post-office department is without consideration.¹

§ 160. **Past consideration.**—An executed and past consideration is not sufficient to support a subsequent promise. It is not enough to show that a service has been rendered, and that it was beneficial to the party sought to be charged, unless it was rendered at his express request, or under such circumstances that the law would imply a request. A mere volunteer can not make himself the creditor of another. Even an express promise, subsequently made and depending wholly on the past consideration, is not sufficient to create a legal liability.² Thus, if a horse is sold and afterwards is warranted as sound, this warranty not having been made at the time of the sale is void.³ The past default of a debtor, or past forbear-

there may be a legal possibility of benefit to which he was not entitled except for the agreement, then the agreement is not *nudum pactum*." *Thompson v. Percival*, 5 B. & Adol. 925; *Ludington v. Bell*, 77 N. Y. 138; *Pardee v. Wood*, 8 Hun, 584; *Douglass v. White*, 3 Barb. Ch. 621. See *Jaffray v. Davis*, 124 N. Y. 164, where the whole question is reviewed at length.

¹ *Putnam v. Woodbury*, 68 Maine, 58, the court saying: "But since the trial, the defendant moves for a new trial, on the ground of newly-discovered evidence, and offers to prove that the change of route (the alleged consideration of the promise) was made with the consent of the post-office department. * * * This is very important and material; for the defendant would not be liable upon his promise to pay the plaintiff for carrying the mail in accordance with his contract with the postmaster-general." In England the law is otherwise. See *Morton v. Burn*, 7 A. & E. 26; *Scotson v. Pegg*, 6 H. &

N. 295; *Shadwell v. Shadwell*, 9 C. B. (N. S.) 159.

² *Walker v. Henry*, 36 W. Va. 100; 14 S. E. Rep. 440; *Parsons v. Robinson*, 15 N. Y. Supl. 138; *Chamberlin v. Whitford*, 102 Mass. 448; *Dearborn v. Bowman*, 3 Met. (Mass.) 155; *McGilvery v. Capen*, 7 Gray, 523; *Mills v. Wyman*, 3 Pick. 207; *Barlow v. Smith*, 4 Vt. 139, 144; *Roscorla v. Thomas*, 3 Q. B. 234, the court saying: "A consideration past and executed will support no other promise than such as would be implied by law." *Eastwood v. Kenyon*, 11 A. & E. 438; *Hayes v. Warren*, 2 Strange, 933; *Tipper v. Bicknell*, 3 Bing. N. C. 710; *Jones v. Ashburnham*, 4 East, 455; *Tooley v. Windham*, Cro. Eliz. (1 Croke) 206; *Shealy v. Toole*, 56 Ga. 210. See, also, *Loomis v. Newhall*, 15 Pick. (Mass.) 159.

³ *Roscorla v. Thomas*, 3 Q. B. 234; *Roswel v. Vaughan*, Cro. Jac. 196; *Pope v. Lewyns*, Cro. Jac. 630; *Thorn-ton v. Jenyns*, 1 Man. & G. 166.

ance of the creditor, is not a consideration for a promise to pay increased interest.¹ A note given by a candidate for an elective office in payment of services in promoting his election, but which were not rendered at his request, is void for want of consideration.² A warranty of an article sold should be made at the time of the sale;³ and whether the warranty is made at the time of the sale, there being several negotiations between the parties relative to the sale, is a question of fact for the jury, all that passes between the parties in relation to the terms of the sale being competent evidence.⁴ But where an auctioneer has let fall his hammer and sold a horse, if before the money is paid and the horse delivered the question of warranty arises between the parties, and they agree that words of warranty shall be written in the bill of sale, and the money is then paid and the horse delivered, this warranty rests upon a present consideration; but it would be otherwise if the horse is delivered and the money paid before the warranty is given.⁵

§ 161. Consideration moved by previous request.—An exception to the rule that a past consideration is no consideration, is the case of services rendered on request, no promise of remuneration being made at the time, but subsequently an express promise being made to pay for them. Such a promise is binding.⁶

¹ Shealy v. Toole, 56 Ga. 210.

² Dearborn v. Bowman, 2 Met. (Mass.) 155.

³ Reed v. Wood, 9 Vt. 285, 287; Wilmot v. Hurd, 11 Wend. 586; Morehouse v. Comstock, 42 Wis. 626; Hoggins v. Plympton, 11 Pick. 97: "Any subsequent or collateral contract of warranty must arise from an express promise to warrant, and that upon a new consideration, distinct from that of the sale itself." Per Shaw, C. J.

⁴ Way v. Martin, 140 Pa. St. 499; 21 Atl. Rep. 428; Wilmot v. Hurd, 11 Wend. 586.

⁵ McGaughey v. Richardson, 148 Mass. 608. See, also, Hobart v. Young, 63 Vt. 363; 21 Atl. Rep. 612; Eastern Ice Co. v. King, 86 Vir. 97.

⁶ Lamplugh v. Braithwait, Hobart, 105; 1 Smith's Leading Cases, 267;

Comstock v. Smith, 7 Johns. 88; Allen v. Woodward, 22 N. H. 544; Brown v. Crump, 1 Marsh. C. P. 567; Granger v. Collins, 6 Mes. & Wels. 458; Bradford v. Roulston, 8 Irish Com. L. Rep. 468; Dearborn v. Bowman, 3 Met. (Mass.) 155, where Shaw, C. J., said: "The past performance of services constitutes no consideration even for an express promise, unless they were performed at the express or implied request of the defendant." Per Shaw, C. J. Mills v. Wyman, 3 Pick. 207; Loomis v. Newhall, 15 Pick. 159; Dodge v. Adams, 19 Pick. 429; Pool v. Horner, 64 Md. 131; Osborne v. Rogers, 1 Wms. Saunders, 264, where the court said: "A past consideration is not sufficient to support a subsequent promise, unless there was a request of the party, express or im-

But the only promise which such a consideration will sustain is to pay what the parties agree the services are worth, and a subsequent promise to do something else, different from, or in addition to, that which the law implies, is *nudum pactum*;¹ and when it is claimed that a promise is supported by a past consideration, it must be shown, as a matter of fact, that the promise was made in respect of that consideration.²

§ 162. Statute of limitations.—One exception to the rule that a past consideration will not support a promise, is the case of a claim barred by the statute of limitations. Such a debt may form the consideration of a promise to pay it.³ The rule

plied, at the time of performing the consideration; but where there was an express request at the time, it would in all cases be sufficient to support a subsequent promise." *Boothe v. Fitzpatrick*, 36 Vt. 681.

¹ *Merrick v. Giddings*, 1 Mackey (D. C.), 394; *Brown v. Crump*, 1 Marsh. C. P. 567; *Granger v. Collins*, 6 M. & W. 458; *Goldsby v. Robertson*, 1 Blackf. 247.

² *Merrick v. Giddings*, 1 Mackey (D. C.), 394; *Carson v. Clark*, 2 Ill. 113; *Chaffee v. Thomas*, 7 Cow. 358. The rule of the leading case of *Lampleigh v. Brathwait*, 1 Hob. 105 b., that services rendered on request will support a subsequent promise to pay for them, is similar in doctrine to the rule that a barred debt will support a promise to pay it. In neither case will the consideration support any promise other than one to pay for the services or to pay the debt. See authorities *supra*. While in some instances this rule has been applied to cases other than services, as for instance the payment of a note, *Pool v. Harner*, 64 Md. 131, the doctrine is well settled as stated in the text that the subsequent promise different from, or in addition to, that which the law implies, is *nudum pactum*.

³ *Lowrey v. Robinson*, 141 Pa. St. 189; 21 Atl. Rep. 513; *Davis v. Noyes*, 15

N. Y. Supl. 431; *Fleming v. Fleming*, 33 S. C. 505; 12 S. E. Rep. 257; *Nelson v. Becker*, 32 Neb. 99; *Collar v. Patterson*, 137 Ill. 403; *Bowmar v. Peine*, 64 Miss. 99; *Ray v. Rood*, 62 Vt. 293; *Linderman v. Pomeroy*, 142 Pa. St. 168; *Rose v. Foord*, 96 Cal. 152; *Stewart v. McFarland*, 84 Iowa, 55; *Drury v. Henderson*, 36 Ill. App. 521; *Waldron v. Alexander*, 136 Ill. 550; *Wells v. Wilson*, 140 Pa. St. 645; *Davis v. Davis*, 20 Ore. 78; *Marshall's Estate*, 138 Pa. St. 285; *Georgetown College v. Perkins*, 74 Md. 72; 21 Atl. Rep. 551; *Chapman v. Barnes*, 93 Ala. 433; *Walker v. Henry*, 36 W. Va. 100; 14 S. E. Rep. 440 (W. Va.); *Bryar v. Willcocks*, 3 Cow. 150; *Ross v. Ross*, 6 Hun, 80; *Morrow v. Morrow*, 12 Hun, 386; *Adams v. Orange County Bank*, 17 Wend. 514; *Jackson v. Hunt*, 6 Johns. 16; *McNamee v. Tenny*, 41 Barb. 495; *Murray v. Coster*, 20 Johns. 576; *Bell v. Morrison*, 1 Pet. 351; *Bangs v. Hall*, 2 Pick. 368; *Sands v. Gelston*, 15 Johns. 511; *Clementson v. Williams*, 8 Cranch, 72; *Brown v. Campbell*, 1 Serg. & Rawle, 176; *Wetzell v. Bussard*, 11 Wheat. 309; *Harrison v. Handley*, 1 Bibb, 443; *Earle v. Oliver*, 2 Ex. 71, 90, the court saying: "Where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision

is general in America that such a promise must be in writing, or that there must be such a written acknowledgment of the barred debt as will support an implied promise to pay it.¹

of the statute or common law meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it." It is to be observed that the rule goes no further than that a debtor may renew his liability by a promise to pay the debt without further consideration. A barred debt does not constitute a consideration for any other promise than that of a promise to pay it.

¹ § 395 New York Code of Civil Procedure; *City Nat. Bank v. Phelps*, 86 N. Y. 484; *Morrow v. Morrow*, 12 Hun, 386; *Clark v. Van Amburgh*, 14 Hun, 557; *Kincaid v. Archibald*, 73 N. Y. 189; *Ray v. Rood*, 62 Vt. 293; *Chapman v. Barnes*, 93 Ala. 433; *Bowmar v. Peine*, 64 Miss. 99; *Fleming v. Fleming*, 33 S. C. 505; *Sturges v. Burton*, 8 Ohio St. 215; *Chabot v. Tucker*, 39 Cal. 434, the court saying: "An acknowledgment or promise contained in a writing, signed by the party to be charged thereby, is the only competent evidence of a new or continuing contract, whereby to take a case out of the operation of the statute of limitations." New York Code of Civil Procedure, § 395; Maine Rev. St., ch. 146, § 19; Massachusetts Rev. St., ch. 120, § 13; Vermont Rev. St., ch. 58, § 22; Ohio Rev. St., § 4992; Michigan Rev. St., § 13; Arkansas Rev. St., ch. 91, § 14; Texas, act Feb., 1841, art. 2388; Iowa, *Frisbee v. Seaman*, 49 Iowa, 95; California, § 31, St. Cal.; Oregon, § 24, G. L. Ore.; Minnesota, § 23, Rev. St.; Virginia, act April 3, 1838; Nevada, § 30, Code; Nebraska, Gen. St., ch. 55, § 22. Usually the

statute prescribes three methods of reviving a barred debt. One is an express written promise; the second is by such a written acknowledgment as implies a promise, and the third is by part payment, which of course may be shown, *ex necessitate*, by oral evidence. "I will read what is laid down by Chief Justice Jervis on the subject, in this book called Jervis's New Rules, which, in my early days at the bar, we were constantly in the habit of quoting, and I find this passage cited with approbation by Lord Campbell: * * * * 'Before this statute (that is, 9 Ga. 4, c. 14, making a written promise or acknowledgment necessary to stop the running of the statute of limitations), not only a verbal promise to pay a debt more than six years old, but a bare unconditional acknowledgment of its subsistence, made within six years before action brought, had been held sufficient to take this case out of the statute, 21 Jac., c. 16, § 3. But now, in order to revive the liability of the debtor, after the expiration of the six years, by subsequent acknowledgment or promise, there must be proof of some writing, signed by himself, either containing an express promise to pay the debt, or being in terms from which an unconditional promise to pay it is necessarily to be implied. If, therefore, the writer, although he admits the existence of a debt, refuses to pay it, or reserves the matter for future consideration, or refers the creditor to some third person for payment, or the like, this will not be sufficient to prevent the operation of the statute.' That being the rule, there must be one of these three things to take the case out of the statute. Either there

§ 163. **The same subject continued.**—The acknowledgment or admission must be a clear and unambiguous recognition of an existing debt, and so distinct and express as to preclude all doubt as to the debtor's meaning, and as to the particular debt to which it applies, and must be consistent with a promise to pay.¹ But an admission or acknowledgment made to a stranger, not intended to be communicated to or to influence the conduct of the creditor, is not effectual to revive a debt barred by the statute of limitations.² When the creditor sues, after the statute has run upon the original contract, his cause of action is not the original contract, for his action thereupon is barred, but it is the new promise. There are many authorities to the contrary, some holding that the new promise takes the case out of the statute, others that it removes the bar of the statute, and others still that it renews the original contract. But the better opinion is that the action is sustainable only upon the new promise, the original contract, or the moral obligation arising therefrom, binding in *foro conscientiæ*, notwithstanding the bar of the statute, being the consideration for the new promise.³ Although a statute provides that a

must be an acknowledgment of the debt, from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed." Mellish, L. J., in *In re River Steamer Co.*, L. R. 6 Ch. App. 822, 828.

¹ *Wesner v. Stein*, 97 Pa. St. 322.

² *Matter of Kendrick*, 107 N. Y. 104; *Collar v. Patterson*, 137 Ill. 403.

³ *Fleming v. Fleming*, 33 S. C. 505; *Walters v. Kraft*, 23 S. C. 578; *Dickson v. Gourdin*, 29 S. C. 343; *Reigne v. Desportes*, *Dud. Law (S.C.)*, 118; *Smith v. Caldwell*, 15 Rich. 365; *Colvin v. Phillips*, 25 S. C. 228; *McCormick v. Brown*, 36 Cal. 434; *Chabot v. Tucker*, 39 Cal. 180; *Hill v. Henry*, 17 Ohio, 9; *Ray v. Rood*, 62 Vt. 293; *Sturges v.*

Burton, 8 Ohio St. 215; *Van Alen v. Feltz*, 32 Barb. 139. *Contra*, *Soulden v. Van Rensselaer*, 9 Wend. 293; *McCrea v. Purmort*, 16 Wend. 460; *Watkins v. Stevens*, 4 Barb. 168; *Carshore v. Huyck*, 6 Barb. 583; *Philips v. Peters*, 21 Barb. 351; *Winchell v. Bowman*, 21 Barb. 448; *Esselstyn v. Weeks*, 12 N. Y. 635; *Wadsworth v. Thomas*, 7 Barb. 445; *Frisbee v. Seamen*, 49 Iowa, 95; *Wesner v. Stein*, 97 Pa. St. 322, the court saying: "The debt is not destroyed by the statute of limitations, but the right of action is lost; when that is restored the declaration is still on the original contract and not on the new promise." *Suter v. Sheeler*, 22 Pa. St. 308; *Burr v. Burr*, 26 Pa. St. 284; *Yaw v. Kerr*, 47 Pa. St. 333; *Patton v. Hassinger*, 69 Pa. St. 311; *Barclay's Appeal*, 64 Pa. St. 69.

promise to pay a debt barred by the statute of limitations must be in writing, still the promise, if in parol, is not illegal; the only effect of the statute is to take away the right to prove the promise save by written evidence, and if a party permits the promise to be shown by parol evidence, he waives the statutory objection, and the promise is effective to prevent the operation of the statute.¹

§ 164. Doing what another is bound to do.—The subsequent ratification of an act done by a voluntary agent of another, without authority from him, is equivalent to a previous authority. The law will not allow a party to maintain an action for money paid to discharge the debt of another without his consent; for, to allow this would subject every debtor to the power of those who might be disposed to injure him, and who might harass him with suits, and burden him with costs, in the most unreasonable and oppressive manner. But if the debtor assents to the payment, the reason of the law fails; and whether this assent be given before or after the payment is immaterial. The promise to recompense, therefore, a person who has performed a duty which one is under a legal obligation to perform, is binding although made subsequent to the doing of the act done without request. Thus if a person pay a mortgage without request of the mortgagor, this will support a subsequent promise of reimbursement therefor.² But if one not a party to nor liable upon a chose in action take it up with his own money, the transaction will be deemed a purchase, and not a payment, if such was the intention of the parties; and this is the rule, whatever may have been the mode adopted of accomplishing the result.³

§ 165. Where party is already bound.—Neither the promise to do, nor the actual doing, of that which the promisor is, by

¹ Ray v. Rood, 62 Vt. 293.

² Gleason v. Dyke, 22 Pick. 390; Osborne v. Rogers, 1 Wms. Saund. 264; Doty v. Wilson, 14 Johns. 378; Watson v. Turner, Buller, Nisi Prius, 147, n.; Paynter v. Williams, 1 C. & M. 810; Wing v. Mill, 1 B. & A.

105; Atkins v. Banwell, 2 East, 505.

³ Swope v. Leffingwell, 72 Mo. 348; Allen v. Dermott, 80 Mo. 56; Campbell v. Allen, 38 Mo. App. 27; Thompson v. Longan, 42 Mo. App. 146; Brice's Appeal, 95 Pa. St. 145; McCall v. Lenox, 9 S. & R. 302.

law or subsisting contract, bound to do, is a sufficient consideration to support a promise in his favor.¹ Thus the payment by a debtor of a part of an adjudicated liability is not a sufficient consideration to support a promise by the creditor to cancel the whole liability, although the debtor be insolvent.² To the same effect, where a promoter of a corporation gave it a license to use a patent owned by him, because another declared that, unless this was done, he would not pay his subscription to the capital stock, it was held that the license was without consideration, since the other promoter merely promised to do what he was legally bound to do.³ And equally a surrender of mortgaged premises by the mortgagor, after condition broken, "to save the mortgagee trouble in getting possession of the mortgaged premises," is no con-

¹ *Esterly Machine Co. v. Pringle*, 41 Neb. 265; 59 N. W. Rep. 804. "The rule is elementary that neither the promise to do, nor the actual doing, of that which the promisor is by law or subsisting contract bound to do, is a sufficient consideration to support a promise in his favor. Pollock on Contracts, 177; 2 Parsons on Contracts, 437; Bishop on Contracts, 420; *Deacon v. Gridley*, 15 C. B. 295; *Bartlett v. Wyman*, 14 Johns. 260; *Reynolds v. Nugent*, 25 Ind. 328; *Ayres v. Chicago, etc., Railroad Co.*, 52 Iowa, 478; 3 N. W. Rep. 522; *Conover v. Stillwell*, 34 N. J. Law, 54; *Hennessey v. Hill*, 52 Ill. 281; *Withers v. Ewing*, 40 Ohio St. 400. It is apparent from the agreement set out above that the defendants had, in the most explicit terms, obligated themselves to store and care for the property in controversy for one year from the expiration thereof. They had also, in no uncertain language, stipulated that they should not have a lien upon said property, but would deliver it to the plaintiff on demand. Being bound, by the terms of their own valid undertaking, to render the services contem-

plated by the agreement with *Christenson*, it follows that the promise of the latter is *nudum pactum*."

² *Beaver v. Fulp*, 136 Ind. 595; 36 N. E. Rep. 418, the court saying: "Is the payment of a part of one's liability sufficient consideration to support a promise to cancel the whole liability, where that liability is definitely ascertained and adjudicated? This inquiry is answered in the negative by the numerous and consistent holdings of this court. *Bateman v. Daniels*, 5 Blackf. 71; *Fitzgerald v. Smith*, 1 Ind. 310; *Cameron v. Warbritton*, 9 Ind. 351; *Stone v. Lewman*, 28 Ind. 97; *Markel v. Spitler*, 28 Ind. 488; *Ritenour v. Mathews*, 42 Ind. 7; *Smith v. Tyler*, 51 Ind. 512; *Fletcher v. Wurgler*, 97 Ind. 223; *Laboyteaux v. Swigart*, 103 Ind. 596, 3 N. E. Rep. 373; *Miller v. Eldridge*, 126 Ind. 461; 27 N. E. Rep. 132. A promise to pay one for what he is obliged to render has no consideration to support it. *Peelman v. Peelman*, 4 Ind. 612; *Ford v. Garner*, 15 Ind. 298; *Reynolds v. Nugent*, 25 Ind. 328."

³ *Havana Drill Co. v. Ashurst* (1893), 148 Ill. 115; 35 N. E. Rep. 873.

sideration for the mortgagee's agreement to cancel notes secured thereon.¹

§ 166. The same subject continued.—Where one party to a contract refuses to perform it unless promised some further pay or benefit than the contract provides, and the promise is made, and such refusal and promise are one transaction, the promise is without consideration, unless the refusal was induced by substantial and unforeseen difficulties in the performance, which would cast upon the party additional burdens not anticipated by the parties when the contract was made.²

¹ *Wendover v. Baker*, 121 Mo. 273; 25 S. W. Rep. 918.

² *King v. Duluth, etc., R. Co.* (Minn. 1895), 63 N. W. Rep. 1105, the court saying: "In other words, a promise by one party to a subsisting contract to the opposite party to prevent a breach of the contract on his part is without consideration. The following cases sustain and illustrate the practical application of the rule. *Ayres v. Chicago, etc., Railroad Co.*, 52 Iowa, 478; 3 N. W. Rep. 522; *McCarty v. Hamilton, etc., Association*, 61 Iowa, 287; 16 N. W. Rep. 114; *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578; 15 S. W. Rep. 844; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Reynolds v. Nugent*, 25 Ind. 328; *Robinson v. Jewett*, 116 N. Y. 40; 22 N. E. Rep. 224; *Wimer v. Overseers, etc.*, 104 Pa. St. 317. If the allegations of the complaint, when taken together, are in legal effect simply that the contractors finding, by the test of experience in the prosecution of the work, that they had agreed to do that which involved a greater expenditure of money than they calculated upon, that they had made a losing contract, and thereupon notified the opposite party that they were unable to proceed with the work, and he promised them extra compensation if they would perform their contract, the case is within the rule stated, and the demurrer ought to

have been sustained as to the first cause of action. It is claimed, however, by the respondent, that such is not the proper construction of the complaint, and that its allegations bring the case within the rule adopted in several states, and at least approved in our own, to the effect that if one party to a contract refuses to perform his part of it unless promised some further pay or benefit than the contract provides, and such promise is made by the other party, it is supported by a valid consideration, for the making of the new promise shows a rescission of the original contract and the substitution of another. In other words, that the party, by refusing to perform its contract, thereby subjects himself to an action for damages, and the opposite party has his election to bring an action for the recovery of such damages or to accede to the demands of his adversary and make the promise; and if he does so it is a relinquishment of the original contract and the substitution of a new one. *Munroe v. Perkins*, 9 Pick. 298; *Bryant v. Lord*, 19 Minn. 396 (Gil. 342); *Moore v. Detroit Locomotive Works*, 14 Mich. 266; *Goebel v. Linn*, 47 Mich. 489; 11 N. W. Rep. 284; *Rogers v. Rogers*, 139 Mass. 440, 1 N. E. Rep. 122. The doctrine of these cases as it is frequently applied does not commend itself either to our judgment or

But where one party to a contract has by his acts so delayed the other party in the performance of his part of the contract that he is not legally bound to complete the contract within the stipulated time, and thereupon the former promises him extra pay if he will complete the contract within such time, and he so promises and performs, the promise of extra pay is supported by a valid consideration.¹

§ 167. Forbearance.—The forbearance to exercise a right for a definite time is a sufficient consideration.² An agree-

our sense of justice, for where the refusal to perform and the promise to pay extra compensation for performance of the contract are one transaction, and there are no exceptional circumstances making it equitable that an increased compensation should be demanded and paid, no amount of astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party."

¹ *King v. Duluth, etc., R. Co.*, 63 N. W. Rep. 1105, the court saying: "What unforeseen difficulties and burdens will make a party's refusal to go forward with his contract equitable, so as to take the case out of the general rule and bring it within the exception, must depend upon the facts of each particular case. They must be substantial, unforeseen, and not within the contemplation of the parties when the contract was made. They need not be such as would legally justify the party in his refusal to perform his contract, unless promised extra pay, or to justify a court of equity in relieving him from the contract; for they are sufficient if they are of such a character as to render the party's demand for extra pay

manifestly fair, so as to rebut all inference that he is seeking to be relieved from an unsatisfactory contract, or to take advantage of the necessities of the opposite party to coerce from him a promise for further compensation. Inadequacy of the contract price which is the result of an error of judgment, and not of some excusable mistake of fact, is not sufficient. The cases of *Meech v. City of Buffalo*, 29 N. Y. 198, where the unforeseen difficulty in the execution of the contract was quicksand, in place of expected ordinary earth excavation, and *Michaud v. McGregor*, 63 N. W. Rep. 479, where the unforeseen obstacles were rocks below the surface of the lots to be excavated, which did not naturally belong there, but were placed there by a third party, and of the existence of which both parties to the contract were ignorant when the contract was made, are illustrations of what unforeseen difficulties will take a case out of the general rule."

² *Von Brandenstein v. Ebensberger*, 71 Texas, 267; *Shadburne v. Daly*, 76 Cal. 355; *Fraser v. Backus*, 62 Mich. 540; *Howe v. Taggart*, 133 Mass. 284; *Calkins v. Chandler*, 36 Mich. 320; *Hockenbury v. Meyers*, 34 N. J. Law, 346; *Atlantic Bank v. Franklin*, 55 N. Y. 235; *Foard v. Grinter (Ky.)*, 18 S. W. Rep. 1034; *Perkins v. Proud*, 62 Barb. 420; *Traders' Bank v. Parker*, 130 N. Y. 415; *Rogers v. Wiley*, 131

ment between parties interested in a foreclosure sale, that all but one shall refrain from bidding, and permitting that one to become the purchaser, is a sufficient consideration for a mortgage given by the purchaser on the property purchased.¹ The forbearance to file a mechanic's lien is a good consideration to support a promise to accept an order for payment, although there is nothing due the drawers of the order.² The relinquishment of a right to a homestead entry on public land, and the dismissal and withdrawal of a written protest against the final proof of another, is a good and valid consideration in a written instrument for the payment of money.³

§ 168. Extension of time.—A promise to extend the time of payment of a debt is void unless founded upon a good consideration; and a payment of a part of a debt or the interest already accrued, or an agreement to pay interest for the future, is not a sufficient consideration for such a promise; nor will the

N. Y. 527; *Heitsch v. Cole*, 47 Minn. 320; *McCullough v. Barr*, 145 Pa. St. 459; *Mygalt v. Tarbell*, 78 Wis. 351; *Hopkins v. Ensign*, 122 N.Y. 144; *Pelham v. Service*, 45 Kan. 614; 26 Pac. Rep. 29; *Smith v. Bibber*, 82 Me. 34; *Flanagan v. Mitchell*, 10 N. Y. Supl. 234; *Murdock v. Lewis*, 26 Mo. App. 234; *Lundberg v. Northwestern Elevator Co.*, 42 Minn. 37; 43 N. W. Rep. 685; *Tousey v. Moore*, 79 Mich. 574; 44 N. W. Rep. 958; *Jones v. Sikes*, 85 Ga. 546; 11 S. E. Rep. 664; *Bell v. Bean*, 75 Cal. 86.

¹ *Hopkins v. Ensign*, 122 N. Y. 144. "We are also of the opinion that W.'s relinquishment of his right to bid at the sale was a sufficient consideration to support the mortgage. It is not essential that the consideration should import a gain or loss to either party. If the party in whose favor the contract was made foregoes some right or benefit it is sufficient."

² *Flanagan v. Mitchell*, 10 N. Y. Supl. 234. "The real consideration here was forbearance on the part of the plaintiff. Plaintiff's theory of the

action is that, relying on M.'s acceptance, he did not take immediate steps to secure himself by a lien. This is certainly ample consideration, etc." The defendants sought to escape liability on the ground that they owed the drawer of the order nothing when they agreed with plaintiff to accept.

³ *Pelham v. Service* (1891), 45 Kan. 614; 26 Pac. Rep. 29. "All [cases] affirm that contracts about the possession, improvements and relinquishment [forbearance] of rights of public land, when free from fraud, can be enforced, and constitute a good consideration." See, also, *McCabe v. Caner*, 68 Mich. 182; 35 N. W. Rep. 901; *Olson v. Orton*, 28 Minn. 36; 8 N. W. Rep. 878; *Thompson v. Hanson*, 28 Minn. 484; 11 N. W. Rep. 86; *Lamb v. Davenport*, 18 Wall. 307; *Myers v. Croft*, 13 Wall. 291; *Kennedy v. Shaw*, 43 Mich. 359; 5 N. W. Rep. 396; *Lapham v. Head*, 21 Kan. 332; *Moore v. McIntosh*, 6 Kan. 39; *Bell v. Parks*, 18 Kan. 152; *Fessler v. Haas*, 19 Kan. 216.

giving of a new obligation, with additional security, for part of the debt, be a good consideration for a promise to extend the time as to the residue. The discharge of a legal obligation by a debtor to his creditor is not sufficient consideration for the promise of the latter.¹ So, also, an executory agreement by the plaintiff with the defendant to accept in payment less than the whole amount of the debt is not obligatory without a fresh consideration to support it, and mere payment of a part of the sum agreed on will not serve as a consideration.² But a promise to a person entitled to a distributive share in excess of the other distributees, on account of ad-

¹ *Parmelee v. Thompson*, 45 N.Y. 58. In *Babcock v. Kuntzsch* (1895), 32 N. Y. Supl. 663, Hardin, P. J., said: "No valid extension of the time of payment was shown by the evidence to have taken place prior to the commencement of the action." In *Miller v. Holbrook*, 1 Wend. 318, it was held that a promise to extend was not valid unless founded upon a good and sufficient consideration; also, "the promise of a maker to pay part of a note when due and payment in pursuance thereof is not sufficient consideration." In *Gibson v. Renne*, 19 Wend. 389, the question of the sufficiency of a consideration to support a promise was raised, and, in dealing with it, Bronson, J., said: "The debt was due. The debtor says to the creditor, 'You promised, in consideration that I would discharge in part an existing and present duty, that you would give further time for the satisfaction of the residue.' I can not understand how this makes a good consideration for the promise. The discharge of a legal obligation by the debtor to the creditor can not be such an injury to the one, or benefit to the other, as will make what the law calls a 'sufficient consideration' for an agreement." In *Manchester v. Van Brunt* (City Ct. N. Y.), 19 N. Y. Supl. 685, it was said: "The promise to extend the

time of payment of the note was void unless founded upon a good consideration, and the payment of \$100, part of the amount due on the note, was not a good consideration for such promise." In *Graham v. Negus*, 55 Hun, 440, 8 N. Y. Supl. 679, it was said: "If the promises to pay in the future had been verbal only, as there was no consideration to sustain them, the plaintiffs, after accepting them, would have been at liberty at once to disregard the promises, and commence an action for the recovery of their debt." In 2 *Randolph on Commercial Paper*, p. 650, § 964, it is said: "An agreement for an extension, to have such effect, must have a new and valid consideration, and without such consideration it will not discharge the surety." In *Pabodie v. King*, 12 Johns. 426, a partial payment was made upon the plaintiff's debt, and it was claimed there was an agreement in consideration thereof to "forbear to sue." The court said: "The promise to forbear was a *nudum pactum*. In paying the fifty dollars, King did no more than he was legally bound to do; and the promise, on the part of Pabodie, was without any benefit to him, and occasioned no loss to King."

² *Blalock v. Jackson* 94 Ga. 469; 20 S. E. Rep. 346.

vancements to them, to pay the excess if he will forbear to enforce his claim therefor, is based on a sufficient consideration.¹

§ 169. Further illustrations.—A surety on a promissory note, at the request of the holder, refrained from taking from the principal debtor security to indemnify him from liability, in reliance upon the promise of the holder that, if he would so refrain, he should be released from liability on the note. Except for such request and promise, the surety would and could have obtained such indemnity. It was held that there was a sufficient consideration for the promise to release.² Where two execution creditors, each of whom claims priority in his levy upon certain property, agree to allow the property to be sold under one execution and to divide the proceeds, the release by the junior execution creditor is a sufficient consideration on his part to support the compromise agreement.³ Where one party is engaged in a business venture with another, from which he may retire at will, his continuance therein is a sufficient consideration to uphold a promise to allow him an advantage not embraced within the terms of the original contract; and in such a case it may be inferred that the promisee continued in the business upon the strength of the promise.⁴ Forbearance, under an agreement to forbear, by a creditor, to present a claim to the executor of the will of a deceased person is a consideration for a promise on the part of the widow of the

¹ *Fain v. Turner* (Ky. 1895), 29 S. W. Rep. 628.

² *Heitsch v. Cole*, 47 Minn. 320. "A valuable consideration, in the sense of the law, may consist either in some benefit resulting to the one party, or in some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. Consideration means, not so much that our party is benefited, as that the other suffers detriment."

³ *Mygatt v. Tarbell*, 78 Wis. 351. See, also, *Knox v. Webster*, 18 Wis. 406; *People v. Goss*, 99 Ill. 355.

⁴ *Rogers v. Wiley*, 131 N. Y. 527, the court saying: "A sufficient consideration, however, for the promise of the defendants to carry the stock without additional margin, was shown when it was made to appear that the plaintiff forebore his determination to immediately cover the stock and close his account without the risk of further loss." See, also, *Emery v. Wilson*, 79 N. Y. 78; *Clarke v. Meigs*, 10 Bosw. 337; *Markham v. Jaudon*, 41 N. Y. 135; *White v. Smith*, 54 N. Y. 522; *Hess v. Rau*, 95 N. Y. 359; *Gillett v. Whiting*, 120 N. Y. 402.

testator to pay such claim.¹ And the withdrawal of opposition to the probate of a will and the allowance of its probate, when there is ground for the opposition, is a consideration to support a promise on behalf of the devisees to pay a certain sum therefor.² A highway board agreed with a gas company, that if the board would give the company a license to open a highway in their jurisdiction, the company should make good the surface of the road and would pay the board a certain sum besides. It was held the contract was valid because the agreement of the board to allow the company to interfere with the surface of the road was a good consideration.³

§ 170. Forbearance to sue—Time.—An agreement to withhold suit is a good consideration to support a promise to pay a debt, although no fixed and definite time is expressly agreed upon.⁴ Thus an agreement by a creditor to withhold suit against his debtor is a good consideration to support a promise by a third party to pay the debt, although no fixed and definite time of extension is expressly agreed on.⁵ And what would

¹ Shadburne v. Daly, 76 Cal. 355, but it is otherwise if there is no agreement to forbear.

² Prater v. Miller, 25 Ala. 320.

³ Edgeware Highway Board v. Harrow District Gas Co., L. R. 10 Q. B. 92. "The first objection is that the contract is *nudum pactum* for want of a consideration. The agreement is that if the plaintiffs would give to the defendants their license to open a certain public highway the defendants would make good the surface of the road, etc. * * * There is both a benefit to the one party and a detriment to the other—a detriment to the plaintiffs, inasmuch as they are charged with the duty of repairing and maintaining the highway, and would have had to incur costs for this purpose; and a benefit to the defendants, who could not have opened the highway without the consent of the plaintiffs, and who forebore to exercise their power of preventing the de-

fendants from opening the highway."

⁴ Traders', etc., Bank v. Parker, 130 N. Y. 415; Walker v. Sherman, 11 Metc. 170; Mecorney v. Stanley, 8 Cush. 85; Hakes v. Hotchkiss, 23 Vt. 231; Calkins v. Chandler, 36 Mich. 320; Lonsdale v. Brown, 4 Wash. C. C. 148; Downing v. Funk, 5 Rawle, 69; Sidwell v. Evans, 1 Pen. & W. (Pa.) 383; King v. Upton, 4 Maine, 387; Elting v. Vanderlyn, 4 Johns. 237; Watson v. Randall, 20 Wend. 201; Mutual Life Ins. Co. v. Smith, 23 Hun, 535; Foard v. Grinter (Ky. 1892), 18 S. W. Rep. 1034; Prouty v. Wilson, 123 Mass. 297; Howe v. Taggart, 133 Mass. 284; Robinson v. Gould, 11 Cush. 55; Boyd v. Frieze, 5 Gray, 553; Ellis v. Clark, 110 Mass. 389; Pratt v. Hedden, 121 Mass. 116; Mecorney v. Stanley, 8 Cush. 85; Manter v. Churchill, 127 Mass. 31; Coles v. Pack, L. R. 5 C. P. 65; Oldershaw v. King, 2 H. & N. 517.

⁵ Traders', etc., Bank v. Parker, 130 N. Y. 415.

be a reasonable time, if not always a question of fact, would be at least a mixed question of law and fact, depending for its solution upon the circumstances of each case.¹ And whenever there is an agreement to forbear bringing suit for a debt due, for an indefinite time, if followed by actual forbearance for a reasonable time, this is a good consideration for a promise to pay the debt by a person other than the debtor.²

§ 171. Extension—Paying interest—Surety's consent.—A promise to pay interest is a sufficient consideration for a promise to extend the time for the payment of a note.³ But a promise to pay at a future time a debt already due, and which draws interest, is not a consideration for the extension of the time of payment when the rate of interest thereon is not changed.⁴ A surety's consent to an extension by the creditor to the debtor of the time of paying the debt is a sufficient consideration for a promise by the creditor to the surety to procure a chattel mortgage from the debtor to secure the debt for which the surety has assumed liability.⁵ And, likewise, an

¹ *Traders', etc., Bank v. Parker*, 130 N. Y. 415.

² *Howe v. Taggart*, 133 Mass. 284; *Prouty v. Wilson*, 123 Mass. 297; *Robinson v. Gould*, 11 Cush. 55; *Boyd v. Frieze*, 5 Gray, 553; *Calkins v. Chandler*, 36 Mich. 320; *Watson v. Randall*, 20 Wend. 201.

³ *Moore v. Redding* (1892), 69 Miss. 841, the court saying: "It is wholly immaterial what rate of interest is agreed on by the parties. It may be the same, or a greater or less, rate than that stipulated for by the original contract. The right to have the use of money for a defined time, and the right to have interest at any agreed rate, for any defined time, are alike deemed valuable in law; and reciprocal promises—one by the creditor, to permit the money to remain on interest, and the other by the debtor, to retain it on interest—mutually support each the other. *Brown v. Proffit*, 53 Miss. 649."

⁴ *Stickler v. Giles*, 9 Wash. 147; 37 Pac. Rep. 293, per Hoyt, J.: "As to the question of consideration for the contract of extension, it is claimed that the agreement to pay interest constituted such consideration. That an agreement to pay interest on an account which would not otherwise draw interest would constitute such consideration is beyond question. It is equally clear that such an agreement would constitute no consideration if, without it, the account would draw the same rate of interest. Was this account of such a nature, at the time this conversation was had, that it would draw interest without any express promise on the part of the appellant to pay it? We think it was."

⁵ *Resseter v. Waterman*, 151 Ill. 169; 37 N. E. Rep. 875, where Shope, J., said: "It needs the citation of no authority that if the transaction was of advantage to Waterman, or detrimental or to the disadvantage of Resseter, it would

agreement to extend the time of payment of a debt is sufficient consideration for the execution by a third party of his note to the creditor as collateral security for the payment of such debt.¹ So, also, a promise by a third mortgagee to forbear foreclosing is sufficient to support a promise by a second mortgagee to keep the interest on all senior mortgages paid.² To constitute a forbearance to sue a third person a good consideration for a promise by a stranger to the original consideration, it must have been in pursuance of an agreement to forbear;³ and the mere forbearance to sue is not enough.⁴ But an actual forbearance to sue may often, in connection with other facts, be evidence of an agreement to forbear, and, as such, form a good consideration for a promise.⁵

§ 172. The same subject continued.—An agreement between the maker of a note and the payee that the latter will extend the time of payment, and that the former will pay interest during the time extended, is binding without additional consider-

form a sufficient consideration for the promise. That Resseter was induced thereby to consent to the extension of the time of payment to Severson, and continue his liability as surety, and forego his right to then compel payment out of Severson's property, which, by the failure of Waterman to keep his promise, and subsequent conduct in violation of it, subjected Resseter to the loss, is not questioned. *Bunting v. Darbyshire*, 75 Ill. 408; *Buchanan v. International Bank*, 78 Ill. 500; *Burch v. Hubbard*, 48 Ill. 164."

¹ *Nichols, etc., Co. v. Dedrick* (Minn. 1895), 63 N. W. Rep. 1110.

² *Burke v. Dillin* (Iowa 1894), 61 N. W. Rep. 370: "It is well settled that an agreement to forbear, for a time, proceedings at law or in equity to enforce a well-founded claim, is a valid consideration for a promise. 1 *Parsons on Contracts*, § 441; *American and English Encyclopedia of Law*, p. 836; *Lomax v. Smyth*, 50 Iowa, 223. See *Hamer v.*

Sidway, 124 N. Y. 538; 27 N. E. Rep. 256. Whatever may be said as to *Rice, Lodge & Henry*, by carrying out the contract, would not be doing what they were in any event obligated to do, as they were under no legal obligation to pay the taxes, or to pay the interest on the Squire mortgage, in the absence of this agreement."

³ *Shadburne v. Daly*, 76 Cal. 355; *Robinson v. Gould*, 11 Cush. 55; *Mecorney v. Stanley*, 8 Cush. 85; *Walker v. Sherman*, 11 Metc. 170; *Breed v. Hillhouse*, 7 Conn. 523; *Manter v. Churchill*, 127 Mass. 31; *Von Brandenstein v. Ebensberger*, 71 Texas, 267; *Rue v. Meirs*, 43 N. J. Eq. 377.

⁴ *Shadburne v. Daly*, 76 Cal. 355; *Mecorney v. Stanley*, 8 Cush. 85; *Foard v. Grinter* (Ky. 1892), 18 S. W. Rep. 1034.

⁵ *Walker v. Sherman*, 11 Metc. 170; *Breed v. Hillhouse*, 7 Conn. 523; *Mecorney v. Stanley*, 8 Cush. 85; *Rue v. Meirs*, 43 N. J. Eq. 377.

ation, and will release a surety who does not consent to the extension.¹ But an agreement by the holder of a note not to sue thereon for a certain length of time, supported only by the debtor's promise to pay within that time, is not binding;² and where a father gave to the owners of money embezzled by his son a note secured by mortgage, for the amount thereof, it is error to instruct, in an action on the mortgage, that there was no consideration therefor, the evidence warranting a finding that the obligations were given at the request of the son,

¹ *Benson v. Phipps*, 87 Texas, 578; 29 S. W. Rep. 1061, per Gaines, C. J.: "Whether a mere agreement for an extension by the debtor is sufficient to support a promise to extend by the creditor is a question upon which the authorities are not in accord. We are of opinion, however, that the question should be resolved in the affirmative, at least in cases in which it is contemplated by the contract that the debt should bear interest during the time for which it is extended. If the new agreement were that the debtor should pay, at the end of the period agreed upon for the extension, precisely the same sum which was due at the time the agreement was entered into, the case might be different. But a promise to do what one is not bound to do, or to forbear what one is not bound to forbear, is a good consideration for a contract. In case of a debt, which bears interest either by convention or by operation of law, when an extension for a definite period is agreed upon by the parties thereto, the contract is that the creditor will forbear suit during the time of the extension, and the debtor foregoes his right to pay the debt before the end of that time. The latter secures the benefit of the forbearance; the former secures an interest bearing investment for a definite period of time. One gives up his right to sue for a period, in consideration of a promise to pay interest during the whole of the time; the

other relinquishes his right to pay during the same period, in consideration of the promise of forbearance. To the question why this is not a contract, we think no satisfactory answer can be given. It seems to us it would be a binding contract, even if the agreement were that the debt should be extended at a reduced rate of interest. That an agreement by the debtor and creditor for an extension for a definite time, the debt to bear interest at the same rate, or at an increased, but not usurious, rate, is binding upon both, is held in many cases, some of which we here cite: *Wood v. Newkirk*, 15 Ohio St. 295; *Fowler v. Brooks*, 13 N. H. 240; *Davis v. Lane*, 10 N. H. 156; *Stallings v. Johnson*, 27 Ga. 564; *Robinson v. Miller*, 2 Bush, 179; *Reynolds v. Barnard*, 36 Ill. App. 218; *Chute v. Pattee*, 37 Maine, 102; *Reese v. Berrington*, 2 Ves. Jr. 540. See, also, *Crossman v. Wohleben*, 90 Ill. 537; *McComb v. Kittridge*, 14 Ohio, 348. In many cases which seemingly support the contrary doctrine, there was a mere promise by the creditor to forbear, without any corresponding promise on part of the debtor not to pay during the time of the promised forbearance. In such cases it is clear that there is no consideration for the promise."

² *Austin Real Est. Co. v. Bahn*, 87 Texas 582; 30 S. W. Rep. 430, distinguishing *Benson v. Phipps*, 87 Texas, 578; 29 S. W. Rep. 1061.

and that it was understood that the giving of them suspended any action against the son for the debt until maturity of the note.¹

§ 173. Nudum pactum—Promise of indulgence.—A mere promise to relinquish part of a debt, or, what is the same thing, to take part in discharge, or for an assignment of the whole, is *nudum pactum*, and without legal obligation.² Thus, where the attorney for heirs, half-owners in a mill, which plaintiff, the other half-owner, was operating, having written

¹ *Saalfeld v. Manrow*, 165 Pa. 114; 30 Atl. Rep. 823.

² *Day v. Gardner*, 42 N. J. Eq. 199, 201; 7 Atl. Rep. 365; *Tulane v. Clifton*, 47 N. J. Eq. 351; 20 Atl. Rep. 1086; on appeal *Clifton v. Tulane*, 48 N. J. Eq. 310; 24 Atl. Rep. 131. In *Isham v. Therasson* (N. J. Eq. 1895), 30 Atl. Rep. 969, a mortgagee gave the mortgagor a memorandum as follows: "I agree with you to assign your * * * mortgage * * * to any party you may desire, in consideration of receiving from you or them the sum of \$250. * * * I do this in consideration of the taxes, assessments, and charges you have already paid and now due on the property." The administrator of W. repeatedly called upon T. to pay the \$250, and take an assignment of the mortgage. T. expressed a willingness to do so, but failed to produce the money. After T. had had ample opportunity to pay the money, and take the assignment, the administrator assigned the mortgage to I., who brought suit to foreclose it. Thereupon T. tendered I. \$250, and demanded an assignment of the mortgage. It was held that the memorandum, regarded as a promise to assign, was not supported by valuable consideration." McGill, Ch., said: "The memorandum purports to have been made in consideration of previous payments, by Mr. Therasson, of taxes, etc., charged on the mortgaged premises, and of the fact that at the

making of the memorandum there existed unpaid taxes incumbering the property. To constitute a valuable consideration, which will render a promise enforceable, the promisor must thereby acquire some benefit or advantage, and the promisee, or some one for him, must in consequence of the promise surrender some right or suffer loss or disadvantage. *Conover v. Stillwell*, 34 N. J. Law, 54. Mr. Winans did not reap any benefit or advantage from his promise, nor did Mr. Therasson suffer any disadvantage or loss because of it. Mr. Therasson did not pay the taxes and assessments in reliance upon the promise, nor did he suffer taxation because of it. The reference in the memorandum to Mr. Therasson's payment of taxes and assessments, as the consideration for his promise to assign upon being paid \$250, was not reference to a valuable legal consideration, but merely to matter of sympathetic inducement, as though the promisee had said: 'You have been burdened with the payment of taxes and assessments, and the mortgaged lands are yet charged with taxes and assessments which have not been paid. Therefore, when you pay me \$250, I will assign my mortgage to you, or to another whom you may procure to take it.' The promise thus made was clearly voluntary, and incapable of enforcement, prior to the payment or tender of the \$250."

to plaintiff about the rent then in arrears, received an answer that an agent of the heirs had recently been at the mill, and expressed a wish not to take advantage of plaintiff, but to sell the mill and adjust matters; and the agent had three years before combated plaintiff's desire to give up the mill, saying that, if he would continue to operate it, the heirs would, when they sold it, do what was right by him, it was held that there was no foundation for a demand on the heirs for wages for operating the mill, less profits made, the agent's promise being merely one of indulgence as to the rent.¹ A naked promise as of course, by a party to an award to allow to the other party an additional credit for an item, if it were inadvertently omitted by the arbitrators from the award, is without consideration, and hence not binding.² Except in the case of commercial paper unsealed promises do not imply any legal consideration. Accordingly, a mere written promise to pay the debt of another is not binding, if there be no evidence of consideration outside of the promise.³

§ 174. Disputed and doubtful claims.—The basis of forbearance is the giving up either a legal right or else a disputed and doubtful claim.⁴ Thus the compromising a suit after verdict is a sufficient consideration to support a promise, although the suit is to try a question respecting which the law is doubtful or is supposed by the parties to be doubtful.⁵

¹ *Glover v. Tousley*, 101 Mich. 229; 299; *Dunkel v. Failing*, 5 N. Y. Supl. 59 N. W. Rep. 620.

² *Patton v. Garrett*, 116 N. Car. 847; 21 S. E. Rep. 679.

³ *Pike v. Van Riper* (N. J. 1894), 30 Atl. Rep. 529.

⁴ *Fire Ins. Co. v. Wickham*, 141 U. S. 564; *Hunter v. Lanus*, 82 Texas, 677; *Lukens' Appeal*, 143 Pa. St. 386; *Leavitt v. Dodge*, 16 N. Y. Supl. 309; *French v. French*, 84 Iowa, 655; 15 L. R. A. 300; *Smith v. Farra*, 21 Ore. 395; *Blackwell v. Bainbridge*, 19 N. Y. Supl. 681; *Prout v. Pittsfield Fire Dist.*, 154 Mass. 450; *Bunn v. Bartlett*, 8 N. Y. Supl. 160; *Emery v. Royal*, 117 Ind. 504; *Wahl v. Barnum*, 116 N. Y. 87; *Phillips v. Pullen*, 50 N. J. Law, 439; *Schaben v. Brunning*, 74 Iowa, 102; *Antoine v. Smith*, 40 La. Ann. 560; *United States Bank v. Homestead Bank*, 18 N. Y. Supl. 758; *Battle v. McArthur*, 49 Fed. Rep. 715; *Renwick v. Wheeler*, 48 Fed. Rep. 431; *Dunbar v. Tirey*, —Texas App.—; 17 S. W. Rep. 1116; *Creutz v. Heil*, 89 Ky. 429 (1891); *Shaw v. Chicago R. Co.*, 82 Iowa, 199; 47 N. W. Rep. 1004; *Coffey v. Emigh*, 15 Colo. 184; *Potts v. Polk County*, 80 Iowa, 401.

⁵ *Prout v. Pittsfield Fire District*, 154

§ 175. Further illustrations.—Where an action was brought for criminal conversation, and, pending suit, the parties agreed to settle in consideration of a fixed sum being paid at a certain time, and subsequently, this sum not having been paid, suit was brought to enforce the agreement, it was held that the agreement was supported by sufficient consideration.¹ And where a woman agreed to abandon her claim upon an alleged promise of marriage upon the offer by the man of an annuity,² this was a consideration. So, also, is the concession of such a claim without litigation.³ And a note given in compromise of a disputed claim, the validity of which is doubtful, is sup-

Mass. 450, where the court said: "The general power to compromise doubtful and disputed claims is necessarily incident to the power to sue and the liability to be sued. If a claim against the defendant can not be adjusted by way of compromise, neither could a claim in its favor. If this doctrine were applied generally to all claims, the result would be that in all disputed cases the defendant must perforce engage in a litigation, the expense of which would be certain, but the result doubtful. The defendant would be under the necessity of insisting at all hazards upon a judicial determination of all its controverted rights, and would be bound to pursue or resist all doubtful claims until final adjudication by the court of last resort. * * * * Whether the result of a litigation depends chiefly upon the ascertainment of the facts by the verdict of a jury, or upon the determination of the rules of law found applicable by the court, in either case there is an uncertainty until the decision is reached." See, also, *Cushing v. Stoughton*, 6 Cush. 389; *Drake v. Stoughton*, 6 Cush. 393; *Matthews v. Westborough*, 131 Mass. 521; *Inhabitants of Medway v. Milford*, 21 Pick. 349; *Bean v. Jay*, 23 Maine, 117; *Town of Petersburg v. Mappin*, 14 Ill. 193; *Agnew v. Brall*,

124 Ill. 312; *Board of Supervisors v. Bowen*, 4 Lans. 24; *Supervisors of Chenango v. Birdsall*, 4 Wend. 453; *Barlow v. Ocean Ins. Co.*, 4 Metc. 270; *Cobb v. Arnold*, 8 Metc. 403; *Allis v. Billings*, 2 Cush. 19; *Leach v. Fobes*, 11 Gray, 506; *Kerr v. Lucas*, 1 Allen, 279; *Easton v. Easton*, 112 Mass. 438; *Riggs v. Hawley*, 116 Mass. 596; *Wilton v. Eaton*, 127 Mass. 174; *Union Bank v. Geary*, 5 Pet. 99; *Miles v. New Zealand Co.*, L. R. 32 Ch. Div. 266; *Ex parte Banner*, L. R. 17 Ch. Div. 480; *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449; *Cook v. Wright*, 1 B. & S. 559.

¹*Phillips v. Pullen*, 50 N. J. Law, 439, where the court said: "The agreement for forbearance was carried out and the situation produced was this: The damages were liquidated so that P. could obtain and S. would be answerable for, no more than the fixed sum; and the proceedings in the pending suit were foreborne and the suit might, on demand, be discontinued. It therefore furnished a sufficient consideration for the promise to pay." See also, *Conover v. Stillwell*, 34 N. J. Law, 54; *Union, etc., Co. v. Erie, etc.*, 37 N. J. Law, 23; *Collins v. Gibbs*, 2 Burr. 899.

²*Keenan v. Handley*, 2 D. J. & S. 283.

³*Stracy v. Bank*, 6 Bing. 754.

ported by sufficient consideration.¹ An agreement to give up all the land covered by a mortgage, by an amicable foreclosure suit, is a sufficient consideration for an agreement to accept the land in full satisfaction of the debt, including any deficiency that might remain after the foreclosure sale.² The withdrawal of a distress for rent, some rent being due, although the amount was disputed, was held a good consideration for a promise to pay a certain sum.³ And even though one does not receive all that is legally due him, yet where the sum actually due is in dispute, the avoidance of litigation is a sufficient consideration to support a settlement fairly made with full knowledge of all the facts.⁴ The settlement of a dispute between the owners of mining cross-veins, although ignorant of their legal rights, is a consideration to support a voluntary agreement for the amicable adjustment of the controversy.⁵ Where a note was given in settlement of a threatened suit on a prior note given for a machine after objection to the working of the machine, and a test and knowledge that it failed to do good work, it was held a valid note.⁶ As a result of the authorities, a doubtful or disputed claim, sufficient to constitute a good consideration for an executory contract of compromise, is one honestly and in good faith asserted, arising from a state of facts upon which a cause of action can be predicated, with the reasonable belief on the part of the party asserting it that he has a fair chance of sustaining his claim, and concerning which an honest controversy may arise, although in fact the claim may be wholly unfounded.⁷

§ 176. Forbearance where the right or claim is doubtful.—

A promise to give something for the compromise of a claim, about which there is merely a dispute and controversy, and for which there is no legal foundation whatever, is void.⁸ The

¹ *French v. French*, 84 Iowa, 655; 15 L. R. A. 300.

² *Renwick v. Wheeler*, 48 Fed. Rep. 431.

³ *Skeate v. Beale*, 11 A. & E. 983.

⁴ *Battle v. McArthur*, 49 Fed. Rep. 715.

⁵ *Coffee v. Emigh*, 15 Colo. 184.

⁶ *Dunbar v. Tirey* (Texas, 1891), 17 S. W. Rep. 1116.

⁷ *Smith v. Farra*, 21 Ore. 405.

⁸ *Moon v. Martin*, 122 Ind. 211; *Emery v. Royal*, 117 Ind. 299; *Jarvis v. Sutton*, 3 Ind. 289; *Schnell v. Nell*, 17 Ind. 29; *Spahr v. Hollingshead*, 8 Blackf. 415; *Smith v. Boruff*, 75 Ind.

husband of a life tenant, after her death, refused to surrender possession, asserting a claim to the property, and in order to obtain possession the remainder-man gave him a mortgage on the property. It was held that the mortgage was obtained by enforcing a void claim and that it was invalid.¹ Where a difference having arisen between the parties to an illegal gambling contract, as to who should bear the losses incurred in furtherance thereof, and paid by one, and as a compromise of the business it was agreed that each should pay a certain sum, this was an invalid compromise, as the only claim each had against the other was a void one, insufficient to sustain a promise.² Where a party refuses to cancel a mortgage which he wrongfully insists is not paid, his forbearance to insist upon an examination as to whether it has been paid or not will not be a consideration, because if it has been paid his right to refuse to cancel it is invalid and void.³ Where a judgment debtor wrongfully obtains a satisfaction of the judgment from the creditor, the surrender of the instrument of satisfaction, forms no consideration for a promise.⁴ A promise to conduct proceedings in bankruptcy against a person in such a manner as to injure his credit as little as possible is no consideration for a promise to pay the costs.⁵ Where a claim against a town for damages is without foundation, because no action lies

412; *Coy v. Stucker*, 31 Ind. 161; *Kidder v. Blake*, 45 N. H. 530; *Pitkin v. Noyes*, 48 N. H. 294; *North v. Forest*, 15 Conn. 400; *Emmitsburg R. Co. v. Donoghue*, 67 Md. 383; *Demars v. Musser, etc., Co.*, 37 Minn. 418; *Creutz v. Heil*, 89 Ky. 429; *Potts v. Polk County*, 80 Iowa, 401; *Pitkin v. Noyes*, 48 N. H. 294, the court saying: "The surrender or discharge of a claim, which is utterly without foundation, and known to be so, is not a good consideration for a compromise; but it is otherwise if the claims are doubtful." *Tucker v. Ronk*, 43 Iowa, 80; *Sullivan v. Collins*, 18 Iowa, 228; *Jones v. Ashburnham*, 4 East, 455; *Smith v. Alger*, 1 B. & Ad. 603; *Wade v. Simeon*, 2 C. B. 548; *Gould v. Armstrong*, 2 Hall, 266; *Cabot v. Haskins*, 3 Pick. 83; *Warder*

v. Tucker, 7 Mass. 449; *Haynes v. Thom*, 29 N. H. 386, 141; *Dunbar v. Maden*, 13 N. H. 311; *Stewart v. Ahrenfeldt*, 4 Denio, 189; *Anthony v. Boyd*, 15 R. I. 495.

¹ *Creutz v. Heil*, 89 Ky. 429.

² *Everingham v. Meighan*, 55 Wis. 354.

³ *Smith v. Boruff*, 75 Ind. 412.

⁴ *Crosby v. Wood*, 6 N. Y. 369. This case might also have been decided on the ground that the debtor in surrendering the paper was only doing what in law he was bound to do, which is no consideration.

⁵ *Bracewell v. Williams*, L. R. 2 C. P. 196. This result was arrived at because the promise really amounted to one not to abuse the process of the court.

against it therefor, this claim will not support a promise by the electors of the town, assembled in town meeting, to pay the same, as the claim is not doubtful but void.¹

§ 177. Dismissing a suit.—Where legal proceedings have been instituted, the dismissal of them constitutes a consideration for the compromise agreement, regardless of the validity of the claim sued on, and whether the suit could have been prosecuted to a successful issue or not.²

¹ *Morey v. Town of Newfane*, 8 Barb. 645, the court saying: "It has been repeatedly said by courts, that the compromise of a 'doubtful claim' will support a promise to pay. It is not very easy to determine what sort of claim is intended by this expression. It is clear it need not be a valid claim either in law or equity. May it be entirely without foundation? Where a suit has been actually commenced, and is pending, it would seem that its settlement will constitute a sufficient consideration, although there should be no probable or plausible ground for the action. * * * The discontinuance of a pending suit appears of itself to be sufficient, without regard to the nature of the claim. But in a case where no proceedings have been instituted, the mere assertion of a claim, having no plausible ground for its support, could hardly prevent a promise to pay from being regarded as a *nudum pactum*. But how much or what foundation a claim must have to elevate it from a baseless to a doubtful claim, which will support a promise, it is difficult to say. In the case of *Russell v. Cook*, 3 Hill, 504, the compromise of a disputed claim, not in suit, was held to sustain a promise. Judge Cowan there says, no one would think of denying that at least the dispute between the parties was doubtful, and that probably the law was against the defendant on the facts disclosed by their evidence. It is enough, however,

that it was doubtful. This language seems that the word doubtful, as used, in this connection, has some meaning—that the claim must have some probable foundation—must be really doubtful. This being so, if the case, instead of being doubtful, is clear in the judgment of the court, and free from doubt against the claim, it follows that the compromise could not be sustained."

² *Clark v. Turnbull* (1885), 47 N. J. Law, 265, the court saying: "This rule, both in England and America, seems to be without exception, in the absence of fraud or duress," and calling attention to the diversity in judicial opinion as to the degree of strength requisite in a claim to make a compromise of it a good consideration where the claim is not actually in suit. *Longridge v. Dorville*, 5 B. & Al. 117; *Edwards v. Baugh*, 11 M. & W. 641; *Cooper v. Parker*, 14 C. B. 118; *Morey v. Town of Newfane*, 8 Barb. 645; *Sigsworth v. Coulter*, 18 Ill. 204; *Grandin v. Grandin*, 49 N. J. Law, 508, 510; *Stewart v. Ahrenfeldt*, 4 Denio, 189, the court saying: "The plaintiff is right in his law, that the settlement of a suit, or the compromise of a doubtful claim, is a good consideration for a promise to pay money." *Moon v. Martin*, 122 Ind. 211, the court saying: "There is a difference between compromising a suit that has been instituted in good faith and settling a claim asserted by

§ 178. **Mutual promises.**—A promise may constitute the consideration for another promise.¹ But in order that one promise may be the consideration for another, both promises must be concurrent in point of time and both parties must be bound.² But while both promises must be binding, there need not be the same remedy to both parties. Thus an infant's promise may be the consideration for a promise, although the infant may elect to plead infancy.³ And a contract may be unenforce-

one against another." See, also, Flanagan v. Kilcome, 58 N. H. 443, where it is ruled that "A promise to pay a sum certain, upon the discontinuance of a pending suit, by the promisee, is *prima facie* founded on a good consideration." *Contra*, Wade v. Simeon, 2 C. B. 548; Tooley v. Windham, Cro. Eliz. 206; Loyd v. Lee, 1 Strange, 94; Haynes v. Thom, 28 N. H. 386; Kidder v. Blake, 45 N. H. 530.

¹ Flanders v. Wood, 83 Texas, 277, 280; 18 S. W. Rep. 572; Baker v. Kansas City R. Co., 91 Mo. 152; 3 S. W. Rep. 486; Pryor v. Hunter, 31 Neb. 678; 48 N. W. Rep. 736; Siddall v. Clark, 89 Colo. 321; 26 Pac. 829; Coleman v. Eyre, 45 N. Y. 38; Livingston v. Rogers, 1 Cai. 583; Briggs v. Tillotson, 8 Johns. 304; Keep v. Goodrich, 12 Johns. 397; Tucker v. Woods, 12 Johns. 190; White v. Demilt, 2 Hall, 405; Gould v. Banks, 8 Wend. 562; Missisquoi Bank v. Sabin, 48 Vt. 239; Babcock v. Wilson, 17 Maine, 372; Aldrich v. Lyman, 6 R. I. 98; Commissioners v. Perry, 5 Ohio, 57; Nott v. Johnson, 7 Ohio St. 270; Boies v. Vincent, 24 Iowa, 387; Leach v. Keach, 7 Iowa, 232; Crawford v. Paine, 19 Iowa, 172; Downey v. Hinchman, 25 Ind. 453; Bruce v. Smith, 44 Ind. 1; Funk v. Hough, 29 Ill. 145; Hawes v. Woolcock, 26 Wis. 629; Whitehead v. Potter, 4 Ired. L. 257; James v. Fulcrod, 5 Texas, 512; Rice v. Sims, 8 Rich. L. 416; Howe v. O'Mally, 1 Murphy, 287; 3 Am. Dec. 693; Congregational Society v. Perry, 6 N. H. 164; George v. Harris, 4 N. H.

533; Barringer v. Warden, 12 Cal. 311.

² Utica R. Co. v. Brinckerhoff, 21 Wend. 139; Livingston v. Rogers, 1 Caines, 583; Tucker v. Woods, 12 Johns. 190; Keep v. Goodrich, 12 Johns. 397; Efner v. Shaw, 2 Wend. 567; Lester v. Jewett, 12 Barb. 502; Townsend v. Fisher, 2 Hilt. (N. Y.), 47; Flanders v. Wood, 83 Texas, 277; 18 S. W. Rep. 572; James v. Fulcrod, 5 Texas, 512. "The promise of each must be concurrent and obligatory at the same time to render either binding, and should be so stated in the declaration." Nelson, Ch. J., in Utica R. Co. v. Brinckerhoff, 21 Wend. 139. "The legal principle that contracts must be mutual, that they must bind both parties or neither, does not then mean that in every case each party must have the same remedy for a breach by the other. Covenant may lie against one, when only assumpsit can be maintained against the other. Nor does the principle mean that when a contract is written each party must sign it. It is true that when a contract consists of mutual promises, both parties must be bound, or neither is; but in no case, when the consideration is a covenant or a promise, is the form of the undertaking material. It is its substance." Strong, J., in Grove v. Hodges, 55 Pa. St. 504, 516.

³ "The numerous decisions which have been had in this country justify the settlement of the following definite rule as one that is subject to no exceptions. The only contract bind-

ble as to one party as within the statute of frauds, while the same contract is enforceable as to the other because of his signature in writing.¹

§ 179. The same subject continued—College endowment bond.

—A bond payable after the maker's death to a college for its endowment, accepted by the college, rests upon a sufficient consideration, and may be enforced after the maker's death.²

ing on an infant is the implied contract for necessities. The only act which he is under a legal disability to perform is the appointment of an attorney. All other acts and contracts, executed or executory, are voidable or confirmable by him at his election."

1 Am. Lead. Cas., 5th ed., 300. See, also, *Curtin v. Patton*, 11 Serg. & Raw. 305; *Hinely v. Margaritz*, 3 Pa. St. 428; *Patchin v. Cromach*, 13 Ver. 330; *Vaughan v. Parr*, 20 Ark. 600; *Shropshire v. Burns*, 46 Ala. 108; *Williams v. Moor*, 11 M. & W. 256; *Fetrow v. Wiseman*, 40 Ind. 148; *Fonda v. Van Horne*, 15 Wend. 631; *Scott v. Buchanan*, 11 Humph. 467; *Cole v. Pennoyer*, 14 Ill. 158; *Cummings v. Powell*, 8 Texas, 80; *Mustard v. Wohlford*, 15 Gratt. 329.

¹*Clason v. Bailey*, 14 Johns. 484; *Justice v. Lang*, 42 N. Y. 493; *Worrall v. Munn*, 5 N. Y. 229; *Parton v. Crofts*, 16 C. B. N. S. 11; *Farwell v. Lowther*, 18 Ill. 252; *Hodson v. Carter*, 3 Pinney, 212; *Cheney v. Cook*, 7 Wis. 413; *Shirley v. Shirley*, 7 Blackf. 452. "The weight of authority from adjudicated cases will be found to fully sustain the doctrine that a contract may not bind one party, in consequence of his omitting to sign it according to the statute of frauds; and yet he may sue the other party who has complied with the act." *Dewey, J.*, in *Old Colony R. Co. v. Evans*, 6 Gray (Mass.), 25, 32. See *Wilkinson v. Heavenrich* (1886), 58 Mich. 574, where a great many authorities on both sides of this question are

collected and discussed. But this subject is more germane to the statute of frauds, and will be treated thereunder.

²*Barnett v. Franklin College*, 10 Ind. App. 103, 37 N. E. Rep. 427, the court saying: "The case of *Garrigus v. Home*, etc., Society, 3 Ind. App. 91; 28 N. E. Rep. 1009, bears a strong analogy to the case at bar upon the question of the sufficiency of such a consideration. In that case the society filed a claim against the estate of Elizabeth Storer, deceased, on an instrument in the form of a note, by which she had promised to pay to said society, out of her estate, one month after her death, the sum of \$600, 'to advance the cause of missions, and to induce others to contribute for that purpose.' A demurrer having been overruled to the claim, it was urged, on appeal to this court, that the instrument was without sufficient consideration, and that the action could not be maintained. This court ruled, however, that the promise could not be held void for want of consideration, citing in support of its ruling the cases of *Johnston v. Wabash College*, 2 Ind. 555, and *Roche v. Roanoke*, etc., Seminary, 56 Ind. 198, in which cases instruments of a similar character to those in the present case were adjudged to be founded upon a sufficient consideration to sustain an action for their collection. In the case of *Roche v. Seminary*, *supra*, the supreme court expressly held that the instrument required no further consideration to support it than 'the ac-

So, also, in a well considered Texas decision, a demand for accommodation in a sleeping-car, and a promise on the part of

accomplishment of the object in aid of which the money was promised,' which, in that case, as in this, was to go to the endowment fund of an institution of learning. The case of *Gammon, etc., Seminary v. Robbins*, 128 Ind. 85; 27 N. E. Rep. 341, is easily distinguishable from the case before us, as well as from the cases cited. In that case there had been no delivery of the instrument sued upon, and it contained a mere promise to give something. It was held not to be a valid gift *inter vivos*, as there had been no delivery to the payee, and as the promise was purely one to make a gift, and not a contract. In the case at bar there had not only been a delivery of the instrument, but it is expressly averred that the same had been accepted upon the terms stipulated, and that the acceptance had been entered of record by the appellee, to say nothing of the difference between a promise to give something in the future and an obligation to pay upon a valid consideration. The principle upon which promises of the character of those embraced in the present case are held to be valid is the reciprocal undertaking on the part of the promisor to pay and the promisee to perform something of value to the promisor, though the value may only be of indirect benefit to the latter, such as the obligation in the present case that the appellee will hold and apply the funds promised in compliance with the terms of the contract. The benefit to the promisor to be derived from the performance of the promise may consist in the introduction into the community in which he resides or is interested something which will permanently enhance the general value of property in such community, or will elevate the moral or educational standing thereof. On the other hand, the con-

sideration may lie in the assumption of certain risks and the incurring of expenditures upon the faith of the promise on the part of the obligee. In either case, and, *a fortiori*, when the two are combined, the essence of the validity of the consideration is found in the promise to pay, and the acceptance of the same. Nor will it do to say that there is no method of enforcing the performance of the duty or obligation assumed by the promises in such cases. Courts of equity have ample powers to coerce the application of the funds arising from subscriptions or bonds, such as those in controversy, to the accomplishment of the purpose expressed in the contract. The acceptance of the obligation imposed creates a trust incapable of being subsequently renounced, and which may be enforced by proper legal proceedings. Nor is it necessary that the obligation of the trustee should be performed in advance of the payment of the fund, for the very purpose of the subscription is to enable such party to perform the duty imposed; and hence the mere retaining of the instrument and the institution of suit upon the same is regarded as sufficient *prima facie* evidence of such acceptance. *Carnahan v. Tousey*, 93 Ind. 561; *Coppage v. Gregg*, 127 Ind. 359; 26 N. E. Rep. 903; 1 *Lewin on Trusts*, p. 200, and note 1; 1 *Perry on Trusts* (4th ed.), § 259. The views we have expressed as to the validity of such a promise as that sought to be enforced in this action, and the sufficiency of the consideration therefor, are fully supported by the decisions of able courts in other jurisdictions, as well as by eminent writers. Thus, it was said in *Amherst Academy v. Cowls*, 6 Pick. 427, which was an action on a note given to the college: 'But it is quite sufficient to create a

the employe of the car company to furnish it, constitute a contract; the mutual obligations and promises between passenger

consideration that the other party, the payee, should have assumed an obligation in consequence of receiving the note, which he was compellable either at law or in equity to perform, unless the promisor should be able to show, when sued, that the payee had refused, or was unable, or had unreasonably neglected, to perform the engagement on his part; in which cases a defense might be raised on the ground of a failure of the consideration. The defense is not put upon that ground, and so it must be presumed that the corporate body to whom the promise is made has applied its funds to the purpose for which they were raised, or is ready and willing to do it whenever the different contributors to it shall have performed their engagements. In a court of equity of general jurisdiction, they could be compelled to discharge their duty. Without such a court, they would be subjected to a loss of their charter by refusal or neglect, for without doubt the legislature are the visitors of all corporations founded by them for public purposes, where there is no individual founder or donor, and may direct judicial process against them for abuses or neglects which, by common law, would cause a forfeiture of their charters. It certainly, then, would seem that every contributor to the funds of a corporation authorized by law to receive moneys and apply them to the improvements, in most essential points, of the community to which he belongs, has his recompense in his share of the public good resulting from them; and if by means of his contribution, or his solemn promise to pay, the body to whom he has pledged his word should encounter expense, become under legal obligations, or otherwise pursue the intent

and purpose of the legislature in granting them the charter, this is a sufficient legal consideration to support such a promise. In this respect the principles of common honesty can not be at variance with the law of the land.' In *Ladies' Institute v. French*, 16 Gray, 196, which was a suit upon a college subscription, the court said: 'The second objection is that the promises of the defendants, being mere subscriptions to the funds of the institute, are without consideration, and therefore void. Subscriptions of this character have been made the subject of litigation in many instances, and the earlier cases in our reports contain *dicta* some of which have not been sanctioned by later decisions. But in the cases of *Amherst Academy v. Cows*, 6 Pick. 427; *Williams College v. Danforth*, 12 Pick. 541, and *Thompson v. Page*, 1 Metc. 565, their validity is established, and the ground of it is definitely stated. It is held that by accepting such a subscription the promisee agrees on his part with the subscribers that he will hold and appropriate the funds subscribed in conformity with the terms and objects of the subscription, and thus mutual and independent promises are made, which constitute a legal and sufficient consideration for each other. They are thus held to rest upon a well-settled principle in respect to concurrent promises.' In *Troy Academy v. Nelson*, 24 Vt. 189, which was also a suit upon a college subscription, it was said: 'A legal consideration may consist in loss, damage, or inconvenience sustained by the party to whom the promise is made, or of benefit or advantage to the party promising. The amount of the consideration is unimportant; nor is it necessary, in this state, that it should appear upon the face of the con-

and carrier being a valid consideration.¹ And an agreement to sell is sufficient to support a promise to pay an agreed amount for an option to purchase a mining claim, although the contract provides for liquidated damages in a like amount in case of refusal by the vendor to complete the sale, as the vendee may insist upon a specific performance.² A contract

tract or agreement, as it may be proved by testimony *aliunde*. The consideration for this agreement is found in the obligation imposed upon and assumed by the trustees of this academy to see to and make the application of this money as directed to the subscribers to this fund, so as to enable this institution to prosecute its duties of public instruction, for which it was incorporated; thus rendering this assumed liability and promise the consideration of the promise of the other. To create this obligation upon this corporation or its trustees it was not necessary that the instrument should have been signed by them, for that obligation arises from the acceptance of those subscriptions for that purpose, and which can be enforced at law and in equity. This was so expressly decided in the case of *Patchin v. Swift*, 21 Vt. 292. The court there says: "That the accepting and adopting a written contract by a party who has not put his name to it binds such party equally as if he had signed such contract." In *Maine, etc., Institute v. Haskell*, 73 Maine, 140, which was also a suit upon a college subscription, the court said: "But we are not prepared to admit that the subscription paper in this case 'is a bare, naked promise,' without any consideration whatever. It is true, no consideration was actually received at the time of signing, but one was plainly implied, if not expressed, from the language used. The promise was of money for a specified purpose, 'to make up a building fund for said institution.'" This purpose was ever recognized by the law as a public

charity. The promise was made to a definite payee by name, one legally competent to take, incorporated for the express purpose of carrying out the object contemplated in the promise, and therefore amenable to law for negligence or abuse of the trust. It is not, of course, binding upon the promisor until accepted by the promisee, and may, up to that time, be considered as a revocable promise. But when so accepted, and much more when the execution of the trust has been entered upon, when money has been expended carrying out the purpose contemplated, it becomes a completed contract, binding upon both parties; the promise to pay, and at least the implied promise to execute, each being a consideration for the other.' The same rule has been adopted by the Kentucky court of appeals. *Collier v. Baptist, etc., Society*, 8 B. Mon. 68."

¹ *Pullman Car Co. v. Booth* (Texas App. 1894), 28 S. W. Rep. 719.

² *Morris v. Lagerfelt*, 103 Ala. 608; 15 So. Rep. 895, where the court said: "If, under the agreement, properly interpreted, it be true that the vendor had the right to repudiate the promise to sell, and, in that event, incur no other responsibility or obligation than the payment of the liquidated damages of \$100, we would unhesitatingly declare the instrument a mere *nudum pactum*, for the obvious reason that, the sum fixed as liquidated damages being that sum which was paid for the option to purchase, the payment of such damages would be no more than the mere restoration of the consideration paid for the option to purchase, placing

between plaintiff and defendant recites that plaintiff owned timber lands tributary to two streams on which defendant was engaged in the business of driving logs, and that differences had arisen between the parties in regard to charges for services rendered by defendant; it was therefore agreed that, in consideration of a specified compensation, defendant should drive, boom, and deliver all logs put by plaintiff in the rivers in question, not to exceed a named limit annually. The parties acted under this contract until all but a small part of the timber was cut from plaintiff's land. It was held that defendant could

the vendor precisely where he was when the agreement was made, with no other obligation whatever resting upon him. But we do not so interpret the agreement. It clearly evidences a promise to sell and convey the specified interest in the mine, upon specified conditions and terms. It is true liquidated damages are stipulated for the breach of that promise, and the vendee, relying, for his redress, upon the payment of damages for the breach, would be limited in his recovery to the stipulated sum; but the fact that the damages are liquidated by the contract for the sale of realty, as in the present case, does not affect the right of the vendee to insist upon a specific performance of the contract. In all breaches of this kind, the vendee has his election to enforce specific performance of the contract, or, waiving that, sue at law for damages for the breach. If the latter redress is elected, and the damages have not been liquidated by the agreement of the parties, they will be assessed by the jury according to the known principles of law; if liquidated by the agreement, that will be the measure of recovery. 22 Am. and Eng. Encyc. of Law, p. 999, and cases cited in note 4; 22 Am. and Eng. Encyc. of Law, p. 970, and note 6; *Haynes v. Farley*, 4 Port. (Ala.) 528; *Eads v. Murphy*, 52 Ala. 520; *Micou v. Ashurst*, 55 Ala. 607; *Cotton v. Cotton*, 75 Ala.

345. We therefore hold, in this case, that the appellant, Morris, upon compliance with the conditions and terms of the agreement upon his part, could have enforced performance, on the part of the other party, of his agreement to convey; wherefore the contract was mutually obligatory, and the appellee entitled to receive the \$100 agreed upon as its consideration." In *Morrow v. Jones*, 41 Neb. 867; 60 N. W. Rep. 369, Norval, C. J., thus expressed the rule: "It is elementary that mutual promises constitute a good consideration for a contract. By the written proposition submitted to Mrs. Jones she was promised the right to redeem the property at any time by paying the amount of the mortgage and costs, with interest, in case she would execute a quitclaim deed to the premises, and an assignment of her equity of redemption. The deed and assignment were duly executed and delivered, and they certainly constitute a valid and binding consideration for the promise and agreement made by Morrow. Without the deed and assignment he could not have redeemed the premises from the foreclosure sale, but would, in all probability, have been forced to lose \$125 of his debt. By the new arrangement he was to receive the full amount of his debt, interest, and costs, in case Mrs. Jones should redeem from the mortgage."

not refuse performance as to the balance of the timber on the ground that there was a lack of mutuality in the contract.¹

§ 180. Past consideration—Future services.—The rendering of future services may be a good consideration to uphold a promise to pay for services already rendered. Thus where an attorney had rendered service and was then told that if he would continue to render services he would be paid both for those already rendered and for what he might do in future, it was held that under this promise the attorney could recover for his past services.² And giving credit in future, or forbearing to sue the debtor for a certain time, or any other sufficient consideration, will support a promise to guarantee all debts, past as well as future.³ If supplies are furnished to a person and afterwards in consideration of future supplies a

¹ *Robson v. Mississippi Logging Co.* (1894), 61 Fed. Rep. 893, where Shiras, J., said: "In *Storm v. United States*, 94 U. S. 76, wherein was involved the question of the liability of a contractor and his sureties for the non-performance of a contract to furnish certain supplies, it was objected that the contract was not mutually binding, was therefore without consideration, and hence was void. The court overruled the objection, saying that, 'Beyond doubt, the written agreement went into operation, and it is not even suggested that the department and division commanders ever expressed any disapproval of its terms or conditions. * * *

Suppose it to be true that the quartermaster-general might terminate it, if he should see fit. It is a sufficient answer to the suggestion to say that he never did interfere in the matter, and that the contract continued in full force and operation throughout the whole period for which the necessary supplies were purchased by the United States in open market. Where the defendant has actually received the consideration of a written agreement, it is no answer to an action brought against him for a breach of

his covenants in the same to say that the agreement did not bind the plaintiff to perform the promises on his part therein contained, provided it appears that the promises in question have in fact been performed in good faith, and without prejudice to the defendant. Addison on Contracts (6th ed.) 15; *Morton v. Burn*, 7 Adol. & E. 19. Agreements are frequently made which are not, in a certain sense, binding on both sides at the time when executed, and in which the whole duty to be performed rests primarily with one of the contracting parties. * * * Cases often arise where the agreement consists of mutual promises, the one promise being the consideration for the other; and it has never been seriously questioned that such an agreement is valid, and that the parties are bound to fulfill their respective obligations.' "

² *Roberts v. Griswold*, 35 Vt. 496.

³ *Johnston v. Nicholls*, 1 C. B. 251; *Boyd v. Moyle*, 2 C. B. 644; *White v. Woodward*, 5 C. B. 810; *Wood v. Benson*, 2 C. & J. 94; *Hoad v. Grace*, 7 H. & N. 494; *Coles v. Pack*, L. R. 5 C. P. 65.

promise is made to pay for the past as well as future supplies, this is a binding promise.¹ And for similar reasons a promise by the father of a bastard child to pay the step-father for the child's support, past and future, if he will continue to support it, is binding.²

§ 181. **Marriage.**—Marriage is a valuable consideration,³ and will support a contract made in consideration of it.⁴ So an antenuptial settlement of lands, although made by the settler with the design of defrauding his creditors, will not be set aside in the absence of the clearest proof of his intended wife's participation in the fraud.⁵ Marriage is such a consideration for the assignment of a mortgage by the intended husband to the wife, before marriage, as will make the wife a purchaser for value.⁶ A covenant or promise before marriage to settle certain land, or to charge certain land, in favor of the intend-

¹ *Loomis v. Newhall*, 15 Pick. 159. The head note of this case is: "an entire promise founded partly on a past and executed consideration and partly on an executory consideration, is supported by the executory consideration. See also, *Sturlyn v. Albany*, Cro. Eliz. 67; *Williamson v. Clements*, 1 Taunt. 523; *Phillips v. Bateman*, 16 East, 356; *Jones v. Ashburnham*, 4 East, 455.

² *Wiggins v. Keizer*, 6 Ind. 252.

³ *Mellick v. Mellick*, 47 N. J. Eq. 86; 19 Atl. Rep. 870; *Prewit v. Wilson*, 103 U. S. 22, the court saying: "Now marriage is not only a valuable consideration, but as Coke says, there is no other consideration so much respected in the law." *Barrow v. Barrow*, 2 Dick. 504; *Nairn v. Prowse*, 6 Ves. Jr. 752; *Campion v. Cotton*, 17 Ves. Jr. 264; *Sterry v. Arden*, 1 Johns. Ch. 261; *Herring v. Wickham*, 29 Gratt. 628.

⁴ The contract of mutual promises to marry are more properly referable, as to the matter of consideration, to the doctrine of mutual promises, one

promise being a consideration for the other.

⁵ *Prewit v. Wilson*, 103 U. S. 22.

⁶ *Mellick v. Mellick*, 47 N. J. Eq. 86; 19 Atl. Rep. 870. In this case a man induced a woman to marry him by a promise to assign to her before marriage a certain mortgage, but before he did assign it he previously assigned it to his son for value, and then afterwards obtaining possession of the mortgage, on the day of the wedding assigned it to his wife. It was held that the wife was entitled to the benefit of the mortgage, notwithstanding that the prior assignment was recorded on the day it was executed, and that the son was innocent and ignorant of the fraudulent scheme of his father. "It is common learning that marriage is a valuable consideration, and quite as much so as cash. The complainant, then, stands in this court precisely as if, instead of marrying Mr. Mellick, she had paid him \$5,000 in cash for this security. * * * She stands therefore as a *bona fide* purchaser for full value."

ed wife, becomes binding upon the marriage taking place, and creates a lien in equity upon the specific land.¹

§ 182. Illustrations.—A legal contract and promise of marriage, made in good faith by a woman to one who has executed to her a deed of land for the purpose of inducing her to marry him, furnishes a good consideration for the deed; and she will be entitled to hold the land against his creditors, although the marriage is prevented by his death.² Where land was conveyed to an intended wife “in consideration of the promise of the said party of the second part to marry” the grantor, the deed was held supported by a sufficient consideration, although the original promises were not in writing, since the grantee is bound by the recitals in the deed.³ A husband gave his note as an inducement to his wife to marry him; she was allowed to recover.⁴ An oral contract between the wife and husband before marriage, by which the latter was to provide for her support during life, pay her debts and improve the land, and the parties then marrying, she conveying to him certain land, it was held that the consideration for the conveyance was not the marriage, but the support of the wife.⁵

§ 183. Representations.—A representation made by one party for the purpose of influencing the conduct of another, and acted on by him, will, in general, be sufficient to entitle him to the assistance of a court of equity. And so in proposals of marriage. If the parent or his agent deliberately holds

¹ *Freemoult v. Dedire*, 1 P. Wms. 429.

² *Smith v. Allen*, 5 Allen, 454. “A legal contract and promise made in good faith to marry another must, therefore, like an actual marriage, be deemed to be a valuable consideration for the conveyance of an estate, and will justly entitle the grantee to hold it against subsequent purchasers, or the creditors of the grantor.”

³ *Prignon v. Daussat*, 4 Wash. 199; 29 Pac. Rep. 1046. “As we view the

law, it is the contract to marry, and not the marriage itself, which is the consideration which supports the deed.” And see, *Potts v. Meritt*, 14 B. Mon. 406, which was an antenuptial contract, the husband agreeing to allow the wife to keep her slaves if she would marry him.

⁴ *Wright v. Wright*, 54 N. Y. 437. See, also, *Dygart v. Remerschnider*, 32 N. Y. 629.

⁵ *Larsen v. Johnson*, 78 Wis. 300; 47 N. W. Rep. 615.

out inducements to the suitor to celebrate the marriage, and he consents and celebrates it, believing he should have the benefits so held out to him, a court of equity will give effect to the proposals.¹

§ 184. **Conveyances.**—Marriage is a valuable consideration, sufficient to support a conveyance of property, even against creditors, and in such a case the wife is deemed a purchaser of the property settled on her, in consideration of the marriage, and is entitled to hold it against the world.² And when a settlement is made in contemplation of marriage, the

¹*Hammersley v. De Biel*, 12 C. & F. 45, where a man represented to his daughter's suitor that he would leave her a provision by will. *Jorden v. Money*, 5 H. L. C. 185, the court saying: "That is a principle of universal application, and has been particularly applied to cases where representations have been made as to the state of property of persons about to contract marriage, and where, upon the faith of such representations, marriage has been contracted. There the person who has made the false representations has in a great many cases been held bound to make his representations good." *Neville v. Wilkinson*, 1 Bro. C. C. 543; *Montefiori v. Montefiori*, 1 W. Bl. 363; *Gale v. Lindo*, 1 Vern. 475; *Mills v. Fox*, L. R. 37 Ch. Div. 153; *Prole v. Soady*, 2 Giffard, 1. Here a settlement was directed to be made in accordance with the representations, although they were by parol. "If it be supposed to be necessary for this purpose to find a contract such as usually accompanies transactions of importance in the pecuniary affairs of mankind, there may not be found in the memorandum or in the other evidence in the cause proof of any such contract. When the authorities on this subject are attended to, it will be found that no such formal contract is required. A representation made by one party

for the purpose of influencing the conduct of the other party, and acted on by him, will in general be sufficient to entitle him to the assistance of this court for the purpose of realizing such representation." Lord Cottenham in *Hammersley v. De Biel*, 12 C. & F. 45, 62, note. See the following cases where the distinction is taken between marriage as a consideration to support the promise, which under the statute of frauds must be in writing, and cases where marriage not so much as fraud was held the ground for relief, in the latter instances no memorandum being necessary. *Hannon v. Hounihan*, 85 Va. 429; *Southerland v. Southerland*, 5 Bush, 591; *Mallory v. Mallory*, 92 Ky. 316; 17 S. W. Rep. 737; *White v. Bigelow*, 154 Mass. 593; *Prewit v. Wilson*, 103 U. S. 22; *Nickerson v. Nickerson* 127 U. S. 668; *Prole v. Soady*, 2 Giff. 1; *Bold v. Hutchinson*, 5 De G., M. & G. 558; *Savage v. Foster*, 9 Mod. 35.

²*Herring v. Wickham*, 29 Gratt. 628; *Barrow v. Barrow*, 2 Dickens, 504, the court saying: "I never knew an instance where a settlement in consideration of marriage has been set aside, and I will make no precedent." *Campion v. Cotton*, 17 Ves. 264; *Nairn v. Prowse*, 6 Ves. 752; *Tunno v. Trezevant*, 2 Des. 264; *Ex parte McBurnie's Trustees*, 1 DeG., M. & G. 440; *Fraser v. Thompson*, 4 DeG. &

law presumes it was an inducement to it. So, where a father makes such a settlement upon his daughter, even before any contract of marriage, if the settlement was known to third persons, it will be presumed it was a probable inducement to the marriage.¹ And a settlement in consideration of marriage is valid against the creditors so far as concerns the interests of the wife and the children, but a limitation in a marriage settlement in favor of the settler's illegitimate child and his issue is not within the marriage consideration.² When a marriage settlement goes beyond the immediate objects of the marriage and there are provisions for collateral relatives from whom no valuable consideration moves, then, as to such provisions, the settlement has nothing to do with the marriage, but it is considered as a settlement purely for the purpose of providing for those relatives and void as against creditors.³

J. 659; *Magniac v. Thomson*, 1 Baldwin, 344; *Magniac v. Thompson*, 7 Peters, 367, where Judge Story said: "Nothing can be clearer, both upon principle and authority, than the doctrine that, to make an antenuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. If the settler alone intended a fraud, and the other party have no notice of it, she is not and can not be affected by it. Marriage in contemplation of the law is not only a valuable consideration to support such a settlement, but a consideration of the highest value, and from motives of the soundest policy is upheld with a steady resolution. The husband and wife, parties to such a contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration, and so that it is *bona fide* without notice of fraud brought home to both sides, it becomes unimpeachable by creditors." *Serry v. Arden*, 1 Johns.

Ch. 260, where Chan. Kent said: "It is the constant language of the books and of the courts that a voluntary deed is made good by a subsequent marriage, and a marriage has always been held to be the highest consideration in law." *Verplank v. Sterry*, 12 Johns. 536; *Smith v. Allen*, 5 Allen, 454; *Jones' Appeal*, 62 Pa. St. 324; *Greenhow v. Coutts*, 4 Hen. & Mun. 485; *Bunell v. Witherow*, 29 Ind. 123; *Armfield v. Armfield*, Freeman Ch. (Miss.) 311; *Andrews v. Jones*, 10 Ala. 400. See also, *Huston v. Cantril*, 11 Leigh, 136; *Bentley v. Harris*, 2 Gratt. 357; *Eppes v. Randolph*, 2 Call, 125; *Welles v. Cole*, 6 Gratt. 645; *Fones v. Rice*, 9 Gratt. 568.

¹ *Herring v. Wickham*, 29 Gratt. 628, 646; *Welles v. Cole*, 6 Gratt. 645; *Brown v. Carter*, 5 Ves. 862.

² *Demestre v. West*, L. R. (1891) A. C. 264; *Kevan v. Crawford*, L. R. 6 Ch. Div. 29.

³ *Smith v. Cherrill*, L. R. 4. Eq. Ca. 390; *Johnson v. Legard*, 6 M. & S. 60.

§ 185. Promise of third person.—Marriage is a sufficient consideration to support a promise by a third person to the husband or wife.¹

¹ *Gurvin v. Cromartie*, 11 Ired. (Law) 174; 53 Am. Dec. 406. In this case the following language was relied on as establishing a promise to pay: "Now, Charles, be smart and get a wife and have a child, and I will give you five hundred dollars." The plaintiff subsequently married and had a child, and brought this action against the executor of the promisor. The parties were in no wise related to one another, and it was insisted there was no consideration for the promise. Chief Justice Ruffin said: "It is not needful to consider of the benefit which the marriage of the plaintiff and the birth of the issue might have been to the testator in preventing the estate, which he had purchased, from going over and making his fee absolute; since, without doubt, marriage is a valuable consideration, and sufficient to support a contract, whether executed or executory. It is generally the sole consideration on which marriage settlements are founded, and it sustains them against the creditors of the contracting parties and purchasers from them. * * * * So mutual promises between a man and woman to marry will sustain each other, and the party violating his or her promise is liable to the action of the other, as is often seen. In like manner a promise by one man to another to pay him so much in consideration that he will marry a certain woman is valid. The same reasons make it so upon which a marriage settlement is upheld upon the consideration of the marriage. There are many cases of actions on collateral promises to one, in consideration that the promisee will marry a third person. * * * * It follows, that a promise to pay him for

marrying any woman, without designating one in particular, is likewise valid; for there is no perceptible distinction on which the law can give the action in the one case and not in the other. It was argued, indeed, that it might be a prejudice to one to marry a particular woman, and by possibility, in such a case, the man would not have married her, had it not been for the promise; whereas marriage generally is to be taken to be to the party's gratification and benefit, and when he is left at large to his own free choice, his marriage can not be intended to be to his disadvantage; and therefore, that in this last case the marriage is not a sufficient consideration. But the distinction seems to be entirely untenable; for experience proves, even when the parties are of their own exclusive selection, marriages may or may not be judicious or happy. And it is just as much an act of prudence for a man to refrain from marrying any woman without having a competent livelihood for himself, his wife, and a family, as it is for him, under those circumstances, not to marry a particular woman. In either case he may be induced to marry or not to marry by his having or not having a reasonable consideration. But the law does not inquire whether the party has or has not made a fortunate match, because it is not the adequacy of the consideration which determines the validity of the promise, but it is the doing of something by the party to whom the promise is made, and it is a familiar elementary principle that such act, however trifling, constitutes a sufficient consideration. The act of marriage with any one woman must, in this point of

§ 186. Illustrations of third person's promise.—Thus, where an uncle wrote to his nephew saying he was glad to hear of his intended marriage and that he would pay him a certain sum yearly during his life, this was held a binding promise.¹ And while an actual marriage, forming the consideration for a promise, renders it necessary that the promise should be in writing under the statute of frauds, still it is doubtful if a promise to marry which is the consideration of a promise other than a reciprocal promise to marry is not of itself sufficient to support any promise, although such promise does not comply with the statute of frauds. The distinction here made is between the doing of an act, to wit, marrying, as a consideration, and a mere promise to marry as a consideration. It is well

view, be the same as that with any other; and therefore, as far as the objection to the want of a consideration affects the case the instructions were right." See this case further for a discussion of the distinction between a unilateral and a bilateral contract. The proposition in the text might be stated in the following manner; a request of another to marry a third person is a unilateral contract which becomes binding upon the doing of the act. This contract is within the statute of frauds, and the promise must be in writing. *Douglasse v. Waad*, 1 Ch. Cas. 100; *Brown v. Jones*, 1 Atk. 188; *Browne v. Garborough*, Cro. Eliz. 63; *Bradley v. Toder*, Cro. Jac. 228; *Berisford v. Woodroff*, Cro. Jac. 404; *Ex parte Cottrell*, 2 Cowp. 742; *Poynter v. Poynter*, Cro. Car. 194; *Bockenham v. Thacker*, 2 Vent. 71.

¹ *Shadwell v. Shadwell*, 9 C. B. (U. S.) 159. The following is the head note of this celebrated case, it also being an authority on another branch of the subject: "A promise based on the consideration of doing that which a man is already bound to do is invalid; and it is not necessary, in order to invalidate the consideration, that

the plaintiff's prior obligation to afford that consideration should have been an obligation to a third person. Per Byles, J. A. wrote to B. as follows: 'I am glad to hear of your intended marriage with E. N.; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you £150 yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas. Your ever affectionate uncle, A.' In an action against A.'s executors for arrears of the annuity the declaration alleged the consideration for the promise to be, 'that the plaintiff would marry E. N.' Held, by Earle and Keating, that the promise was binding, and made upon good consideration. Held, by Byles, that the letter was no more than one of kindness, creating no legal obligation. Held, by the whole court, that B's continuance to practice was not a condition precedent to his right to the annuity." See also, *Luders v. Anstey*, 4 Ves. 501; *In re Badcock*, L. R. 17 C. D. 361; *Freemoult v. Dedire*, 1 P. Wms. 429; *Viret v. Viret*, 50 L. J. C. 69.

settled that mutual promises to marry are not within the statute of frauds.¹

§ 187. **Marriage as the consideration of dower.**—In South Carolina the wife's dower is based upon the valuable consideration of marriage, and under the revised statutes of that state can be defeated only where she elopes and is not afterwards reconciled to her husband,² the doctrine in that commonwealth being that marriage is a valuable consideration paid by the wife for such rights and estates as the laws accord to her as a wife.³ A bond given by a man to his wife as a provision for her, or as a gift, is not enforceable against his estate, since an executory contract supported only by a meritorious consideration is not enforceable either in law or equity.⁴ But a promise in writing made by a husband, prior to his marriage with his wife, that, 'if she would marry him, he would leave her certain real property for her life, on the faith of which promise she married him, constitutes a binding contract on the part of the husband to leave the property to his

¹ *Ogden v. Ogden*, 1 Bland, 284; *Clark v. Pendleton*, 20 Conn. 495; *Short v. Stotts*, 58 Ind. 29; *Harrison v. Cage*, 1 L. Raym. 386; *Philpott v. Wallet*, 3 Lev. 65; *Cork v. Baker*, 1 Strange, 34; *Montacute v. Maxwell*, 1 P. Wms. 618; *Caton v. Caton*, L. R. 1 Ch. 137; *Randall v. Morgan*, 12 Ves. 67; *Ungley v. Ungley*, L. R. 4 C. D. 73. See the form of a declaration to recover damages for the breach of a promise to pay a certain sum upon a marriage having taken place in *Chitty on Pleading*, 16 Am. ed. 207.

² *McCreery v. Davis* (S. C. 1895), 22 S. E. Rep. 178, per Pope, J.: "Under our law, 'marriage is a valuable consideration. Some have considered it the highest known in law. None would say it was a lower consideration than money. There is nothing unreasonable in this. The great value of the consideration consists in this: That the wife surrenders her person and her self-dominion to the husband,

and enters into an indissoluble engagement with him, foregoing all other prospects in life; and, if the consideration for which she stipulates fails, she can not be restored to the *status in quo*. She can have no remedy or relief.' *Rivers v. Thayer*, 7 Rich. Eq. 136. In *Wilson v. McConnell*, 9 Rich. Eq. 500, the court used this language: 'But this claim is met by a corresponding equity on the part of the widow, who is entitled, under her marriage, to the position of a purchaser for valuable consideration, against all but existing liens,'—liens that existed before the marriage. It is true, at present, this right of dower of Mrs. McCreery in the lands of her husband, the plaintiff, is inchoate; yet it is substantial right of property, and not a lien. *Shell v. Duncan*, 31 S. C. 547; 10 S. E. Rep. 330."

³ *Brooks v. McMeekin*, 37 S. C. 285.

⁴ *In re James Estate*, 78 Hun, 121; 28 N. Y. Supl. 992.

wife for life, and she was entitled to treat a conveyance by the husband to a third party as a breach of that contract, and to at once sue him for damages.¹

§ 188. Naming child as a consideration.—It has been held in Massachusetts that the privilege of naming a child is a valid consideration for a promise to the parents to pay the child a certain sum of money, and that the parents having surrendered to the child all rights therein, the child may enforce the promise against the promisor.²

¹*Synge v. Synge*, L. R. (1894), 1 Q. B. 466; 9 Rep. (Eng.) 265, per Lord Justice Keay: "The learned judge who decided this case has held that the letter was not treated by the lady as a contract, although by the advice of Mr. Woodruff she preserved it, because she did not adopt his recommendation to have the terms carried out by deed nor to have the letter stamped. We can not, with deference to the learned judge, agree in his view that she treated the letter as a mere statement of intention by which the intended husband was not to be bound. The law relating to proposals of this kind before marriage was thus stated by Lord Lyndhurst, L. C., in *Hammersley v. De Biel*, 12 Cl. & F. 45: 'The principle of law, or at least of equity, is this—that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a court of equity will take care that he is not disappointed, and will give effect to the proposal.' We are of opinion that the proposal of terms in this case was made as an inducement to the lady to marry, that she consented to the terms and married the defend-

ant on the faith that he would keep his word, and that accordingly there was a binding contract on the defendant's part to leave to his wife the house and land at Ardfield for her life. Marriage is a valuable consideration for such a contract of the highest order, and when, as here, the contract is in writing, so that there is no question upon the statute of frauds, in the language already quoted, a court of equity will take care that the party who marries on the faith of such a proposal is not disappointed, and will give effect to the proposal."

²*Eaton v. Libbey* (1896), 42 N. E. Rep. 1127, Barker, J.: "The defendants concede that the privilege which was given to their testator of naming the plaintiff was a valid consideration for the testator's promise to the plaintiff's parents to pay him the sum of \$100, for which sum the testator then gave his promissory note, payable to the plaintiff. But they contend that the plaintiff was a stranger to the consideration, and that he could not recover upon that note, and that he can not recover upon the note in suit, which the testator afterwards gave to the plaintiff in renewal of the original note. We have no doubt that the privilege of naming a child is a valid consideration for a promise. It was so held in *Wolford v. Powers*, 85 Ind. 294, 307. See, also,

§ 189. Change of name as a consideration.—Where the grandfather of a child promises her parents to leave to her by his will a specified amount of money as a legacy, if they would change her name from Catharine to Harriet, and the change was accordingly made, it was held that the change of name was a sufficient consideration for the promise, and that there was a sufficient privity between the child and her parents to enable her to enforce the promise.¹

Parks v. Francis, 50 Vt. 626. Gifts to a child because of its name are common, and a change of name is often made the condition of a gift or bequest. In many jurisdictions, the change of a name is regulated by statute. If we assume that the right to name a child belongs to its parents, and, ultimately, to its father, the child can not be said to have no interest in the name imposed. The consequences affect the child more than any one else. He is deprived of the advantage of receiving any other name, and is subjected to the possibility of detriment because he bears the name imposed. Assuming that the privilege belongs to the parents, if they waive the right in favor of another, we think the child has an interest in the name which it shall bear, analogous to the interest which the child has in its own services, which belong to the father, but which, if the father waives his right, furnish a good consideration for a promissory note given to the child by a person to whom they have been rendered. *Nightingale v. Withington*, 15 Mass. 272. The right of the parents is one which they have as the natural guardians of the child, and they may be presumed to act in the matter for its interest. If, for exercising the right in a particular manner, they received a reward, which they recognize and treat as belonging to the child, it should be considered as its property, even if the parents could have kept the reward as their

own. In this case, it is fair to say that, in the transaction in which the original note was given, the parents were acting for the child, and were understood by the defendants' testator to be so acting. The plaintiff has continued to bear the name, and has accepted the present note since he arrived at years of discretion, and he has further ratified the contract by bringing this suit since he became of age. We are of opinion that there was a valid consideration for the note moving from the plaintiff himself."

¹ *Babcock v. Chase* (1895), 92 Hun, 264; 36 N.Y.Supl.879; *Merwin, J.* "In *Wolford v. Powers*, 85 Ind. 294, it was held that a promissory note, executed in consideration of a parent naming a child after the maker of the note, and in pursuance of a promise made by him that if the child were so named he would provide generously for its education and support in life, is based on a sufficient consideration. In that case it is said: 'The surrender at the intestate's request of the right or privilege of naming the appellant's child was the yielding of a consideration. The right to give his child a name was one which the father possessed, and one which he could not be deprived of against his consent. If the intestate chose to bargain for the exercise of this right he should be bound, for by his bargain he limited and restrained the father's right to bestow his own or some other name upon the child. We can perceive no solid reason for de-

§ 190. Adequacy of consideration.—It is considered unwise to interfere with the facility of contracting, and the free exer-

claring that the right with which the father parted at the intestate's request was of no value. It is difficult, if not impossible, to invent even a plausible reason for affirming that such a right or privilege is absolutely worthless. The father is the natural guardian of his child, and entitled to its services during infancy, and within this natural right must fall the privilege of bestowing a name upon it. In yielding to the intestate's request, and in consideration of the promise accompanying it, the appellant certainly suffered some deprivation and surrendered some right. * * * It will not do to say that the bestowal of a name is a valueless act, and if once it be granted to be of some value, then, in the absence of fraud and oppression, it must be held to possess the value placed upon it by the contracting parties.' In *Diffenderfer v. Scott*, 5 Ind. App. 243; 32 N. E. Rep. 87, it was held, following the *Wolford* case, that naming a child after the maker of a note is a sufficient consideration for the note given to the child. In general a waiver of any legal or equitable right at the request of another party is a sufficient consideration for a promise. *Parsons on Contracts* (8th ed.), *444. It is said: 'A valuable consideration in the sense of the law may consist either in some right or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other.' *Currie v. Misa*, L. R. 10 Exch. 153, referred to in *Hamer v. Sidway*, 124 N. Y. 538, where it also said that courts 'will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something

is promised, done, forbore or suffered by the party to whom the promise is made as consideration for the promise made to him.' It is also said, quoting from *Pollock on Contracts*, 166, that 'consideration means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future as an inducement for the promise of the first.' In *Hamer v. Sidway*, *supra*, a promise to pay the promisee \$5,000 if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, was held to be based on sufficient consideration. A similar view was taken in *Lindell v. Rokes*, 60 Mo. 249. In *Earle v. Angell*, 157 Mass. 294, it was held that a promise to pay the promisee \$500 if he would attend the funeral of the promisor was enforceable. In view of the doctrine of the *Wolford* case and the general principle enunciated or approved in the *Hamer* case, we are of the opinion that a sufficient consideration is alleged for the promise of the decedent. There is no question here about the adequacy. *Earl v. Peck*, 64 N. Y. 596. That has been fixed by the parties. Can the plaintiff enforce the promise? It was made expressly for her benefit, and by reason of the relationship between her and the promisees, and also by reason of her connection with the consideration, there was such a privity between her and the promisees that she had a right to enforce the contract. This view is sustained by authority. In 1 *Comyn's Digest* (5th ed., p. 210, note), the rule is stated: 'Where one for whose benefit a contract has been expressly made is nearly related to the party from whom

cise of the judgment and will of the parties, by not allowing them to be sole judges of the benefits to be derived from their bargains. Therefore, the law will not enter into an inquiry as to the adequacy of the consideration, but will leave the parties to judge of that for themselves.¹ Thus, for example, the consideration of giving up a promissory note of a third person was held sufficient consideration for a note, although the note surrendered was not collectible.² So, where a person, being aware of his approaching death, executed and delivered

its consideration moves, either may sue for the breach of it, though the pendency of either's suit will preclude the other's action.' This is based mainly on the case of *Dutton v. Poole*, 2 Levinz, 210, where the right of the child to sue was asserted. The authority of that case has been often recognized. *Shepard v. Shepard*, 7 Johns. Ch. 57; *Todd v. Weber*, 95 N. Y. 193; *Knowles v. Erwin*, 43 Hun, 152; *affd.*, 124 N. Y. 633; *Sackett v. Sackett*, 14 N. Y. St. Rep. 251. The principle that relationship may be the basis of a privity sufficient for the action is also recognized in *Bogardus v. Young*, 64 Hun, 398; *Coleman v. Hiler*, 85 Hun, 547. In *Vrooman v. Turner*, 69 N. Y. 280, 284, it is said: 'To give a third party who may derive a benefit from the performance of the promise an action, there must be, first, an intent by the promisee to secure some benefit to the third party, and, second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise or an equivalent from him personally.' The plaintiff here has certainly an equitable claim to the benefit of the promise. The plaintiff's parents acted for her as well as for themselves in the transaction. They owed her a duty in that regard from which it may

well be said a privity arose sufficient for the maintenance of the action.'

¹ *Judy v. Louderman*, 48 Ohio, St. 562; *Pilkington v. Scott*, 15 M. & W. 657; *Yard v. Patton*, 13 Pa. St. 278; *Candor's Appeal*, 27 Pa. St. 119; *Harris v. Harris*, 23 Gratt. 737; *Sherk v. Endress*, 3 W. & S. (Pa.) 255; *Aller v. Aller*, 40 N. J. Law, 446; *Carter v. King*, 11 Rich. L. 125; *Harrell v. Watson*, 63 N. C. 454; *Walker v. Walker*, 13 Ired. 335; *Wing v. Chase*, 35 Maine, 260; *Kennedy v. Howell*, 20 Conn. 349; *Richardson v. Bates*, 8 Ohio St. 257; *Bolton v. Madden*, L. R. 9 Q. B. 55; *Hitchcock v. Coker*, 6 A. & E. 438. "The adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the court when it is sought to be enforced." *Per curiam* in *Bolton v. Madden*, L. R. 9 Q. B. 55.

² *Judy v. Louderman*, 48 Ohio St. 562. "If, before and at the time the note was surrendered, it was not collectible out of L.'s estate, it would not follow that the written obligation was necessarily without consideration. L. received from the plaintiff that for which he contracted, and obtained that which, by the terms of the contract, was evidently deemed by the contracting parties an object of value. In contemplation of law, there was, in our view, no want or failure of consideration for the written obligation of L."

to his housekeeper, to whom he was indebted for services, a promissory note for the sum of ten thousand dollars, the consideration expressed being for "services rendered," this note was held valid, although the amount greatly exceeded the value of the services.¹

§ 191. **Illustrations.**—Judicial sales will not be disturbed for mere inadequacy of price, unless so gross as to amount to a fraud. Thus, where property valued at twenty-five hundred dollars was sold at judicial sale for nineteen hundred dollars, the court declined to set aside the sale.² The release of a married woman's right of dower is a good consideration for a separate provision for her benefit, or of a promise to pay money to her separate use.³ An agreement to accept a transfer of railway shares, on which nothing has been paid, is not *nudum pactum*, but a contract which may be specifically enforced in equity.⁴ Where the holder of a promissory note agreed with the maker to extend the time of

¹ *Earl v. Peck*, 64 N. Y. 596, where the court said: "If the intestate chose to pay for the services rendered a much larger sum than they were worth, he had a right to do so. The note was not a gratuity or gift. There is no standard whereby courts can limit the measure of value in such a case, and an obligation is not wanting even partially in consideration, because the value is less than the obligation. A note for a thousand dollars given for a horse confessedly worth but one hundred can not be successfully defended in whole or in part, on the ground of a want or failure in consideration." See, also, *Johnson v. Titus*, 2 Hill, 606; *Oakley v. Boorman*, 21 Wend. 588; *Sawyer v. McLouth*, 46 Barb. 350; *Scott v. Frink*, 54 N. Y. 635; *Lobdell v. Lobdell*, 36 N. Y. 327; *Worth v. Case*, 42 N. Y. 362.

² *Duncan v. Sanders*, 50 Ill. 475. See, also, *Comstock v. Purple*, 49 Ill. 158.

³ *Sykes v. Chadwick*, 18 Wall. 141.

⁴ *Cheale v. Kenward*, 3 De G. & J.,

27, where the court said: "But the defendant insists that this particular agreement can not be enforced for want of consideration and mutuality. Now what are the circumstances of the case? The plaintiff was the owner of ten specific shares, which was so much property in his hands, subject to certain liabilities. Whether this would be valuable or valueless at the time of the agreement no one could tell. The value was merely speculative, and persons' ideas differ very much about speculations. But the plaintiff was willing to divest himself of the shares, and to relieve himself from his liabilities; and the defendant was willing to take the chances of the speculation, and to undertake those liabilities. * * * The defendant desired to have the shares; he was willing to pay the amount of the liabilities, from which he agreed to exonerate the plaintiff; and that appears to me a sufficient consideration."

payment, provided the maker would get another to sign the note, it was held that the procurement of such other's signature was a sufficient consideration for the extension, although the new signer had no property subject to execution.¹ A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract.²

§ 192. Further illustrations.—So the delivery up of a will is a sufficient consideration, although the will is invalid.³ A note given by the maker to a child, in consideration that the parents should name it after him, is valid.⁴ A valid patent, or any interest in or license under it, without regard to its pecuniary value or the degree of its utility, is a good consideration for a promissory note, or other contract.⁵ But a void

¹ *Williams v. Jensen*, 75 Mo. 681. "It may have been an inconvenience for S. to secure the signature of his wife."

² *Lawrence v. McCalmont*, 2 Howard, 426.

³ *Smith v. Smith*, 13 C. B. (N. S.) 418.

⁴ *Diffenderfer v. Scott* (1893), 5 Ind. App. 243; 32 N. E. Rep. 87; 48 Alb. Law Journal, 257. See, also, *Wolford v. Powers*, 85 Ind. 294; 44 Am. Rep. 16; *Glasgow v. Hobbs*, 32 Ind. 440; *Dunton v. Dunton*, 18 Victorian L. Rep. 114; *White v. Bluett*, 23 L. J. Ex. 36.

⁵ *Nash v. Lull*, 102 Mass. 60, where the court said: "Letters patent of the United States can be lawfully granted only for new and useful inventions; and are but *prima facie* evidence of the novelty and utility of the invention described. All that is required to make an invention useful, under the patent laws, is that it should be capable of being applied to some practical and beneficial purpose, and not be frivolous, or injurious to the well-being or morals of society. If it is useful in this sense,

it is patentable, and the degree of its utility or practical value does not affect the validity of the patent; if it is not useful, a patent for it is void. In a suit brought on a promissory note, the only consideration for which is the assignment of an interest in or right under a patent, the question of consideration depends upon the validity of the patent; if the patent is void, the note is of course without consideration; but if it is valid, the court will not inquire into the adequacy of the consideration. The issue in such a case is therefore the same as in a suit in the courts of the United States for the infringement of a patent, the validity of which is denied by the defendant." See, also, *Lowell v. Lewis*, 1 Mason, 182; *Bedford v. Hunt*, 1 Mason, 302; *Kneass v. Schuylkill Bank*, 4 Wash. C. C. 9; *Langdon v. De Groot*, 1 Paine, 203; *Roberts v. Ward*, 4 McLean, 565; *Bliss v. Negus*, 8 Mass. 46; *Dickinson v. Hall*, 14 Pick. 217; *Bierce v. Stocking*, 11 Gray, 174; *Lester v. Palmer*, 4 Allen, 145; *Dunbar v. Marden*, 13 N. H. 311; *Cross v. Huntly*, 13 Wend. 385; *Geiger v. Cook*, 3 W. & S. 266; *McClure v.*

patent is no consideration.¹ And while a direct suit for the infringement of a patent must be brought in the courts of the United States, because the acts of congress, which create the right, provide that all actions and cases, in law or equity, arising under those laws, shall be originally cognizable in those courts,² yet this does not deprive the state courts of the power or the duty, when the question arises collaterally, of deciding whether the patent which is relied on as a consideration for a promise is of any validity.³

§ 193. Inadequacy in equity.—With respect to the adequacy of the consideration in equity the rule is, that in ordinary cases mere inadequacy of consideration is not a ground even for refusing a decree for specific performance of an unexecuted contract, and is not a ground for rescinding an executed contract. The only exception is where the inadequacy is so gross as to shock the moral sense, and tends to prove fraud or imposition on the part of the purchaser; in such a case, it is the fraud, and not the inadequacy of the consideration, which invalidates the contract.⁴ Thus specific performance was de-

Jeffrey, 8 Ind. 79; *Myers v. Turner*, 17 Ill. 179; *Jolliffe v. Collins*, 21 Mo. 338; *Clough v. Patrick*, 37 Vt. 421; *Elmer v. Pennel*, 40 Maine, 430; *Rich v. Hotchkiss*, 16 Conn. 409; *Sherman v. Champlain Transportation Co.*, 31 Vt. 162; *Slemmer's Appeal*, 58 Pa. St. 155.

¹ *Geiger v. Cook*, 3 Watts & Serg. 266; *Nash v. Lull*, 102 Mass. 60, 62, 63; *Hunter v. McLaughlin*, 43 Ind. 38, 49; *Kernodle v. Hunt*, 4 Blackf. (Ind.) 57; *Hardesty v. Smith*, 3 Ind. 39; *Gatling v. Newell*, 9 Ind. 572; *Johnson v. McCabe*, 37 Ind. 535.

² 5 U. S. Statutes at Large, 124; *Gibson v. Woodworth*, 8 Paige, 132; *Dudley v. Mayhew*, 2 Comst. 9; *Parkhurst v. Kinsman*, 2 Halst. Ch. 600; *Kemp-ton v. Bray*, 99 Mass. 350; *Howe v. Richards*, 102 Mass. 64.

³ *Nash v. Lull*, 102 Mass. 60, 64; *Rich v. Hotchkiss*, 16 Conn. 409;

Sherman v. Champlain Transportation Co., 31 Vt. 162; *Slemmer's Appeal*, 58 Pa. St. 155.

⁴ *Borell v. Dann*, 2 Hare, 440; *Blake v. Blake*, 7 Iowa, 46; *Rice v. Gibbs*, 33 Neb. 460; 50 N. W. Rep. 436; *Hunter v. Mills*, 29 S. C. 72; *Morrill v. Everson*, 77 Cal. 114; *Woodruff v. Woodruff*, 44 N. J. Eq. 349; *Winter v. Goebner*, 2 Colo. App. 259; 30 Pac. Rep. 51; *Henrici v. Davidson*, 149 Pa. St. 323; 24 Atl. Rep. 334; *Hibbert v. MacKinnon*, 79 Wis. 673; *Stock v. Stoltz*, 34 Ill. App. 645; *Coles v. Trecothick*, 9 Ves. 234; *Mortlock v. Buller*, 10 Ves. 292; *Davies v. Cooper*, 5 M. & Cr. 270; *Falcke v. Gray*, 4 Drewry, 651; *Harrison v. Guest*, 6 D. M. & G. 424; *Yard v. Patton* 13 Pa. St. 278; *Candor's Appeal*, 27 Pa. St. 119; *Harris v. Harris*, 23 Gratt. 737; *Aller v. Aller*, 40 N. J. Law, 446; *Wing v. Chase*, 35 Maine, 260; *Kennedy v. Howell*, 20 Conn.

creed of a contract where it was admitted that the price was inadequate.¹ "The adequacy of the consideration is regarded in equity upon the same general principles as at law; mere inadequacy is not a ground upon which courts of equity will set aside a contract or even refuse a decree for specific performance, or an injunction to restrain a breach."²

§ 194. The same subject continued.—In modern times it has been considered not only that those who were dealing for expectations, but those who were dealing for vested remainders also, were so exposed to imposition and hard terms, and so much in the power of those with whom they contracted, that it was a fit rule of policy to impose upon all who deal with expectant heirs and reversioners the onus of proving that they had paid a fair price, and otherwise to undo their bargains, and compel a reconveyance of the property purchased.³

349; *Harrell v. Watson*, 63 N. C. 454; *Walker v. Walker*, 13 Ired. (N. C.), 335; *Carter v. King*, 11 Rich. L. 125; *Sherk v. Endress*, 3 W. & S. (Pa.) 255.

¹ *Rice v. Gibbs*, 33 Neb. 460; *Borell v. Dann*, 2 Hare, 440; *Hunter v. Mills*, 29 S. C. 72; but by a code provision specific performance will not be decreed in California without adequate consideration; *Morrill v. Everson*, 77 Cal. 114; *Woodruff v. Woodruff*, 44 N. J. Eq. 349. See, also, *Stock v. Stoltz*, 34 Ill. App. 645.

² *Leake on Contracts*, 614.

³ 1 Story on Equity Jurisprudence (13th ed.), §§ 337, 338; *Beach on Modern Equity Jurisprudence*, §§ 145, 146. In *Chambers v. Chambers*, 139 Ind. 111; 38 N. E. Rep. 334, the court said: "Counsel argue that no inadequacy of consideration is shown for the quitclaim deed given by appellee to appellant. The consideration was \$562. It was proved on the trial, and found by the court, that the land at the time was worth \$2,835. Counsel think that the incumbrance of the life estate should be taken into account in estimating the value. This the law does

not permit in case of heirs, reversioners, and remainder-men, making sale of their expectancy. The law looks upon such sales as gambling upon the lives of the ancestors or life-tenants, and so against public policy, and will only sanction the sale, as we have seen, when the full market value is paid. *McClure v. Raben*, 125 Ind. 139; 25 N. E. Rep. 179." In *Hulse v. Bonsack Machine Co.* (1895), 65 Fed. Rep. 864, *Simonton, J.*, said: "It can not be said that this agreement, or any part of it, is without consideration. In the absence of fraud, mistake, illegality, or oppression, and where no relations of trust and confidence exist between the parties, courts can not inquire into the inadequacy of the consideration of a contract, or set up their own opinions respecting that which parties in good faith on both sides have agreed upon." In *Registering Co. v. Sampson*, L. R. 19 Eq. 465, the court said: "If there is one thing more than another that public policy requires, it is that men of full age and competent understanding shall have the utmost

§ 195. **Consideration moving from plaintiff.**—A promise made to another for the benefit of a third person can be enforced by such third person, although the consideration did not move directly from him.¹ Where a wife separated from her husband, and her brother, in consideration of a certain sum paid by the husband to him, then executed a mortgage to the husband conditioned to maintain and support her without further expense to him, it was held that she was entitled to the benefit of the mortgage, although not a nominal party to it, and could sue the mortgagor thereon.² A stock of goods was sold and in payment the buyer agreed to pay the notes due a third person from the seller. Such third person was allowed to recover on the agreement.³ So, also, in a famous case in New York, it was held that where one party advanced a sum of money to another, he agreeing to pay it to a creditor of the first party the next day, such creditor could recover on the promise.⁴

liberty of contracting, and that contracts, when entered into fully and voluntarily, shall be held good, and shall be enforced in a court of justice." Some consideration is requisite to support a contract, but the sufficiency of the consideration can not be inquired into. 1 Sedgwick on Damages, 455."

¹ *Lorillard v. Clyde*, 122 N. Y. 498; 4 N. Y. Supl. 441; *Kaufman v. United States, etc., Bank*, 31 Neb. 661; *Barratt v. Henrietta, etc., Bank*, 78 Texas, 222; *Coleman v. Whitney*, 62 Vt. 123; 20 Atl. Rep. 322; *Vanceleave v. Clark*, 118 Ind. 61; *Shamp v. Meyer*, 20 Neb. 223; *Miliani v. Tognini*, 19 Nev. 135; 7 Pac. Rep. 279; *Dodge v. Moss*, 82 Ky. 441; *Rogers v. Gosnell*, 58 Mo. 589; *Lawrence v. Fox*, 20 N. Y. 268; *Farley v. Cleveland*, 4 Cow. 432; *King v. Whitely*, 10 Paige, 465; *Halsey v. Reed*, 9 Paige, 446; *Schmerhorn v. Vanderheyden*, 1 Johns. 139; *Bassett v. Hughes*, 43 Wis. 319; *Austin v. Seligman*, 18 Fed. Rep. 519.

² *Coleman v. Whitney*, 62 Vt. 123. "The mortgage taken by him [the

husband] secures a provision directly beneficial to the oratrix. She can enforce that provision, although not a party to the instrument."

³ *Kaufman v. United States, etc., Bank*, 31 Neb. 661.

⁴ *Lawrence v. Fox*, 20 N. Y. 268. This is the leading case in the United States on the subject. The facts as given in the report are: "On the trial before Mr. Justice Masten, it appeared by the evidence of a bystander that one Holly, in November, 1857, at the request of the defendant, loaned and advanced to him \$300, stating at the time that he owed that sum to the plaintiff for money borrowed of him, and had agreed to pay it to him the then next day." From these facts all the transaction amounted to was that one Holly, who owed a sum of money to Lawrence, gave it to Fox, who at the time promised to pay it over to Lawrence. Also, see, the opinion of Gray, J. Irrespective of any rules of procedure, such a transaction constitutes a person receiving the money a

If a person covenant in a bond to pay another's debt, the creditor may sue on such bond.¹

§ 196. Further illustrations.—Where an instrument is made payable to certain persons, but in fact for the benefit of and to secure a number of subscribers to a certain fund, the unpaid subscribers, being the real parties in interest, may bring suit in their own name against the person who executed the instrument and received the money, without joining the trustees to whom the instrument is, by its terms, made payable.² A mortgagee may maintain a personal action against a grantee of the mortgaged premises who has assumed by a recital in the deed to pay the incumbrance.³

trustee for the benefit of the third person, who of course in equity could sue. *Cf. Barker v. Buklin*, 2 Denio, 45; *Delaware, etc., Canal Co. v. The Westchester Bank*, 4 Denio, 97; *Arnold v. Lyman*, 17 Mass. 400; *Hall v. Marston*, 17 Mass. 575; *Brewer v. Dyer*, 7 Cush. 337; *Mellen v. Whipple*, 1 Gray, 317; *Felton v. Dickenson*, 10 Mass. 287; *Berly v. Taylor*, 5 Hill, 577; *Gold v. Phillips*, 10 Johns. 412; *Ellwood v. Monk*, 5 Wend. 235; *Crow v. Rogers*, 1 Strange, 592; *Price v. Easton*, 4 B. & Ad. 433; *Lilly v. Hays*, 5 A. & E. 548.

¹ *Bassett v. Hughes*, 43 Wis. 319.

² *Rice v. Savery*, 22 Iowa, 470. See, also, *Conyngham v. Smith*, 16 Iowa, 471; *Cottle v. Cole*, 20 Iowa, 481; *Taylor v. Adair*, 22 Iowa, 279.

³ *Burr v. Beers*, 24 N. Y. 178; *Thorpe v. Keokuk Coal Co.*, 48 N. Y. 253. How far the rule that one not a party to a contract may sue upon it extends, is doubtful. In *Hendrick v. Lindsay*, 93 U. S. 143, it was said: "It is now the prevailing rule in this country, that a party may maintain assumpsit on a promise not under seal made to another for his benefit." This confined the doctrine to simple contracts, but in a number of the states such action has been maintained on

sealed instruments. *Coster v. Mayor*, 43 N. Y. 399; *McDowell v. Lev*, 35 Wis. 171; *Bassett v. Hughes*, 43 Wis. 319; *Burr v. Beers*, 24 N. Y. 178; *Kaufman v. United States, etc., Bank*, 31 Neb. 661; *Coleman v. Whitney*, 62 Vt. 123; *Hall v. Plaine*, 14 Ohio St. 417. In *Coster v. Mayor*, *supra*, the court said: "It is settled in this state, that an agreement made on a valid consideration, by one with another, to pay money to a third, can be enforced by the third in his own name. And, although a distinction has sometimes been made in favor of a simple contract (*Delaware, etc., Canal Co. v. Westchester, etc., Bank*, 4 Den. 97) it is now held that where the agreement is in writing and under seal the same rule prevails. (*Van Schaick v. Third Ave. R. Co.*, 38 N. Y. 346; *Ricard v. Sanderson*, 41 N. Y. 179). Nor need the third person be privy to the consideration. Nor need he be named especially as the person to whom the money is to be paid." This was a case where the city of Albany gave an indemnity bond to the state of New York, agreeing to pay all damages caused to property by certain improvements. It was held that a person whose property was injured could sue on the bond. See also *Wright*

§ 197. The English rule.—The rule in England is well settled that the consideration must move from the plaintiff, and that a stranger to the contract can acquire no rights under it.¹

v. Terry, 23 Fla. 160. "The question whether this principle extends beyond mere simple contracts, or is applicable to contracts under seal, is involved in more doubt, and is one upon which courts seem not to be agreed. Whilst it has sometimes been decided that the principle does not so extend it may also be true that the opposite has never been directly adjudicated, though opinions to that effect have been expressed. Such was the opinion expressed by Mr. Justice Paine in *Kimball v. Noyes*, 17 Wis. 695, which seems to have been sustained by the case of *Keeler v. Niagara, etc., Ins. Co.*, 16 Wis. 523. The reasoning of Mr. Justice Payne is very clear and satisfactory, and we feel little hesitation in adopting his views as correct in the law." *McDowell v. Lev*, 35 Wis. 171, 175; a bond given to pay the covenantor's debts. The creditor sued and recovered. And see, *Cotterill v. Stevens*, 10 Wis. 422; *Cook v. Barrett*, 15 Wis. 596; *McClellan v. Sanford*, 26 Wis. 595; *Putney v. Farnham*, 27 Wis. 187; "It is now the settled doctrine in so many of the states, that it may be called the American doctrine — although the contrary rule has been established in England and some states — and notably in Massachusetts, where it has been very recently re-affirmed with emphasis — that, where an express promise was made by A. to B., upon a consideration moving from B. whereby the promisor engages to do something for the benefit of C., as, for example, to pay him a sum of money, although C. is both a stranger to the consideration and not an immediate party to the contract, yet he may maintain an action upon the promise

in his own name against the promisor, without in any manner joining as a party the one to whom the promise was directly made. This rule was originally adopted prior to the reformed procedure, and was based partly upon considerations of convenience, and partly upon a liberal construction of the nature of the contract. The provision of the codes [the real party in interest to be the plaintiff] under review places the matter beyond all doubt; for the person for whose benefit the promise is thus made is certainly the real party in interest." *Pomeroy on Remedies*, § 139. See, also, *Ward v. Cowdrey*, 5 N. Y. Supl. 282; *Pope v. Porter*, 33 Fed. Rep. 7; *Berry v. Brown*, 107 N. Y. 659; 14 N. E. Rep. 289; *Adams v. Kuehn*, 119 Pa. St. 76; 13 Atl. Rep. 184; *Peacock v. Williams*, 7 R. I. 295; 4 S. E. Rep. 550; *Wilbur v. Wilbur*, 21 Atl. Rep. 497; *Baum v. Parkhurst*, 26 Ill. App. 128; *Boals v. Nixon*, 26 Ill. App. 517; *Todd v. Weber*, 95 N. Y. 181, a valuable case which discusses at length the doctrine and re-affirms that "a party for whose benefit a promise was made may maintain an action thereon, although the consideration was one between the promisor and a third person." *Glen v. Hope Ins. Co.*, 56 N. Y. 379, allowing insurance money to be collected by the insured from a company who re-insured the first company. *Clafin v. Ostrom*, 54 N. Y. 581; *Hutchings v. Miner*, 46 N. Y. 456; *Barker v. Bradley*, 42 N. Y. 316; *Dingeldein v. Third Ave. R. Co.*, 37 N. Y. 575; *Hartley v. Harrison*, 24 N. Y. 170; *Russell v. Pistor*, 7 N. Y. 171.

¹ *Tweddle v. Atkinson*, 1 B. & S. 393; *Crow v. Rogers*, 1 Strange, 592; *Colyear*

And such is the rule in Massachusetts,¹ Michigan,² Pennsylvania,³ Connecticut,⁴ Virginia and Rhode Island.⁵ But even where this rule obtains there are exceptions to it, and particular attention is called to the statement of these exceptions in the sections next following.

§ 198. Exceptions to the English rule.—The first and principal exception consists of those cases in which the defendant

v. Mulgrave, 2 Keen, 81; *Ex parte Piercy*, L. R. 9 Ch. 33. The rule that a stranger can not sue or be sued on a contract is applied in all its strictness in case of a deed; the person to sue for the breach of a contract by deed is the person with whom the contract is expressed by the deed to be made. A covenant is not a covenant with any person except the covenantee; but a simple contract, though made on the face of it with one person, and therefore giving him a right to sue upon it, may be often treated as a contract made with some other person whose name does not appear on the face of the contract, but who, as being the person really contracted with, has a right to sue upon the contract. Dicey on Parties, 102. And as to who is the covenantee in a deed, there is a distinction between deeds poll and indentures. No one is a party to an indenture except he is expressly mentioned as a party, while in a deed poll the covenantee is merely the person in respect of whom the obligation is undertaken, that is the beneficiary, who, of course, could always sue. The American rule, allowing the third person to sue on a contract made for his benefit, has been extended to indenture deeds by some states.

¹*Exchange Bank of St. Louis v. Rice*, 107 Mass. 37, where the court said: "The general rule of law is, that a person who is not a party to a simple contract, and from whom no consideration moves, can not sue on the contract, and consequently that a

promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter. And the recent decisions in this commonwealth and in England have tended to uphold the rule and to narrow the exceptions to it." *Cottage Street Church v. Kendall*, 121 Mass. 528; *Moore v. Moore*, 127 Mass. 22. See, also, *Colburn v. Phillip*, 13 Gray, 64; *Flint v. Pierce*, 99 Mass. 68; *Mellen v. Whipple*, 1 Gray, 317; *Millard v. Baldwin*, 3 Gray, 484; *Field v. Crawford*, 6 Gray, 116; *Dow v. Clark*, 7 Gray, 198; *Stoddard v. Ham*, 129 Mass. 383.

²*Halsted v. Francis*, 31 Mich. 113; *Toohey v. Comstock*, 45 Mich. 603.

³*Adams v. Kuehn*, 119 Pa. St. 76; 13 Atl. Rep. 184; *Blymire v. Boistle*, 6 Watts, 182; *Torrens v. Campbell*, 74 Pa. St. 470; *Kountz v. Houlthouse*, 85 Pa. St. 235; *Guthrie v. Kerr*, 85 Pa. St. 303.

⁴*Treat v. Stanton*, 14 Conn. 445. The head note is: "The rule that where one person makes a promise to another for the benefit of a third the latter is the proper party to maintain an action on it, is confined to those cases where the third person for whose benefit the promise was made had the sole and exclusive beneficial interest in the subject of the promise, and was therefore deemed to be invested with the legal interest therein."

⁵*Ross v. Milne*, 12 Leigh, 204; *Wilbur v. Wilbur* (1891), 17 R. I. 295.

has in his hands money which in equity and good conscience belongs to the plaintiff, as where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, either expressly, or by implication from his acceptance of the money or property without objection to the terms on which it is delivered to him, to pay such creditors.¹ Cases where promises have been made to a father or uncle for the benefit of a child or nephew form a second class, in which the person for whose benefit the promise was made has maintained an action for the breach of it. The nearness of the relation between the promisee and him for whose benefit the promise was made is assigned as a reason for this.² And a third exception exists in Massachusetts where a person promises to take an assignment of a lease and pay the rent. Here the landlord may sue on this promise, after possession is transferred, for rent subsequently accruing.³

§ 199. Restrictions upon the American rule allowing third party to sue.—While there is a tendency in those states which have adopted the English rule to introduce exceptions thereto, those states which allow the real party in interest to sue have begun to limit this doctrine. The courts of New York have repeatedly held that the principle declared in *Lawrence v. Fox*⁴ should be limited to cases having the same essential facts.⁵

¹ *Exchange Bank v. Rice*, 107 Mass. 37; *Carnegie v. Morrison*, 2 Metc. (Mass.) 381; *Brewer v. Dyer*, 7 Cush. 337; *Lilly v. Hays*, 5 A. & E. 548; *Walker v. Rostrom*, 9 M. & W. 411.

² *Felton v. Dickinson*, 10 Mass. 287. *Contra Tweddle v. Atkinson*, 1 B. & S. 393; *Wilbur v. Wilbur* (1891), 17 R. I. 295, where the court said: "The plaintiff contends that there are three grounds on which this action can be maintained. The first is that the contract to pay the note was made by said F. with his father for his benefit, and that in such case the action can be maintained in consideration of the relationship. Some old cases hold so but the weight of modern authority is against them,

near relationship being no longer regarded as a sufficient consideration for a contract," citing *Tweddle v. Atkinson*, 1 B. & S. 393; *Hall v. Huntoon*, 17 Vt. 244; *Ross v. Milne*, 12 Leigh (Va.), 204.

³ *Brewer v. Dyer*, 7 Cush. 337.

⁴ 20 N. Y. 268.

⁵ *Lorillard v. Clyde*, 122 N. Y. 498; *Wheat v. Rice*, 97 N. Y. 296, where *Lawrence v. Fox* is distinguished and limited. This latter case decided that a creditor of a firm cannot maintain an action upon an agreement made with the firm, by one not a member, to pay a portion of its indebtedness; as no one creditor can show from the contract that it was intended for his benefit, or covers any part of his debt.

§ 200. **Limitations.**—And in those states which have adopted the reformed procedure, the fundamental rule of

Beveridge v. N. Y. R. Co., 112 N. Y. 1, where the court said: "Within the principles of adjudged cases in this court, where the plaintiff seeks to base his right to maintain his action against a third party upon a contract made between that party and another, it must be one made or intended for his benefit. Such a beneficial intent must be clearly found in the agreement.

* * * * * In all the cases I have found where the action was sustained, the facts showed that the promise clearly was for the third person's benefit, and made with that distinct intention." *Carter v. Holahan*, 92 N. Y. 498; *Seward v. Huntington*, 94 N. Y. 104. Here, three persons, who had jointly indorsed the notes of a corporation, entered into a written agreement with each other to the effect that if the corporation should fail to pay said notes, they would each pay a third. It was also agreed that each of the parties should execute, to a trustee named, a mortgage as security for the performance of his agreement; and it was provided that in case of failure of one of the parties to pay his share of the unpaid paper and which either of the parties should pay, then the trustee was empowered to foreclose the mortgage at the request of the parties so having paid. It was held that no creditor of the corporation could sue on this agreement, as the trust was not created for his benefit, but solely for that of the parties. *Dunning v. Leavitt*, 85 N. Y. 30. In this case mortgaged property was sold; the grantee by a recital in the deed agreed to pay the mortgage. The grantee was evicted by title paramount. It was held the mortgagee could not enforce the covenant in the grantee's deed, as the consideration

failed, and the court said: "It seems that a person for whose benefit a promise is made can not, within the case of *Lawrence v. Fox*, maintain an action to enforce the promise when the promise is void as between the promisor and promisee, because of want or failure of consideration or fraud. The action upon such a promise is subject to the equities between the original parties." *Bean v. Edge*, 84 N. Y. 510, where the transaction was construed to be a conditional sale and not a contract for the benefit of a third person. *Pardee v. Treat*, 82 N. Y. 385, a well considered case. This was an action brought to enforce a covenant in a deed by which the grantee assumed and agreed to pay a judgment lien on the premises conveyed. The court said: "We think the true result of the decisions upon the effect of an assumption clause in a deed is, that it can only be enforced by a lienor, where in equity the debt of the grantor secured by the lien becomes, by the agreement between him and his grantee, who assumes the payment, the debt of the latter. On the other hand, if the assumption is in aid of the grantor, upon the security of the land, and not as between them, a substitution of the liability of the grantee for that of the grantor, or, in other words, if in equity as at law the grantor remains the principal debtor, then the assumption clause is a contract between the parties to the deed alone, and the liability of the grantee, for any breach of his obligation, is to the grantor only. Where the grantee is in equity bound to pay the debt as his own, then the covenant, according to the case of *Burr v. Beers*, may be treated as a promise made for the benefit of the lienor,

which concerning parties is that the real party in interest shall sue, there are also certain limitations upon the right

and may be enforced in a legal action, although, even in that case, it would seem that the primary object of the covenant is to protect the grantor against his personal liability for the debt secured upon the land. * * *

The recent cases show that the court is disinclined to extend the rule in *Lawrence v. Fox* (20 N. Y. 268). The *Lake Ontario R. Co. v. Curtiss*, 80 N. Y. 219, a subscription case. Here certain persons signed a paper pledging themselves to subscribe for and take stock in and for the construction of a railroad, to a certain amount set opposite their names, on condition that the road be located through a certain town. The railroad company brought suit to enforce this agreement. Danforth, J., after stating that the alleged subscription was in fact none at all, but only a promise to subscribe, said: "The general rule applicable to the parties before us, and the instruments signed by the defendant, is that when two persons, for a consideration sufficient as between themselves, covenant to do some act which if done would incidentally result in the benefit of a mere stranger, that stranger has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other," 222. *Clark v. Dickinson*, 74 N. Y. 47, a bought and sold note case. A bought and sold note contract was entered into between two parties, and then one of the parties assigned his bought and sold note to a third. The court said: "Although the defendant was entitled to demand and claim the oil which was agreed to be delivered, yet there was no such privity between the plaintiffs and the defendant which rendered the latter directly liable to the plaintiffs for a breach of the con-

tract." *Miller v. Winchell*, 70 N. Y. 437. The owner of land mortgaged it, the mortgagee agreeing verbally to pay two prior mortgages. Subsequently the mortgagor conveyed the property to a third person. It was held such third person could not maintain an action to compel the mortgagee to perform his promise. *Vrooman v. Turner*, 69 N. Y. 280, a leading case. The following is the syllabus: "A grantee of mortgaged premises whose conveyance recites that the land is conveyed subject to the mortgage and that the grantee assumes and agrees to pay the same as part of the consideration, is not liable for a deficiency arising upon a foreclosure and sale, in case the grantor was not personally liable, legally or equitably, for the payment of the mortgage." In the opinion the court said: "The courts are not inclined to extend the doctrine of *Lawrence v. Fox* to cases not clearly within the principle of that decision. Judges have differed as to the principle upon which *Lawrence v. Fox* and kindred cases rest, but in every case in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise. Whether the decisions rest upon the doctrine of agency, the promisee being regarded as the agent for the third party, who by bringing his action adopts his acts, or upon the doctrine of a trust, the promisor being regarded as having received money or other thing for the third party, is not material. In either case there must be a legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit." *Simson v. Brown*, 68 N. Y. 355. The syllabus is: "A promise for a valid

to sue. The contract must be intended to benefit the third party, and the fact that he will be incidentally benefited does not entitle him to sue.¹ So in a case where a creditor agreed

consideration by A. to B. gives no right of action to C., he being neither privy to the contract nor to the consideration, unless it was made for his benefit and he was the party intended to be benefited; the fact that a benefit would inure to him from the performance is not sufficient." *Garnsey v. Rogers*, 47 N. Y. 233. This is the leading case limiting the doctrine of *Lawrence v. Fox*, 20 N. Y. 268. The following were the facts: The owner of property had mortgaged it and then subsequently by a deed (which was in fact a mortgage) conveyed the property, the grantee by the terms of the deed assuming the payment of the mortgages. There was a right reserved by parol to the grantor to have a reconveyance upon payment of a certain sum. This sum having been paid by note the grantee reconveyed to the grantor the premises, the deed stipulating that the grantee (the original owner, the mortgagor) should re-assume the payment of the mortgages. The mortgagee brought suit against the first grantee on his covenant to pay, and it was held he could not recover. In the opinion the court said: "I do not understand that the case of *Lawrence v. Fox* has gone so far as to hold that every promise made by one person to another, from the performance of which a third would derive a benefit, gives a right of action to such third party, he being privy neither to the contract or the consideration. To entitle him to an action, the contract must have been made for his benefit. He must be the party intended to be benefited; and all that the case of *Lawrence v. Fox* decides is, that where one person loans money to another, upon his promise to pay it to a third party to whom the party so

lending the money is indebted, the contract thus made by the lender is made for the benefit of his creditor, and the latter can maintain an action upon it without proving an express promise to himself from the party receiving the money. * * * If such a contract [meaning the stipulation in the mortgage] could be enforced by the creditor who would be incidentally benefited by its performance, every agreement, by which one party should agree with another, for a consideration moving from him, to become security for him to his creditors, or to advance money to pay his debts, could be enforced by the parties whose claims were thus to be secured or paid. I do not understand any case to have gone this length. * * * It must further be considered that where such an assumption is made on an absolute conveyance of land, it is unconditional and irrevocable. The grantor can not retract his conveyance, or the grantee his promise or undertaking; but when contained in a mortgage, the conveyance is defeasible. The grantor reserves the right to annul it by paying his debt, and when he does so, he discharges the agreement to pay the prior mortgage." And see *Barlow v. Myers*, 64 N. Y. 41; *Kelly v. Roberts*, 40 N. Y. 432; *Berry v. Brown*, 1 Silvernail (N. Y. App.), 542; *Arnold v. Nichols*, 64 N. Y. 117.

¹ *Trimble v. Strother*, 25 Ohio St. 378, where the court said: "We do not question former rulings of this court, that a party may maintain an action on a promise made for his benefit, although the consideration moved from another, to whom the promise was made. But this rule must be understood and applied with its proper

that if his debtor would apply for and procure insurance upon his life, in a designated insurance association, for a stipulated amount, he would from time to time pay the premium assessments necessary to keep the insurance alive, and, at the debtor's death, would apply the proceeds to the reimbursement of his expenditures for premiums with interest, and then to the satisfaction of his debt with interest, and pay over to the debtor's wife whatever balance should remain of such proceeds, it was held that there was sufficient consideration to support the creditor's promise, and that the proceeds of the insurance in the creditor's hands were held upon a trust, the performance of which the debtor's wife might enforce by suit in equity.¹

qualifications." *Bagaley v. Waters*, 7 Ohio St. 359; *Thompson v. Thompson*, 4 Ohio St. 333; *Miller v. Florer*, 15 Ohio St. 148; *Canney v. South Pac.*, etc., R. Co., 63 Cal. 501; *Vancleave v. Clark*, 118 Ind. 61; *Baum v. Parkhurst*, 26 Ill. App. 128; *Boals v. Nixon*, 26 Ill. App. 517; *Wright v. Terry*, 23 Fla. 160; *Pope v. Porter*, 33 Fed. Rep. 7; *Kaufman v. Bank*, 31 Neb. 661; *Barrett v. Henrietta*, etc., Bank, 78 Texas, 222; *Coleman v. Whitney*, 62 Vt. 123; *Gilbert v. Sanderson*, 56 Iowa, 349; *Rogers v. Gosnell*, 58 Mo. 589. This should not be confounded with the rule allowing the assignee of a chose in action to sue in his own name. Such assignee, of course, may always sue, must be the only plaintiff in fact, at least in those states making it mandatory for the real party in interest to sue.

¹ *Sell v. Steller* (N. J. Eq. 1895), 32 Atl. Rep. 211, where the court said: "The proceeds of the insurance have come to the defendant, and after paying the agreed payments to himself he has a balance in his hands, which the debtor's widow demands from him. His promise to pay her that balance was not a mere voluntary undertaking.

It was conditioned upon the debtor doing that which he hoped would secure his debt,—that is, apply for and obtain insurance. In performing that condition the debtor gave valuable consideration for the promise, because he secured that which benefited the defendant in providing a possible means for the recovery of his debt, and, at the same time, at the defendant's request, he put himself to the inconvenience, trouble, and expenditure of time, in applying for and securing the insurance. Mr. Justice Depue, in *Conover v. Stillwell*, 34 N. J. Law, 54, said that 'a consideration emanating from some injury or inconvenience to the one party, or from some benefit to the other party, is a valuable consideration.' And in *Traphagen's Ex'r v. Voorhees*, 44 N. J. Eq. 21; 12 Atl. Rep. 895, Vice-Chancellor Van Fleet said: 'A very slight advantage to one party, or a trifling inconvenience to the other, is a sufficient consideration to support a contract.' Prior to the latter decision, the same distinguished judge had, in *Day v. Gardner*, 42 N. J. Eq. 199; 7 Atl. Rep. 365, defined consideration in the same way. The courts will not

§ 201. **Illegality—Rescission.**—In order to enable a third person to sue on a contract made for his benefit, it must be valid as between the original parties. No action can be maintained where the promise is void as between the promisor and promisee, for fraud, or want of consideration, or failure of consideration.¹ And the parties to a contract made for the

inquire into the adequacy of consideration in absence of the suggestion of fraud or deceit. I think that, in this instance, there was sufficient consideration, both in the benefit the defendant received and in the inconvenience the complainant's husband suffered, to support the promise in question. When the proceeds of the insurance reached the defendant's hands, they became a trust fund which he was to apply to the satisfaction of his demands already specified, and to the payment of the surplus thereof to the complainant. The enforcement of this trust by a beneficiary under it is sought in this suit. That she may maintain this action is consequent upon her beneficial interest, and is a well-recognized right. In *Cubberly v. Cubberly*, 33 N. J. Eq. 82, affirmed on appeal, *Cubberly v. Cubberly*, 33 N. J. Eq. 591, Chancellor Runyon said: 'If one person make a promise to another, on lawful consideration, for the benefit of a third person, such third person may maintain an action, even at law, upon it. *Joslin v. New Jersey Car Spring Co.*, 36 N. J. Law, 141.'"

¹ *Dunning v. Leavitt*, 85 N. Y. 30. The grantee of mortgaged property assumed to pay the mortgage, and after taking possession was evicted by title paramount. It was held the mortgagee could not recover the amount of his mortgage on the stipulation in the grantee's deed, because as between the original parties there was a failure of consideration. In the opinion the

court said: "I know of no authority to support the proposition that a person not a party to the promise, but for whose benefit the promise is made, can maintain an action to enforce the promise, where the promise is void as between the promisor and promisee, for fraud, or want of consideration, or failure of consideration. It would be strange, I think, if such an adjudication should be found. The party suing upon the promise, in cases like *Lawrence v. Fox*, is in truth asserting a derivative right. In *Vrooman v. Turner*, 69 N. Y. 280, it was held that an assumption clause in a deed did not give a right of action to the mortgagee, where the grantor was not himself liable to pay the mortgage debt, although in that case there was ample consideration for the promise of the defendant. There is no justice in holding that an action on such a promise is not subject to the equities between the original parties springing out of the transaction or contract between them. It may be true that the promise can not be released or discharged by the promisee, after the rights of the party, for whose benefit it is said to have been made, have attached. But it would be contrary to justice or good sense to hold that one who comes in by what Judge Allen, in *Vrooman v. Turner*, calls 'the privity of substitution,' should acquire a better right against the promisor than the promisee himself had." See, also, *Crowe v. Lewin*, 95 N. Y. 423.

benefit of a third person may rescind without the permission of such third party, and he then has no right of action.¹

§ 202. Rescission not to affect rights attached.—Where two parties contract for the benefit of a third, and where the law allows such third person to maintain a suit thereon, after knowledge and assent thereto by such third person the con-

¹*Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650. A leading case where the whole doctrine of the liability of the grantee of mortgaged property, who assumes by covenant in his deed to pay the mortgage, is discussed. *Garnsey v. Rogers*, 47 N. Y. 233. In this and the preceding case the grantee of mortgaged property, who assumed to pay the mortgage by a stipulation in his deed, re-conveyed to his grantor, and it was held the mortgagee could not enforce the stipulation because the parties had a right to rescind. *Brewer v. Maurer*, 38 Ohio St. 543. Here mortgaged property was conveyed subject to the mortgage, and the grantee conveyed subject to the mortgage, the property passing through mesne conveyances (in each conveyance the grantee by covenant assumed the payment of the mortgage) to the defendant. The defendant's grantor subsequent to the conveyance released him from his covenant to pay the mortgage. It was held this barred the mortgagee's suit on defendant's covenant to pay the mortgage. *Trimble v. Strother*, 25 Ohio St. 378, the rescission of an agreement to pay a firm's liabilities. *Held*, creditor barred. *Talburt v. Berkshire Life Ins. Co.*, 80 Ind. 434, the canceling a deed assuming payment of mortgage. *Durham v. Bischof*, 47 Ind. 211. Creditor can not sue on canceled agreement to pay firm's debts. *Miller v. Billingsly*, 41 Ind. 489; *Davis v. Calloway*, 30 Ind. 112; *Gilbert v. Sanderson*, 56 Iowa, 349. Compare *Corbett v. Water-*

man, 11 Iowa, 86; *Simson v. Brown*, 68 N. Y. 355; *Kelly v. Roberts*, 40 N. Y. 432; *Jones v. Higgins*, 80 Ky. 409. It will be observed and it is necessary to distinguish that authorities are not agreed as to the grounds upon which the grantee, who by a covenant in his deed assumes payment of a mortgage, is held liable. In some of the adjudicated cases (notably *Crowell v. Hospital*, 27 N. J. Eq. 650) it has been held the contract of indemnity, or to pay the mortgage, operates as a collateral security, obtained by the mortgagor, which by equitable subrogation inures to the benefit of the mortgagee. This being so, it has been held to follow that the mortgagee can only recover a personal judgment against the person who agreed to pay the debt, when the mortgagor holds an obligation that will support the judgment. See *Jones on Mortgages*, § 762; *Crowell v. Currier*, 27 N. J. Eq. 152. But in those states having the reformed procedure the cases generally place the liability of the grantee to the mortgagee on the broad principle that if one person make a promise to another for the benefit of a third person, the latter may maintain an action on such promise. *Garnsey v. Roberts*, 47 N. Y. 233; *Ross v. Kennison*, 38 Iowa, 396. In the former the grantee really incurs no personal liability to the mortgagee, but in the latter while he incurs a personal liability, it is liable to be nullified by the act of the grantor and grantee.

tract can not be rescinded to his prejudice.¹ The Supreme Court of the United States, speaking through Mr. Justice Davis, said: "The right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country."² The action was assumpsit to recover money paid by sureties on a bail bond, upon the following facts: The president of a corporation against which judgment had been rendered, wishing to appeal, requested another by letter to secure an appeal bond stating that he would indemnify him in case of

¹ *Bassett v. Hughes*, 43 Wis. 319, a bond executed to pay the covenantor's debts; after the creditor learned of its execution and assented thereto, *held*, too late for parties to rescind. *Kelly v. Roberts*, 40 N. Y. 432; *Brewer v. Maurer*, 38 Ohio St. 543. This was a case where the mortgagor released the grantee from his covenant to pay the mortgage, and the court said: "No such release, after the rights of the mortgagee had become fixed, would operate as a discharge. The contract for the benefit of the mortgagee was one which he could avail himself of or not, at his election, but until he had done some act which fixed his right it was competent for the parties thereto, in good faith, and for a valuable consideration, to rescind or cancel it." *Trimble v. Strother*, 25 Ohio St. 378, where the court said: "If he has not been induced to alter his position by relying, in good faith, on the promise made in his favor, the defendant is not estopped from setting up any defense." *Dodge v. Moss*, 82 Ky. 441. The following is the syllabus: "C. conveyed a tract of land to W., in consideration that he would pay the former's debts. *Held*, the vendor can not, after the creditors have accepted, release W., the vendee, from liability on the promise. * * * That the party, for whose benefit a promise is made to another

may maintain an action upon such promise against the party who has made it, has long since been settled." *Garnsey v. Rogers*, 47 N. Y. 233. In this celebrated case Judge Rapallo draws a distinction between a grantee of mortgaged premises assuming payment of a mortgage by a covenant in a deed, an absolute conveyance of the land, and the case of mortgaged property being mortgaged a second time, the second mortgagee, by a covenant in his mortgage, assuming payment of the prior mortgage. He holds that where an assumption is made on an absolute conveyance of land, it is unconditional and irrevocable. *Aliter*, where the assumption is in a mortgage. This distinction is severely criticized in *Crowell v. Hospital*, 27 N. J. Eq. 650, 657. The statement in the text, of course, only refers to those states allowing a third party to sue. Where he is not allowed to sue, of course, he acquires no rights under the contract to enforce. Where a person is not allowed to sue on a contract not made with him, still a party thereto might so act with reference to the contract as would give a third party an action on the ground of estoppel, or something else. But this would not be suing on the contract to which he was not a party.

² *Hendricks v. Lindsay*, 93 U. S. 143, 149.

loss, and it was held that an action could be brought by the bondsmen on the promise to the third party to indemnify. But in a later case in the same court this rule would seem to be greatly modified, if, in fact, not entirely overruled. In this case a corporation for a valuable consideration assumed to pay the debts of another corporation, to wit, its coupon bonds; it was held that the bond holders could not recover on this agreement, and from the language of the opinion it is probable that the court intended to establish the English rule, that no one but the parties to a contract can be bound by it or entitled under it.¹ The doctrine of the court of chancery from which the rule of the reformed procedure is taken is that, as a general rule, strangers to the contract, who are also strangers to the consideration, may, at their pleasure, abandon the contract and mutually release each other from performance; upon such rescission and abandonment, the contract is completely at an end, and thereafter can not be enforced.²

§ 203. Delivery essential to gift—Voluntary trust distinguished.—To constitute a valid gift *inter vivos*, the giver must part with all present and future dominion over the property

¹ *National Bank v. Grand Lodge*, 98 U. S. 123, where the court said: "The resolution of the Grand Lodge [to pay the bonds] was but a proposition made to the Masonic Hall Association, and when accepted the resolution and acceptance constituted at most only an executory contract *inter partes*. It was a contract made for the benefit of the association and of the Grand Lodge, made that the latter might acquire the ownership of stock of the former, and that the former might obtain relief from its liabilities. The holders of the bonds were not parties to it, and there was no privity between them and the lodge. * * * We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between the plaintiff and defendant is necessary to the maintenance

of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist." The court then goes on to point out that if such action is allowed the promisor is liable to two separate actions, one to the other party and one to the beneficiary; but as to this objection see the following cases which hold that the beneficiary's suit supersedes the other party's. *Rice v. Savery*, 22 Iowa, 470; *Cottle v. Cole*, 20 Iowa, 481; *Miller v. Florer*, 15 Ohio St. 148; *Hall v. Plaine*, 14 Ohio St. 417; *Lacey v. Cent. Nat. Bank*, 4 Neb. 179; *Sloman v. Great Western R. Co.*, 67 N. Y. 208.

² *Spence's Equity Jurisprudence*, 280; *Hill v. Gomme*, 1 Beav. 540; *Crowell v. Hospital*, 27 N. J. Eq. 654.

given. He can not give it, and at the same time retain the ownership of it. There must be a delivery to the donee or to some one for the donee; and the gift must be absolute and irrevocable, without any reference to its taking effect at some future period.¹ The intention to give is often established by most satisfactory evidence, although the gift fails. Instruments may be ever so formally executed by the donor, purporting to transfer title to the donee, or there may be the most explicit declaration of an intention to give or of an actual present gift, yet, unless there is delivery, the intention is defeated.² The only important difference between a gift and a voluntary trust is that in the one case the whole title, legal as well as equitable—the thing itself—passes to the donee, while in the other the actual, beneficial, or equitable title passes to the *cestui que trust*, while the legal title is transferred to a third person, or is retained by the person creating it, to hold for the purposes of the trust. But a gift of the equitable or beneficial title must be as complete and effectual in the case of a trust, as is the gift of the thing itself in a gift *inter vivos*.³ While

¹ *Dole v. Lincoln*, 31 Maine, 422; *Carleton v. Lovejoy*, 54 Maine, 445; *Robinson v. Ring*, 72 Maine, 140; *Northrop v. Hale*, 73 Maine, 66.

² *Beaver v. Beaver*, 117 N. Y. 421; 22 N. E. Rep. 940.

³ *Norway Sav. Bank v. Merriam*, 88 Maine (1895); 33 Atl. Rep. 840, per Wiswell, J.. "It is just as essential, to establish the trust sought to be set up here, to prove some act on the part of the donor that shall operate to pass the equitable title to the donee, as it is to prove delivery in a gift *inter vivos*." *Bath Sav. Institution v. Hathorn*, 88 Maine, —; 33 Atl. Rep. 836. The creation of a trust is but the gift of the equitable interest. But on account of the difference in the form and purposes of the two transactions, it necessarily follows that different acts are essential in the two cases. While delivery and a surrender of all present and future dominion over the property given is absolutely necessary

in a gift these would be inconsistent with the very purposes of a trust where a person creates himself as the trustee. Possession and control in such a case remain in him who has the legal title, subject to the direction of courts of equity. But while delivery and surrender of possession are not necessary in the creation of such a trust as is here sought to be maintained, there must be other acts which are so far equivalent as the nature of the transaction will permit. A perfect or completed trust is created where the donor makes an unequivocal declaration, either in writing or by parol, that he himself holds the property in trust for the purposes named. He need not in express terms declare himself trustee, but he must do something equivalent to it, and use expressions which have that meaning. To create a trust, the acts or words relied upon must be unequivocal, implying that the person

courts of equity will enforce a perfect and completed trust, although purely voluntary, equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. In order that such a trust may be valid and enforceable, it must always appear from the written or oral declaration, from the nature of the transaction, the relation of the parties, and the purposes of the gift, that the fiduciary relation is completely established. Nor will the court enforce as a trust a transaction which was intended as a gift, but is imperfect for that purpose, because thereby every imperfect instrument might be made effectual by being converted into a perfect trust. If such a trust is otherwise sufficiently created, its validity is not affected by the fact that the donor reserved the right to modify the purposes or to revoke the trust, nor that he reserved the income of the trust fund during life.¹

holds the property as trustee for another. There must be an executed gift of the equitable title without any reference to its taking effect at some future time. In *Barker v. Frye*, 75 Maine, 29, a deposit was made in a savings bank in the name of the donee subject to the order of the donor during his life-time. Subsequently, the donor notified the treasurer of the bank that she desired to make such a change as would give the donee the full and absolute control over the deposit from that time, and that her right to control the same should cease, and at her request the original entry, subject to the order of the donor, was erased. She immediately notified the donee by letter of what had been done, and that the bank-book would be delivered to him the first time that they met. The donee accepted the gift. The court held that the gift was complete. The important and controlling facts in these cases do not exist in the cases now under consideration. This court has held that where A. deposited money in a savings bank in the name of B. without a declaration of trust

at the time or subsequently and retained the deposit book until his death, it was not sufficient to constitute either a gift or a trust. *Robinson v. Ring*, 72 Maine, 140. Where A. deposited money in a bank in the name of B., but without the knowledge of B. with the entry on the books of the bank and on the pass-book, subject to A., and A. received the dividends and such portion of the principal as she required for her own use and held the pass-book always in her possession, these facts did not constitute either a gift or a trust in favor of B., and if there was any trust B. was the trustee for the depositor. See, also, *Parcher v. Saco*, etc., *Institution*, 78 Maine, 470; *Curtis v. Portland*, etc., *Bank*, 77 Maine, 151, and *Drew v. Hagerty*, 81 Maine, 231."

¹This is the general doctrine in relation to voluntary trusts as laid down by many authorities. *Martin v. Funk*, 75 N. Y. 134; *Young v. Young*, 80 N. Y. 422; *Beaver v. Beaver*, 117 N. Y. 421; *Stone v. Hackett*, 12 Gray, 227; *Davis v. Ney*, 125 Mass. 590; *Gerrish v. New Bedford In-*

§ 204. **Gift of savings bank deposit.**—A gift must be executed by delivery; a trust by declaration. An express trust of personal property may be created or declared by parol, but its terms must be clearly established and show an executed gift, so that the equitable title shall pass effectually to the donee, as in the case of a gift *inter vivos*. An entry on the books of a savings bank, in the name of a donor, and followed by the clause, “in trust for the donee,” is not in itself conclusive evidence of an absolute gift, but it creates a *prima facie* trust in favor of the donee, which may become complete through the donor’s declarations and conduct.¹

stitution, 128 Mass. 159; *Sherman v. New Bedford Bank*, 138 Mass. 581; *Pope v. Burlington Savings Bank*, 56 Vt. 284; *Bank v. Albee*, 64 Vt. 571; 25 Atl. Rep. 487; *Marcy v. Amazeen*, 61 N. H. 131; *Taylor v. Henry*, 48 Md. 550; *Robinson v. Ring*, 72 Me. 140.

¹ *Bath Sav. Inst. v. Hathorn*, 88 Maine (1895); 33 Atl. Rep. 836, *per curiam*: “In this case, the deposit is in the name of the donor, ‘in trust for the donee.’ Standing alone, this entry does not work an absolute, indisputable gift in the form of a dry trust—that is, a trust without limitation or condition, that may be terminated at the will of the *cestui*; but extrinsic evidence is competent to control its effect. *Brabrook v. Boston, etc., Bank*, 104 Mass. 228; *Clark v. Clark*, 108 Mass. 522; *Powers v. Provident Institution*, 124 Mass. 377; *Stone v. Bishop*, 4 Cliff. 593, Fed. Cas. No. 13,482; *Northrop v. Hale*, 72 Maine, 275. The evidence discloses that, at the time the donor made the deposit, he expressed a desire that the donee should have the money at his death. That certainly shows no intent to part with the legal title at an earlier day. He is said to have subsequently made talk of the same purport; but he neither informed the donee of the deposit, nor made any effort or did any act to apprise her of it, or of his intention concerning it.

The deposit on his part was both voluntary and secret. Information of it may have been communicated to her by others, but never at his request or with his knowledge. What evidence, then, operates to pass the equitable title in the deposit to her? He had consummated no contract with her. His intentions were kept in his own breast. He could have withdrawn the money at any time, and have made a new disposition of it, and she may not have been the wiser, so far as he knew. It is just as essential, to establish the trust sought to be set up here, to prove some act on the part of the donor that shall operate to pass the equitable title to the donee, as it is to prove delivery in a gift *inter vivos*. Both require the same essentials. In both, some title must pass from the donor, differing only in degree. A gift must be executed by delivery; a trust, by declaration. In *Augusta Bank v. Fogg*, 82 Maine, 538, 20 Atl. Rep. 92, the donor deposited a sum of money in the name of the donee, subject to his own order, with intent that, at his death, it should go to the donee. No trust was claimed or shown. It was an unexecuted purpose, an ineffectual attempt at testamentary disposition. In *Parcher v. Saco, etc., Institution*, 78 Maine, 470; 7 Atl. Rep. 266, a depositor caused to be entered upon the bank

§ 205. **Gratuitous subscriptions.**—A subscription may or may not be a contract. As a contract is said to be an arrange-

ledger words, in substance, 'Payable also to Mrs. Leavitt in case of my death,' and it was held no gift. In *Curtis v. Portland, etc., Bank*, 77 Maine, 151, the entry of 'Subject also to' the donee was held to constitute no gift, but that a subsequent delivery of the bank-book completed the gift. In *Barker v. Frye*, 75 Maine, 29, a deposit in the name of the donee, subject to the order of the donor during life, afterwards changed by erasing words giving the donor any control of the fund, and after notice to the donee of the change and that the bank-book would be delivered to him the first time they met, and after his reply requesting that the book be sent to him, which the court says 'was an acceptance of the gift,' it was held that the gift was complete. The same doctrine is held in *Northrop v. Hale*, 73 Maine, 66; *Robinson v. Ring*, 72 Maine, 140; *Drew v. Hagerty*, 81 Maine, 231; 17 Atl. Rep. 63; *Parkman v. Suffolk, etc., Bank*, 151 Mass. 218; 24 N. E. Rep. 43. All of our cases require something more than a mere intention to give, a promise to give, or an expectation to give. Benevolence alone will not do. There must be beneficence also. The mystery sometimes supposed to exist about a trust can not change the nature of a transaction. A voluntary trust is a gift, and requires all the essentials of a plain gift to sustain it. In *Dresser v. Dresser, supra*, a writing specifying the terms of a voluntary trust, and a delivery of the trust property so that the dominion of the donor over it was thereafter lost, is a good example of a trust of this sort. In *Alger v. North End, etc., Bank*, 146 Mass. 418; 15 N. E. Rep. 916, the donor made a deposit similar to the one under consideration. It was in his own name, as trustee for the do-

nee, his housekeeper, who claimed the deposit as a payment for her services. It was shown that, shortly before his death, he told her, 'I put it in for you;' 'that money is yours;' and the court held that the judge, who tried the case, was authorized to find a perfected gift, if he chose to do so. Some of the cases are in conflict concerning the question now under consideration, more in the application of the law to the ever-varying facts in the numerous cases than otherwise; but our own cases are all consistent, and squarely hold to the doctrine that a trust in personal property may be created by parol, and that a deposit in bank in the name of another may be explained or controlled by evidence outside the written terms of the deposit. In this case, the terms of the deposit clearly show an intended trust in favor of the donee, but may be controlled or limited by extrinsic evidence. This evidence confirms the trust, showing that it should cease at the death of the donor, and that the legal title should then pass to the *cestui*. When the deposit was made, the treasurer of the bank told the donor that, at his decease, the money would go to the donee, and the donor replied that was his wish. All the subsequent acts and declarations of donor show the same intent. The gift can not be upheld as an absolute gift *inter vivos*, nor as a gift *causa mortis*, for these gifts require a delivery of the *res*, a complete transfer of title. They differ from a gift in trust in that they purport to, and must, pass the whole title, so that the donor can have no dominion or control over them. But a gift in trust withholds the legal title from the donee. It may be transmitted to a third person, or it may be retained by the donor, but in

ment "in writing to furnish a sum of money, or its equivalent, for a designated purpose; as, to assist a charitable or religious

either case the equitable title has gone from him, and unless the declaration of trust contains the power of revocation, or the wide discretion of chancery attaches (*Countts v. Acworth*, L. R. 8 Eq. 558; *Wollaston v. Tribe*, L. R. 9 Eq. 44; *Everitt v. Everitt*, L. R. 10 Eq. 405; *Phillips v. Mullings*, 7 Ch. App. 244; *Welman v. Welman*, 15 Ch. Div. 570; *Lister v. Hodgson*, L. R. 4 Eq. 30; *Sharp v. Leach*, 31 Beav. 491; *Anderson v. Elsworth*, 3 Giff. 154; *Toker v. Toker*, 31 Beav. 629; *Phillips v. Mullings*, 7 Ch. App. 244; *Smith v. Iliffe*, L. R. 20 Eq. 666; *Welman v. Welman*, L. R. 15 Ch. Div. 570, 578, 579; *Prideaux v. Lonsdale*, 1 De Gex, J. & S. 433), it leaves him powerless to extinguish the trust. Of course, the trust must be established by proof, and the fact that no evidence of a voluntary trust once created remains or can be shown, does not alter the principle. Many rights fail of enjoyment from the lack of evidence that might once be adduced. So, a secret trust may be valid when it can be proved; but if the donor conceals the evidence of it, and later appropriates the fund to his own use, it is simply a wrong on his part, that prevails because of his perfidy, and goes unpunished and unnoticed because unknown. The *cestui's* rights are the same, although his remedy may have been destroyed. In the case of *In re Smith's Estate*, 144 Pa. St. 428, 22 Atl. Rep. 916, a lad of three years went to live with his uncle. When the lad was twelve the uncle placed \$13,000 in bonds in an envelope, on which he had written and signed a declaration that he held them for his nephew. The bonds remained in the uncle's possession until his death, and the court held a completed gift in trust for the nephew. In *Conn., etc., Bank v. Albee*, 64 Vt. 571; 25 Atl. Rep. 487, the court says: 'A completed trust, although voluntary, may be enforced in equity. It is not essential that the beneficiary should have had notice of its creation or have assented to it. The owner or donor of personal property may create a perfect or complete trust by his unequivocal declaration in writing, or by parol, that he himself holds such property in trust for the purposes named. The trust is equally valid whether he constitutes himself or another person the trustee.' In that case a father deposited money in a savings bank in the name of his son, naming himself trustee. It appeared that one motive of the father was to avoid taxation; but, said the court, 'that fact does not negative the idea that he also intended to create a trust for the benefit of his son. It is perfectly consistent with it, and the retention of the pass-book is not inconsistent with such a purpose. He must have retained it as trustee.' *Ray v. Simmons*, 11 R. I. 266, is in point. 'One Bosworth deposited money in a savings bank in his own name as trustee for a step-daughter. He did not tell her what he had done, nor show her the pass-book. He kept that himself. After his death, the court held that the step-daughter was entitled to the money—that the transaction constituted a trust in her favor.' So is *Martin v. Funk*, 75 N. Y. 134. Susan Boone deposited \$500 in a savings bank 'in trust for Lillie Willard.' Susan kept the pass-book, and Lillie had no knowledge of it until after Susan's death. Want of notice to Lillie, and the retention of the pass-book by Susan, were urged in defense; but the court held a gift in trust complete. This is an exhaustive case, and contains a review of authorities by Chief Justice Church prior to 1878. So is *Minor v. Rogers*, 40 Conn. 512:

object, or to take stock in a corporation.”¹ It is either voluntary—that is, gratuitous—or else it is supported by a consideration. The cases on the subject of gratuitous subscriptions present several views of the subject. But, according to a distinguished American writer,² all cases of gratuitous subscriptions are referable to one of six classes. The first is that all such subscriptions are null as wanting consideration.³

A widow deposited \$250 in her own name, ‘as trustee of Wm. A. Minor,’ the child of a neighbor. The child knew nothing of the deposit until after the depositor’s death, and meantime did not have possession of the pass-book; and the court held the trust complete, and allowed a recovery of the money from the depositor’s executor. So is *In re Gaffney’s Estate*, 146 Pa. St. 49; 23 Atl. Rep. 163. It appeared that Hugh Gaffney deposited \$560 in his own name, as trustee for Polly Kim, and the court held the entry itself *prima facie* evidence of the trust and, unexplained, sufficient to uphold it. In *Gerrish v. Institution*, *supra*, the court says: ‘No particular form of words is required to create a trust in another, or to make the party himself a trustee for the benefit of another; that it is enough for the latter purpose if it be unequivocally declared in writing—or orally, if the property be personal; that it is held in trust for the person named; that when the trust is thus created, it is effectual to transfer the beneficial interest, and operates as a gift perfected by delivery.’ The same case holds that notice to the beneficiary is unnecessary where the transaction is clear; but when ambiguous, or susceptible of different interpretations, it removes the doubt, and is decisive of the purpose of the donor. Some of the earlier Massachusetts cases seem to hold notice to the beneficiary essential to the validity of a trust, but, when considered in the light of this

case, rather consider the notice a controlling than an essential element in the creation of a voluntary trust. The prevailing doctrine now is that notice is unnecessary, but, when shown, has controlling effect. In this case, the entry ‘in trust for’ is of clear and unmistakable import, and sufficient to create a *prima facie* trust. It might have been controlled by evidence that would have shown a contrary intention, but such evidence is wholly wanting. Moreover, all the declarations, acts, and conduct of the donor are consistent with the presumption arising from the entry itself, and show that it expresses the true import of the transaction and creates a completed trust in favor of the donee.”

¹ Anderson’s Law Dictionary, title, “Subscribe.” It is important to bear in mind the meaning of subscription. To constitute a “subscription” there must be a person or corporation as the beneficiary or payee.

² Judge E. H. Bennett, of Boston, in 16 Am. Law Reg. (N. S.) 548.

³ *Boutell v. Cowdin*, 9 Mass. 254; *Phillips, etc., Academy v. Davis*, 11 Mass. 113; *Foxcroft Academy v. Favor*, 4 Maine, 382; *Bridgewater Academy v. Gilbert*, 2 Pick. 579; *Stewart v. Trustees Hamilton College*, 2 Denio, 403. Judge Bennett points out that many of the cases, where gratuitous subscriptions were declared null and void, were also lacking in all the element of a contract because there was no legal payee who could be compelled to carry out the trust. But, of course, in this view

The second is that one gratuitous subscription is the consideration of the other.¹ A third is that, although the payees named in the subscription paper can not recover upon the original subscription paper, yet if, relying thereon, they have properly expended money for the common object, they might recover upon a count for money paid, laid out, expended, especially if the defendant ratified the subscription after such outlay.² A fourth seems not to be in fact gratuitous at all. They are where, by the terms of the subscription paper, each subscriber is to have an interest or share in the object of the sub-

there was no subscription at all. A subscription must be at least between definite persons.

¹ *Congregational Society v. Perry*, 6 N. H. 164, where the doctrine originated. *Watkins v. Eames*, 9 Cush. 537. "It has sometimes been supposed that when several persons promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of the others, and this although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise by one of the promisors would not in a legal sense be beneficial to the others. * * * The doctrine seems to us unsound in principle. It proceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors and a failure to carry out as between themselves their mutual engagement. It is in no proper sense a case of mutual promises, as between the plaintiff and defendant." *Andrews, J.*, in *Presbyterian Church v. Cooper*, 112 N. Y. 517, 521-2; *George v. Harris*, 4 N. H. 533. "A consideration of mutual promises wholly between A. and B. will not support a

promise by either to pay C." 16 Am. Law Reg. (N. S.) 551. *Berkeley, etc., School v. Jarvis*, 32 Conn. 412. "Similar promises of third persons to the plaintiff may be a consideration for agreements between those persons and the defendant; but as they confer no benefit upon the defendant and impose no charge or obligation upon the plaintiff they constitute no legal consideration for the defendant's promise to him." *Per Gray, J.*, in *Cottage Street Church v. Kendall*, 121 Mass. 528, 531; but in those states allowing a suit to be brought on a contract by the beneficiary, although not a party, of course, if the subscribers as between themselves made a valid contract to subscribe, this contract could be enforced by the beneficiary. *Thrasher v. Pike County R. Co.*, 25 Ill. 393. And it is upon this principle, and not on the principle that one subscription is the consideration of the other, that many cases are decided. See following cases: *Lathrop v. Knapp*, 27 Wis. 214; *Underwood v. Waldron*, 12 Mich. 73; *Hawes v. Woolcock*, 26 Wis. 629.

² 16 Am. Law Reg. (N. S.) 551, citing the following cases: *Farmington Academy v. Allen*, 14 Mass. 172; *Bryant v. Goodnow*, 5 Pick. 228; *Myrick v. French*, 2 Gray, 420; *McAuley v. Billenger*, 20 Johns. 89; *Watkins v. Eames*, 9 Cush. 537.

scription, a pew in the church, a share in the academy, and the like. These are cases, not of gratuitous subscriptions, but of subscriptions supported by distinct grounds of consideration.¹ A fifth class is where the payee, or the institution for whose benefit the subscription is made, has expressly agreed to do certain things, perform certain duties, or has complied with the conditions on which the subscription was made. This makes the subscription valid and enforceable.² There is finally a sixth class of cases upholding gratuitous subscriptions upon the ground of an implied duty and obligation on the part of the payee to carry out the object of the paper, and apply the money for the purposes and objects intended by the donor. This is referred to the doctrine of mutual promises.³

¹ 16 Am. Law Reg. (N. S.) 551, citing *Thompson v. Page*, 1 Metcalf, 565; *Ives v. Sterling*, 6 Metcalf, 310; *Myrick v. French*, 2 Gray, 420.

² 16 Am. Law Reg. (N. S.) 551, citing *Williams College v. Danforth*, 12 Pickens, 541; *University Vermont v. Buell*, 2 Vt. 48; *State Treasurer v. Cross*, 9 Vt. 289; *Caul v. Gibson*, 3 Pa. St. 416; *Barnes v. Perine*, 12 N. Y. 18; *Hamilton College v. Stewart*, 1 N. Y. 581; *Trustees v. Stetson*, 5 Pickens, 506. See, also, *Presbyterian Church v. Cooper*, 112 N. Y. 517.

³ 16 Am. Law Reg. (N. S.) 553, citing as instances of the doctrine: *Collier v. Baptist, etc., Society*, 8 B. Monroe, 68; *Troy Academy v. Nelson*, 24 Vt. 194; *Ladies, etc., Institute v. French*, 16 Gray, 196; *Amherst Academy v. Cows*, 6 Pick. 427; *Trustees v. Ripley*, 6 Maine, 442. Judge Bennett thinks the case of *Cottage Street Church v. Kendall*, 121 Mass. 528, should have been decided on this ground. He says: "There was a competent payee, an absolute subscription, an acceptance thereof by the payee, a subsequent ratification by the defendant, and an actual collection of money from the other subscribers, all of which might be thought to create an implied duty, or raise an

implied promise to devote the proceeds to the object intended by the donors; and, in that light, might, in the view of some authorities, constitute a good consideration for the defendant's promise." See following cases as referring themselves to one of the six classifications of gratuitous subscriptions, as given in the text: *Richelieu Hotel Co. v. International Mil. Encampment Co.*, 140 Ill. 248. This is a very exhaustive discussion of the subject of subscriptions generally, but it is to be observed that the court here found a consideration. The defendant, to increase its trade, subscribed to a fund to bring a military encampment to Chicago. The benefit to the defendant was consideration enough. The following language is taken from the opinion as instructive generally on subscriptions: "The case, then, as presented here, is one of a subscription, not to an existing, but to a contemplated, corporation, and the question is, whether such subscription is enforceable by the corporation after it comes into being. Questions of this character most frequently arise in case of preliminary subscriptions to the capital stock of corporations not yet organized, and it is held

§ 206. The present doctrine.—A gratuitous subscription is a mere offer, which may be revoked at any time before it is accepted by the promisee. And an acceptance can only be shown by some act on the part of the promisee whereby some legal liability is incurred or money is expended on the faith of the promise.¹

that such subscriptions are in the nature of continuing offers to take stock upon the organization of the corporation, and they ripen into binding contracts when the corporation, after becoming a corporate body, accepts the offer. The same principle is held to be applicable to other preliminary contracts. Thus, in *Johnston v. Ewing Female University*, 35 Ill. 518, it was held that a subscription for the building of a university, made prior to its incorporation, but in contemplation thereof, was legal and binding upon the party making it. So, in *Snell v. Trustees*, 58 Ill. 290, it was held to be no defense to a suit to enforce a subscription to aid in building a church, that, at the time of the subscription, the society was not incorporated," citing *Hudson v. Green Hill Seminary*, 113 Ill. 618; *Pratt v. Trustees*, 93 Ill. 475; *Trustees of Ky. Baptist Society v. Carter*, 72 Ill. 247; *Hall v. City of Virginia*, 91 Ill. 535; *Thompson v. Board of Supervisors*, 40 Ill. 379; *McClure v. Wilson*, 43 Ill. 356; *Pryor v. Cain*, 25 Ill. 292; *Snell v. Trustees*, 58 Ill. 290; *Griswold v. Board of Trustees*, 26 Ill. 41; *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54; *George v. Harris*, 4 N. H. 533; *Congregational Society v. Perry*, 6 N. H. 164; *Berkeley Divinity School v. Jarvis*, 32 Conn. 412; *Watkins v. Eames*, 9 Cush. 537; *Trustees v. Stetson*, 5 Pick. 506. The five cases last cited were decided on the ground that one gratuitous subscription upholds another. The doctrine was repudiated in New Hampshire, where it origi-

nated. *Curry v. Rogers*, 21 N. H. 247. See also, "Voluntary subscriptions to charitable and other objects," 9 Virginia Law Journal, 321.

¹ *Cottage Street Church v. Kendall*, 121 Mass. 528. A leading case, where the court said: "A gratuitous subscription, to promote the objects for which a corporation is established, can not be enforced unless the promisee has, in reliance on the promise sued on, done something, or incurred or assumed some liability or obligation; and it is not sufficient that others were led to subscribe by the subscription sought to be enforced." "The performance of gratuitous promises depends wholly upon the good will which prompted them, and will not be enforced by the law. * * * The general rule is that, in order to support an action, the promise must have been made upon a legal consideration moving from the promisee to the promisor. To constitute such consideration, there must be either a benefit to the maker of the promise, or a loss, trouble or inconvenience to, or a charge or obligation resting upon, the party to whom the promise is made. A promise to pay money to promote the objects for which a corporation is established falls within the general rule." And it was accordingly held that a church could not recover on a subscription when it was not built in reliance thereon. The subscription was one to build a church and the church was built, but there was conflicting evidence as to whether anything was done, or, any liability

§ 207. Revocation by death.—As a general rule death revokes a gratuitous subscription.¹ The rule is otherwise, how-

incurred or obligation assumed in reliance on the subscription of defendant. In the opinion Gray, J., likens a gratuitous subscription to a unilateral contract. It being a request to do an act which when done becomes a unilateral contract binding the subscriber. *Richelieu Hotel Co. v. International Military, etc., Co.*, 140 Ill. 248, where the court said: "His promise to pay was a mere offer until acted upon. * * * The real consideration upon which the plaintiff is entitled to recover, in such cases [gratuitous subscriptions], is, that it has expended money, furnished materials, or bestowed labor, upon the faith of the promise in writing, and not any special benefit derived or expected to be derived by the promisor from the corporation." *Presbyterian Church v. Cooper*, 112 N. Y. 517, where the court said: "It is of course unquestionable that no action can be maintained to enforce a gratuitous promise however worthy the object intended to be promoted." In this case a person, together with others, had subscribed to pay off a church debt. The subscription was held to be gratuitous and not enforceable. *Reimensnyder v. Gans*, 110 Pa. St. 17; *Stuart v. Presbyterian Church*, 84 Pa. St. 388. The following is the syllabus: "A verbal promise to pay a certain sum to reduce the debt of a church, on condition that the whole amount be raised, is not binding unless this condition is performed." The case discusses the effect of a subscription. *Lafayette County Monument Co. v. Magoon*, 73 Wis. 627; *Schuler v. Myton*, 48 Kan. 282; *Fulton v. Sterling Land Co.*, 47 Kan. 621; *Bohn, etc., Co. v. Lewis*, 45 Minn. 164; *Grand Lodge v. Farnham*, 70 Cal. 158; *Williams v. Rogan*, 59 Texas,

438. And see, also, *Freidline v. Board of Trustees*, 23 Ill. App. 494; *Kinsley v. International, etc., Co.*, 41 Ill. App. 259; *Miller v. Preston*, 4 N. M. 314; *Vierling v. Horton*, 27 Ill. App. 263; *The Twenty-third Street Church v. Cornell*, 117 N. Y. 601; *Roberts v. Cobb*, 103 N. Y. 600; 9 N. E. Rep. 500; *Lake Ontario R. Co. v. Curtiss*, 80 N. Y. 219. A seal placed to a subscription would, of course, under general principles of law, preclude any consideration of a lack of consideration.

¹*The Twenty-third Street Baptist Church v. Cornell*, 117 N. Y. 601, where the court said: "The contention is, that the church corporation erected its new edifice and incurred the large cost of its construction in reliance upon these subscriptions, and so in the end, if not in the beginning, a consideration arose to support the promise. That may happen where the expenditure can be said to have proceeded with the knowledge and assent of the subscribers; but here, before any expenditure was made, or any work was begun, Mrs. Weeks died. Her gift was unexecuted at her death and revoked by that event; and no after action of the church corporation could change or affect the result;" *Presbyterian Church v. Cooper*, 112 N. Y. 517; *Grand Lodge v. Farnham*, 70 Cal. 158, where the court said: "If the promisor dies before his offer is accepted, it is thereby revoked, and can not afterwards, by any act showing acceptance, be made good as against his estate," per *Belcher*, C. C., 159; *Beach v. First, etc., Church*, 96 Ill. 177; *Phipps v. Jones*, 20 Pa. St. 260; *Helfenstein's Estate*, 77 Pa. St. 328; *Cottage St. Church v. Kendall*, 121 Mass. 528.

ever, where subscribers agree together to make up a specified sum, and where the withdrawal of one increases the amount to be paid by the others. In such case, as between the subscribers, there is a mutual liability, and the co-subscribers may maintain an action against one who refuses to pay, or, if dead, against his personal representative.¹

§ 208. Subscription to capital stock—Before incorporation.—In the case of original subscriptions made for the purpose of effecting the organization of the company, a subscriber becomes a stockholder only upon the performance of all the conditions precedent to corporate existence which may be required by the charter or general act of incorporation.² Before the company enters upon its corporate existence, however, he may withdraw;³ and, although he may have been active in persuading others to subscribe, he can not be held liable for any part of his subscription.⁴ Subscriptions to the stock of a company to be formed in the future are not mutual promises between the subscribers themselves,⁵ nor binding upon them as such; but, upon the organization of the corporation, a

¹ *Grand Lodge v. Farnham*, 70 Cal. 158. But this is an action upon a contract distinct from that of the subscription.

² *Beach on Private Corporations*, § 63; *Spear v. Crawford*, 14 Wend. 20; 28 Am. Dec. 513; *Burrall v. Bushwick R. Co.*, 75 N. Y. 211; *Buffalo R. Co. v. Dudley*, 14 N. Y. 336; *Milford, etc., Co. v. Brush*, 10 Ohio, 111; 36 Am. Dec. 78; *Sedalia R. Co. v. Wilkerson*, 83 Mo. 235; *East Tennessee R. Co. v. Gammon*, 5 Sneed, 567; *Mobile R. Co. v. Yandal*, 5 Sneed, 294; *Connecticut R. Co. v. Bailey*, 24 Vt. 465; 58 Am. Dec. 181; *Selma R. Co. v. Tipton*, 5 Ala. 787; *New Albany R. Co. v. McCormick*, 10 Ind. 499; *Instone v. Frankfort Bridge Co.*, 2 Bibb. 576; *Waukon, etc., R. Co. v. Dwyer*, 49 Iowa, 121; *Wight v. Shelby R. Co.*, 16 B. Mon. 4, holding that whether the company was properly organized or not accord-

ing to its charter is a question that can not be made collaterally, but can only be made by a direct proceeding against the corporation; *Penobscot R. Co. v. White*, 41 Maine, 512; *Penobscot R. Co. v. Dummer*, 40 Maine, 172; *Thigpen v. Mississippi R. Co.*, 32 Miss. 347; *Temple v. Lemon*, 112 Ill. 51.

³ *Stanton v. Wilson*, 2 Hill, 153; *Buffalo R. Co. v. Dudley*, 14 N. Y. 336; *Ashuelot, etc., Co. v. Hoit*, 56 N. H. 548; *Athol Music Hall Co. v. Carey*, 116 Mass. 471.

⁴ *Muncy Traction Engine Co. v. De La Green* (Pa. 1888), 13 Atl. Rep. 747; 12 Cent. Rep. 386.

⁵ *Athol Music Hall v. Carey*, 116 Mass. 471; *Lake Ontario R. Co. v. Curtiss*, 80 N. Y. 219; *Quick v. Lemon*, 105 Ill. 578; *Mt. Sterling Coal Road Co. v. Little*, 14 Bush, 429; *Strasburg R. Co. v. Echternacht*, 21 Pa. St. 220.

subscription made prior thereto becomes binding,¹ the prospective rights of membership being deemed a sufficient consideration to support the contract.²

§ 209. After incorporation.—A subscription made after the organization of the corporation does not constitute the subscriber a shareholder until it be accepted by the company,³ and, until accepted, it may be withdrawn, as in the case of offers generally,⁴ but the offer, when accepted, becomes binding, both upon the subscriber and upon the corporation.⁵

§ 210. The consideration for such a subscription.—The real consideration which supports a stock subscription is the pecuniary advantages and the profits anticipated from being a stockholder.⁶

¹ *Minneapolis Threshing Machine Co. v. Crevier*, 39 Minn. 417.

² *Beach on Private Corporations*, § 63, citing *Lake Ontario R. Co. v. Mason*, 16 N. Y. 451; *Hamilton, etc., Co. v. Rice*, 7 Barb. 157; *Stanton v. Wilson*, 2 Hill, 153; *Barker v. Bucklin*, 2 Denio, 45; *Schenectady, etc., Plank R. Co. v. Thatcher*, 11 N. Y. 102; *Union Turripike Co. v. Jenkins*, 1 Caines, 381; *Cottage Street Church v. Kendall*, 121 Mass. 528.

³ *Beach on Private Corporations*, § 64; *Gray v. Portland Bank*, 3 Mass. 364; *Sewall v. Eastern R. Co.*, 9 Cush. 5; *Carlisle v. Saginaw Valley Co.*, 27 Mich. 315; *Parker v. Northern R. Co.*, 33 Mich. 23; *Northern Central Co. v. Eslow*, 40 Mich. 222; *Busey v. Hooper*, 35 Md. 15; *St. Paul R. Co. v. Robbins*, 23 Minn. 439.

⁴ *Thrasher v. Pike County R. Co.*, 25 Ill. 393; *Rhey v. Ebensburg, etc., Co.*, 27 Pa. St. 261; *Mt. Sterling Coal Road Co. v. Little*, 14 Bush, 429; *Quick v. Lemon*, 105 Ill. 578; *Lake Ontario R. Co. v. Curtiss*, 80 N. Y. 219; *Stuart v. Valley R. Co.*, 32 Gratt. 146; *Goff v. Winchester College*, 6 Bush, 443.

⁵ *Spear v. Crawford*, 14 Wend. 20; *Marsh v. Burroughs*, 1 Woods, 463;

Busey v. Hooper, 35 Md. 15; *McClure v. Peoples', etc., R. Co.*, 90 Pa. St. 269; *Cass v. Pittsburgh*, 80 Pa. St. 31; *Bucher v. Dillsburg*, 76 Pa. St. 306; *Ex parte Mansfield*, 19 L. J. Ch. 258; *Ex parte Yelland*, 21 L. J. Ch. 852; *Ex parte Hawkins*, 25 L. J. Ch. 221; *Ex parte Smith*, 17 W. R. 491; *Ex parte Barrett*, 34 L. J. Ch. 558; *In re Direct Exeter R. Co.*, 3 De G. & Sm. 234; *Bell's Case*, 22 Beav. 35.

⁶ *Beach on Private Corporations*, § 584; *Selma R. Co. v. Tipton*, 5 Ala. 787; *Lake Ontario R. Co. v. Mason*, 16 N. Y. 451; *Buffalo R. Co. v. Dudley*, 14 N. Y. 336; *Schenectady R. Co. v. Thatcher*, 11 N. Y. 102; *Thigpen v. Mississippi R. Co.*, 32 Miss. 347; *New Albany R. Co. v. Fields*, 10 Ind. 187; *Fry v. Lexington R. Co.*, 2 Metc. (Ky.) 314; *Hartford, etc., Co. v. Kennedy*, 12 Conn. 499. The following cases hold that the mutual promises of the subscribers and the implied engagement of the company to issue stock are the consideration, to wit: *Bullock v. Falmouth, etc., Co.*, 85 Ky. 184; *Twin Creek etc., Co. v. Lancaster*, 79 Ky. 552; *St. Paul R. Co. v. Robbins*, 23 Minn. 439, while the following hold that the

§ 211. **Sufficient consideration illustrated.**—Where an agreement was made between plaintiff and defendant's testator that friendly suits should be brought on notes given by plaintiff to defendant's testator as the price of certain lands; that no defense was to be made thereto; that the lands were to be bought in by defendant's testator, and, if they could be afterwards sold, defendant's testator was to retain amount due on the notes, and, if not so sold, they should be taken in full satisfaction of the judgment—there was a sufficient consideration for the agreement on the part of the defendant's testator.¹ So, also, the payment of part of a judgment by a person other than the debtor is a sufficient consideration for the judgment creditor's agreement to cancel the judgment.² In a case where creditors of an insolvent contractor held liens for materials furnished to erect a building, and agreed with him, in writing, to assign their liens to the owner of the building if he would pay the money still due, before a certain day, by first paying in full the claims for labor, and then dividing the remainder proportionately among all other lien claimants, it was held that the agreement was valid, and binding on each signer, as the contract of each was a sufficient consideration for the contracts of the others.³ Likewise a contractor's promise to pay for extra materials ordered by the architect, made before the work is completed, is founded on a sufficient consideration for materials already used, as well as for the rest.⁴ And the agree-

execution of the purpose of incorporation is the consideration, to wit: *Kennebec R. Co. v. Palmer*, 34 Maine, 366; *McCully v. Pittsburgh R. Co.*, 32 Pa. St. 25; *Miller v. Wild Cat Co.*, 52 Ind. 51; *Illinois River Co. v. Zimmer*, 20 Ill. 654.

¹ *Ward v. Gibbs* (Texas App. 1895), 30 S. W. Rep. 1125.

² *Smith v. Gould* (1895), 84 Hun, 325; 32 N. Y. Supl. 373.

³ *Wilson v. Samuels* (1893), 100 Cal. 514, per Searls, J.: "There was sufficient consideration for the agreement. In such cases the contract of each creditor is a sufficient consideration for the contract of all the others.

When they mutually agree to forego their right to pursue the usual method of enforcing their demands in consideration of being paid at a given time, the engagement of each was a sufficient consideration for the engagement of the others to do the same. In this respect, it is, in principle, not distinguishable from a composition agreement. *Pierson v. McCahill*, 21 Cal. 122."

⁴ *Irwin v. Locke*, 20 Colo. 148; 36 Pac. Rep. 898, per Hayt, C. J.: "A part of the extras were not used, and it is claimed that the new promise, in so far as it covered past work that was of no benefit to appellant, was without

ment of a construction company to commute its contract rate of compensation for finished work to a lower rate because of the work not being completed as agreed, in consideration of which commutation the other contracting party consented to presently accept the work in its unfinished condition, afforded a sufficient consideration to sustain the stipulated reduction as a compromise between the parties.¹ So, too, the release of a chattel mortgage on a stock of goods is a sufficient consideration for the execution of an agreement by the mortgagor stating that he holds the goods as consignee of the mortgagees, to be sold on their account, and authorizing them to take possession whenever they deem themselves insecure.² And a contract by a lessor of land to pay a certain sum to a third person for furnishing water to cattle herded on the land is not without consideration moving to the lessor.³

§ 212. The same subject continued.—Where two creditors of an insolvent firm took a chattel mortgage on all its property, agreeing therein to pay the debts of the firm, and one of these creditors promised the plaintiff, also a creditor, that they would pay his debt; the mortgaged property having been exhausted in paying other debts, it was held that the creditor making the promise was liable to plaintiff, the receipt of the property from the debtors being a sufficient consideration therefor;⁴

consideration and not binding, but it is well settled that when a part of a consideration is past, and a part is not, this is sufficient to sustain the promise. *Loomis v. Newhall*, 15 Pick. 159; *Wiggins v. Keizer*, 6 Ind. 252; *Roberts v. Griswold*, 35 Vt. 496."

¹ *Fitzgerald v. Fitzgerald, etc.*, Construction Co., 41 Neb. 374; 59 N. W. Rep. 838.

² *Norris v. Vosburgh* (1894), 98 Mich. 426.

³ *Osmundson v. Thompson*, 90 Iowa, 755; 57 N. W. Rep. 863.

⁴ *Keyes v. Allen* (1893), 65 Vt. 667, per Munson, J.: "The defendants had placed themselves under a valid obligation to pay the debts of the firm be-

fore the making of this promise to the plaintiffs. The undertaking of the defendants, as recited in the mortgage, was not contingent upon a disposal of the property, nor restricted to the amount of its avails. This promise to the plaintiffs was for the payment of a debt which had already become, by arrangement with the debtor, an obligation of the promisor. A promise to pay the debt of another, when there has been an assumption of the debt by the promisor in consideration of a conveyance from the debtor, is to be treated as an independent undertaking, notwithstanding the continuance of the original liability. *Wait v. Wait*, 28 Vt. 350;

and a written contract by plaintiff, made at defendant's request, to cut and haul certain timber, is a good consideration for defendant's oral agreement that he has the right to take the timber from the land on which it is growing.¹ And equally the attendance of one as a witness in an action pending in another state is a sufficient consideration for a promise to pay the witness a sum in excess of the legal witness fees, since such attendance could not have been compelled by subpoena.² In consideration of plaintiffs advertising defendant's property, defendant agreed to pay them a certain commission in case the property should be sold within a specified time, either by reason of the advertisement or otherwise; it was held that any disposition of the property within the specified time rendered defendant liable for the commission.³ And where the assignee of a mortgage brings a foreclosure suit after the mortgagor is garnisheed as a creditor of the mortgagee, when he is not entitled to maintain it, the mortgagor's right to costs in the proceeding are sufficient consideration for a contract by such assignee to accept less than the amount due in satisfaction of the mortgage.⁴

§ 213. The same subject continued.—The following recent case in California well illustrates the rule: Plaintiffs, having executed a note and mortgage to defendant, conveyed the mortgaged property to another, who assumed the payment of the note and mortgage, but, the assignee having defaulted thereon, de-

Fullam v. Adams, 37 Vt. 391; Bailey v. Bailey, 56 Vt. 398."

¹ Hutt v. Hickey (N. H. 1893), 29 Atl. Rep. 456, per Carpenter, J. "The execution of a contract in writing may be a good consideration for a verbal agreement relating to the same subject-matter. Morgan v. Griffith, L. R. 6 Exch. 70; Angell v. Duke, L. R. 10 Q. B. 174."

² Armstrong v. Prentice (1893), 86 Wis. 210.

³ Cook v. Blake (1894), 98 Mich. 389.

⁴ Gemberling v. Spaulding (Mich. 1895), 62 N. W. Rep. 342. In Fish v.

Dunn, 59 Minn. 99; 60 N. W. Rep. 843, it appeared that each of two parties owned an adjoining lot. There was a driveway and shed one-half on each lot. The parties agreed to use them in common, but one party prevented the other from using the same, used them exclusively himself, and promised to pay the other for such use. Canty, J., said: "Whether he so agreed before, during, or after the time he so used the property, there was a sufficient consideration for his promise to pay for that use, and the complaint states a cause of action."

fendant agreed with plaintiffs to purchase the land at the foreclosure sale for the full amount of his claim, and not to take a personal judgment against plaintiffs, and the latter, relying on such promise, allowed a default to be entered, and refrained from attending the sale; it was held that there was a sufficient consideration for such agreement under the provisions of the California civil code.¹ And where the defendants contracted to erect a building for plaintiffs, but before it was finished a portion thereof fell, and work was suspended, it being disputed which of the parties was at fault, and subsequently one of the defendants made a new contract to complete the structure, it was held that the question of doubtful liability was sufficient consideration for the new contract, and upon the fulfillment thereof by such defendant he was entitled to recover the balance of the contract price.² A complaint which states that at the time of the sale of land a judgment and decree of foreclosure for a mechanic's lien stood against it, on which an appeal had been taken, and that the vendor gave a bond to the

¹ *Heim v. Butin* (Cal. 1895), 40 Pac. Rep. 29, per Belcher, C.: "Section 1605 of the civil code provides: 'Any benefit conferred, or agreed to be conferred, upon the promisor by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise.' Under this provision, if, as alleged, the plaintiffs, in reliance upon the defendant's agreement, allowed their defaults to be entered, and refrained from being present and bidding at the sale, thus surrendering their legal rights, a benefit was conferred upon the defendant, and a prejudice suffered by them, which, in our opinion, constituted a good and sufficient consideration for his promise to purchase the property for the full amount of his judgment, and that

no deficiency judgment should be entered against them. See *Montgomery v. Gibbs*, 40 Iowa, 652."

² *Brodek v. Farnum*, 11 Wash. 565; 40 Pac. Rep. 189. In *Grant v. Duluth, etc., R. Co.* (Minn. 1895), 63 N. W. Rep. 1026, A. let a contract to B. by which B. agreed to perform certain work. B. let a subcontract to C. by which C. agreed to perform a part of this work, and B. agreed to pay C. therefor monthly as the work progressed. After C. had partly performed, B. defaulted in these payments, and for this reason C. refused further to perform his contract. Thereupon A. made an agreement with C. by which C. agreed to perform and complete his contract with B., and A. agreed to pay C. extra compensation therefor over and above the price agreed to be paid therefor by B. to C. It was held there was sufficient consideration for the contract between A. and C., and the same was binding.

vendee to hold him harmless from any lien against the property growing out of said judgment, sets forth a sufficient consideration for the bond.¹

§ 214. Insufficient consideration illustrated—Common carrier.—In another case it appeared that the defendant, acting for his client, requested the plaintiffs to render services for the client, and, after they were rendered, promised to pay therefor out of money then held by him for his client, if the latter did not sue him, and it was held that the promise was without consideration.² So, also, where defendant agrees to act as stakeholder for money due a contractor, and to pay the same to the subcontractor, and the person who is to pay the money refuses to accept the order, and the subcontractor draws a portion of the money direct, a subsequent agreement by defendant to pay the debt, under the belief that he was bound to do so by the first agreement, is without consideration.³ And the assignment of an insurance policy constitutes no consideration for an agreement then made by the assignee, where a mortgage theretofore given by the assignor to the assignee had provided for the obtaining of the policy on the mortgaged property, and the assignment

¹ Frank v. Jenkins, 11 Wash. 611; 40 Pac. Rep. 220.

² Walker v. Irwin (Iowa, 1895) 62 N. W. Rep. 785, per Deemer, J.: "It is also contended that there is an express written promise to pay plaintiff's claim in the letter before set out. It is doubtless true that there is a promise to pay plaintiffs in the event Matheson commenced no suit against defendant; and it is shown that Matheson commenced no suit. But the inquiry suggests itself, where is the consideration for such a subsequent promise? If defendant had previously requested the services performed by the plaintiffs, or if they had been performed for defendant with his knowledge or consent and for him, no doubt the subsequent promise would be valid. But, as we have seen, there

was no request that plaintiffs should perform the services for him. They were performed for Matheson. So far as shown, defendant received no personal benefit from plaintiffs' services, and there is no reason why the law should imply a previous request. We think it was a mere *nudum pactum*. While, from a moral standpoint, defendant may not appear to have acted in good faith with his brethren in profession, yet, from a legal point of view, under the now well-established rule announced in Meyer v. Houck, 85 Iowa, 319; 52 N. W. 235, we think the defendant is not liable, and that the court did not err in directing a verdict for defendant."

³ Sweed Iron Works v. Jefferson (Ky. 1895), 30 S. W. Rep. 883.

thereof as further security.¹ In order that a common carrier, by whom the transportation begun on a preceding connecting line is to be completed, may take the benefit of a special contract between the shipper and the initial carrier limiting liability in case of loss to a stipulated value per one hundred pounds, it must appear either that the contract was such as to bind the initial carrier for full performance, so as to make the second carrier the agent of the first, or else that the reduced rate forming the consideration of the special contract was not confined to the line of the first carrier, but was, either by the contract itself or by the act of the second carrier in rating and billing the goods over its line, extended and applied to that line also.²

§ 215. Where grantee is to sell for grantor—The trust as consideration.—Where land is conveyed in consideration of the promise of the grantee to sell it, and pay the proceeds to the grantor, and the grantee sells the land, a promise by the grantee, after the sale, to pay the same to the grantor, is an admission of the trust, and the trust is a consideration for the promise.³ And where land is conveyed subject to judgments

¹ *Lewis v. McReavy* (1893), 7 Wash. 294. In *Read v. Brewer* (Miss. 1894), 16 So. Rep. 350, it appeared that B. and R. agreed to buy together a life estate in land, B. to make the purchase, and R. to furnish the money. B. bought the estate in his wife's name, and offered to give R. \$800 if he would cancel the agreement. R. agreed to this, and took B.'s note for that amount secured on the estate. The sale to B.'s wife was afterwards set aside as fraudulent. It was held that there was no consideration for the note.

² *Central Railroad v. Bridger*, 94 Ga. 471; 20 S. E. Rep. 349.

³ *Harris v. Clark* (Iowa, 1895), 62 N. W. Rep. 854, per Given, C. J.: "The petition shows that the plaintiff conveyed the land described to the defendant in consideration of his

verbal promise to sell the same, and to pay the net proceeds arising from the sale to plaintiff; that he has sold the land; that the net proceeds, after paying all liens, is about \$1,600; and that he refuses to pay the same, or any part thereof. If this was all that appeared in the petition, it would be clearly within the statute of frauds and the ruling in *McGinness v. Barton*, 71 Iowa, 644; 33 N. W. Rep. 152, cited by appellee, the agreement being verbal. It is also alleged as to the \$1,600 that 'defendant, at various times after the receipt of the same as trustee, agreed to pay to plaintiff.' It is upon this alleged agreement as to money then in defendant's hands that plaintiff seeks to recover. Appellee contends in support of his demurrer that 'there is no reason given for the agreement, or any consideration therefor.

on notes against the grantor, and the grantee afterwards pays the judgments, and takes assignments of them to himself, notes and mortgages given such grantee and assignee by a surety on the former notes for the amount and in settlement of such judgments are without consideration, and will be canceled at the suit of the surety.¹ A promissory note, given for the privilege of

Their case must fail for want of consideration.' The alleged agreement is not only an admission that the money was held in trust, but also promises to pay it. The existence of the trust is sufficient consideration for the promise. In *Collar v. Collar*, 86 Mich. 507; 49 N. W. Rep. 551, it is said: 'We held, when the case was here before, that where lands were conveyed under a parol trust to sell and convert into money, and divide the proceeds, and the trust had been so far executed by the trustee as to sell the land and receive the money, and such trust had been recognized by him, an action for money had and received would lie to recover such money by the person entitled thereto.' See, also, *Collar v. Collar*, 75 Mich. 414; 42 N. W. Rep. 847; *Calder v. Moran*, 49 Mich. 14; 12 N. W. Rep. 892; *White v. Cleaver*, 75 Mich. 17; 42 N. W. Rep. 530."

¹*Price v. Rea* (Iowa, 1894), 60 N. W. Rep. 208, per Rothrock, J.. "Such being the case, there was no consideration for the notes and mortgages in the suit, and it would be inequitable and unjust to allow the defendant to enforce them. I have no doubt the defendant thought he had a right to enforce the judgments against plaintiff. I do not find him guilty of an intentional fraud. He admits he did not know the legal effect of the assignment to him. He admits he told plaintiff execution would be issued on the judgments he owned, and levied on the land he had received from Walker, and that the

land would probably not sell for enough to pay them. He may have thought that true, but of course his counsel would not claim that he could sell his own land on his own judgment. Giving time under such circumstances could not constitute any consideration. Defendant says in evidence: 'I am not making any claim on mortgages I have purchased on notes I hold against Walker. They are substantially paid.' This is certainly true and they were paid by the transfer of the land to him, as they were a part of the consideration. Are not these debts in which plaintiff was only the surety in precisely the same situation? Can part be paid, and not all? Could defendant be allowed to select what he should consider paid, and what not paid? Can the debt be paid as to Walker, and not as to his surety? There was then certainly a misapprehension on the part of the parties as to their legal rights at the time, and I do not believe defendant would have endeavored to persuade plaintiff to enter into the contract and execute the notes and mortgages if he had known of the plaintiff's rights, or if he had thought of the equity of his claim; and certainly the plaintiff would not have bound himself to pay a debt if he had known that in legal effect it was already paid. When one, under a mistake of law, acknowledged himself under an obligation which the law will not impose, he should not be bound thereby. *Warder v. Tucker*, 7 Mass. 449. If, by reason

using or selling an article which all men are equally at liberty to use and sell, lacks consideration to support it.¹ And a promise to pay for past services, rendered without a request, is void for want of consideration.²

of the mistake, there is no consideration for the contract, it, like any other similar agreement without consideration, is void. Such, for instance, is one's guaranty of another's debt, founded on the debtor's forbearance to levy an attachment for which in fact there is no valid ground. Bishop on Contracts, § 696." In *Dwelle v. Dwelle* 1 Kan. App. 473; 40 Pac. Rep. 825, it was held that a writing in words and figures, as follows: "Marion, Kansas, March 11th, 1889. Messrs. F. E. Dwelle and Charles A. Sayre—Dear Sirs: Upon my own motion, and to show you my earnest desire for peace between us, having in view the great expense to which you have been put in recent litigation, in which you were concerned, I voluntarily agree to assume part of that burden, and agree to pay you by the 1st of October, A. D. 1889, the sum of six hundred (\$600.00) dollars, and for the purpose of privacy would thank you to intrust this paper to Dennis Madden, Esq. Your obedient servant, J. C. Dwelle," does not import a consideration upon its face, but the consideration therefor must be alleged and proven by the party who relies upon it for the basis of a cause of action.

¹ *Schroder v. Neilson*, 39 Neb. 335; 57 N. W. Rep. 993.

² *Myers v. Dean* (1895), 11 Misc. R. 368; 32 N. Y. Supl. 237, per Bookstaver, J.. "It is well settled that, where services are rendered by a volunteer without request, an action can not be maintained to recover their value. *Bartholomew v. Jackson*, 20 Johns. 28; *Livingston v. Ackeston*, 5 Cow. 531; *Williams v. Hutchinson*, 3 N. Y. 312; *McCarthy v. Mayor*, 96 N. Y. 1. An express promise to pay for past services, rendered without a request, is void for want of consideration. The defendant was under no obligation to make the promise or to pay for services theretofore rendered. It was wholly voluntary, and can not be made the basis of an action. *Presbyterian Church v. Cooper*, 112 N. Y. 517; 20 N. E. Rep. 352; *Twenty-third Street Baptist Church v. Cornell*, 117 N. Y. 601; 23 N. E. Rep. 177; *Eastwood v. Kenyon*, 11 Adol. & E. 438. A primary benefit voluntarily conferred by plaintiff, and adopted by defendant, is not such a consideration as will sustain an action on a subsequent express promise. *Smith v. Ware*, 13 Johns. 257; *Ehle v. Judson*, 24 Wend. 97; *Geer v. Archer*, 2 Barb. 420; *Chilcott v. Trimble*, 13 Barb. 502; *Ainsley v. Mead*, 3 Lans. 116."

CHAPTER VI.

IMPOSSIBLE CONTRACTS.

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| <p>§ 216. Impossibility defined.
 217. The general rule.
 218. Impossibility by act of God.
 219. Contracts excepting acts of God.
 220. Events exempting carrier.
 221. The same subject continued.
 222. Physical impossibility at time of contracting—Known to the parties.
 223. Further illustration.
 224. Legal impossibility at time of contracting.
 225. Impossibility caused by subsequent law.
 226. The same subject continued—Recovery <i>pro tanto</i>.
 227. Contracts of service.
 228. The same subject continued—Recovery.
 229. Further illustrations of recovery.</p> | <p>§ 230. Contracts for personal acts.
 231. What are contracts for personal acts.
 232. Contracts to build becoming impossible.
 233. The same subject continued.
 234. Particular contracts concerning specific things.
 235. The same subject continued—Further illustrations.
 236. Bailment.
 237. Delivery of goods.
 238. "Strikes."
 239. Impossibility caused by the promisee.
 240. Impossibility caused by the promisor.
 241. Alternative promises.
 242. The same subject continued.
 243. False assumption of impossibility—Provisions excepting impossibility.</p> |
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§ 216. **Impossibility defined.**—A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost.¹ But where no express or implied provision as to the event of impossibility can be found in the terms or circumstances of the agreement, it is a general rule of construction, founded on the absolute and unqualified term of the promise, that the promisor remains responsible for damages, notwithstanding the supervening impossibility.²

¹ *Moss v. Smith*, 9 C. B. 94, 103, where the court said: "A man may be said to have lost a shilling, when he has dropped it into deep water; though it might be possible, by some very expensive contrivance, to recover it."

² *Switzer v. Pinconning Co.*, 59 Mich. 488; *Chicago, M. & St. P. Ry. Co. v. Hoyt* (1893), 149 U. S. 1; 13 Sup. Ct. Rep. 779, where the court said: "There can be no question that a party may, by an absolute contract, bind himself or itself to per-

§ 217. **The general rule.**—The general doctrine that, when a party voluntarily undertakes to do a thing without qualification, performance is not excused because by inevitable accident or other contingency not foreseen it becomes impossible for him to do the act or thing which he agreed to do, is well settled.¹ But it is equally well settled that when performance depends on the continued existence of a given person or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation. Executory contracts for personal services, for the sale of specific chattels, or the use of a building, are held to fall within this principle.² Thus an ob-

form things which subsequently become impossible, or pay damages for the non-performance; and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it can not be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." *Sauner v. Phoenix Ins. Co.*, 41 Mo. App. 480, where the court said: "For, where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." *Harrison v. Missouri Pacific Railroad*, 74 Mo. 364; *White v. Missouri Pacific Railroad*, 19 Mo. App. 400; *Fulkerson v. Eads*, 19 Mo. App.

620; *Indiana R. Co. v. Adamson*, 114 Ind. 282; 15 N. E. Rep. 5; *Vicksburg, etc., Co. v. Gorman*, 70 Miss. 360; 11 So. Rep. 680; *Phillips v. Stevens*, 16 Mass. 238; *Vyse v. Wakefield*, 6 M. & W. 442; *Makin v. Watkinson*, L. R. 6 Ex. 31. See, also, *Thornborow v. Whitacre*, 2 Ld. Raym. 1164; *James v. Morgan*, 1 Lev. 111; *Wood v. Malone*, 131 Pa. St. 554.

¹ *Lorillard v. Clyde* (1894), 142 N. Y. 456; 37 N. E. Rep. 489. This doctrine protects the integrity of contracts, and one of the reasons assigned in its support in the early case of *Paradine v. Jane*, Aleyn, 26, is that, as against such contingencies, the party could have provided by his contract. See *Harmony v. Bingham*, 12 N. Y. 99; *Ford v. Cotesworth*, L. R. 4 Q. B. 127; *Jones v. United States*, 96 U. S. 24.

² *Dexter v. Norton*, 47 N. Y. 62; *People v. Globe Mut. Life Ins. Co.*, 91 N. Y. 174; *Taylor v. Caldwell*, 113 E. C. L. 826. These cases are not exceptions to the rule that contracts voluntarily made are to be enforced, but the courts, in accordance with the manifest intention, construe the contract as subject to an implied condition that the person or thing shall be

ligation in a contract providing for the organization of a corporation, and that defendant shall have the management thereof, and in consideration shall guarantee plaintiff a dividend of not less than seven per cent. per annum for seven years, terminates *prima facie* with the dissolution of the corporation.¹ And most contracts for personal services are subject to the implied condition that the party contracting to perform shall continue in health, and such contracts are revocable upon his incapacity from illness to perform.² Where one employed to

in existence when the time of performance arrives. So if, after a contract is made, the law interferes and makes subsequent performance impossible, the party is held to be excused. *Jones v. Judd*, 4 N. Y. 412.

¹ *Lorillard v. Clyde* (1894), 142 N. Y. 456; 37 N. E. Rep. 489, per Andrews, C. J.: "It must be conceded that it is difficult to draw the line and to determine the exact limitations of the principle. When the executory contract relates to specific chattels, and the subject-matter is destroyed without fault of the party, the implied condition arises, and excuses performance. But where the contract is based on the assumed existence and continuance of a certain condition, or upon the continuance of a subject-matter which, however, is not the direct object of the contract, is the principle in such cases excluded? The present case illustrates what we have in mind. The contract in question was not with the corporation whose life was extinguished by the judgment of dissolution. But the guaranty assumed that the corporation would continue in existence during the seven years period. The liability which the defendants assumed was in consideration of the benefits which might accrue to them from the management of the transportation business of the corporation during that period. Upon the assumption that the death of the corporation

was brought about without their fault, were they thereafter bound? Is the doctrine of implied condition less applicable than it would be if the contract had been between the defendants and the corporation? If, in the one case, the contract, so far as it was unexecuted, would be terminated, did not the happening of the same event terminate the engagement of these parties, based on the assumed continuance of the corporation in life? There is, in the present case, we think, an element which strengthens the conclusion we have reached, that the obligation of the contract terminated *prima facie* with the dissolution of the corporation. There is something more than an implied and wholly unexpressed condition that the corporation should continue in life during the seven years. It is the fair construction of the language of the contract itself. The contract was not unilateral. It contains mutual stipulations. These mutual stipulations, by their terms, look to the continuance of the corporation, and the mutual obligations into which the parties entered are qualified by this understanding."

² *Powell v. Newell*, 59 Minn. 406; 61 N. W. Rep. 335, per Collins, J.: "Plaintiff's contract, the consideration for the note, was for the rendition of professional, and hence personal, services. He could not delegate the performance of these services to

teach in a public school for a certain time is able and willing to teach during that time, the fact that the school was necessarily closed part of the time by order of the board of health, because of the prevalence of a contagious disease among the pupils, does not deprive the teacher of the right to compensation for the entire time, since such closing of the schools is not caused by the act of God.¹

another physician. The rule is that contracts for personal services are subject to the implied condition that the party contracting to perform shall continue in health, and such contracts are revocable by his incapacity from illness to perform. If he becomes disabled through sickness, the other party is released from his obligation under his part of the contract. But whether sickness is to constitute an excuse sufficient to release the party who has agreed to render personal services, or sufficient to absolve one who has contracted with him for such services, must necessarily depend on the circumstances of each case. In this instance we think the defendant was released from his obligation to pay in accordance with the terms of his note."

¹ *School Town of Carthage v. Gray*, 10 Ind. App. 428; 37 N. E. Rep. 1059, per Reinhard, J.: "It is the general rule that when the performance of a contract becomes impossible on account of an act of God, the non-performance is excused, and no damages can be recovered therefor. 2 *Parsons on Contracts* (8th ed.), 786-789. But it is often a difficult question to determine when such failure to perform was caused by an act of God, as mere hardship or great difficulty will not suffice. The precise question now under consideration was decided by the supreme court of Michigan in the case of *Dewey v. Union School Dist.*, 43 Mich. 480; 5 N. W. Rep. 646. In that case the plaintiff had been regularly employed as a teacher

in the public schools for ten months, at \$130 per month. He taught the school from the 2d day of September up to the 10th day of December, when the school officers closed the schools on account of the prevalence of small-pox in the city, and kept them closed until the 17th of March, at which time they were re-opened, and the plaintiff resumed his duties. The district refused to pay for the period of suspension, and the teacher brought his action to recover it. It was claimed, among other defenses, that the suspension was owing to the act of God, and that, consequently all parts of the contract were suspended for the time being. The court decided, however, that the position was not tenable. In the course of the opinion, Graves, J., speaking for the court, said: 'Beyond controversy, the closing of the schools was a wise and timely expedient, but the defense interposed can not rest on that. It must appear that observance of the contract by the district was caused to be impossible by act of God. It is not enough that great difficulties were encountered, or that there existed urgent and satisfactory reasons for stopping the schools. But this is all the evidence tended to show. The contract between the parties was positive, and for lawful objects. On one side school buildings and pupils were to be provided, and on the other personal service as teacher. The plaintiff continued ready to perform, but the district refused to open its houses

§ 218. Impossibility by act of God.—Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses are acts of God.¹ The act of God is in some cases said to excuse the breach of a contract; but this is in fact an inaccurate expression. All that is meant is that the accident called “act of God” was not within the contract.² The general rule is that, where an obligation or a duty is imposed upon a person by law, he will be absolved from liability for non-performance of the obligation, if such non-performance was occasioned by an act of God. But when one undertakes by an express contract to do a given act, he is not absolved from liability for non-performance, even though he is prevented from doing the same by an act of God. In that class of cases, if a person desires to absolve himself from liability for non-performance under any circumstances, he should so stipulate in his contract.³

§ 219. Contracts excepting acts of God.—If goods are delivered to a railroad company for transportation without more, the liability of the carrier attaches, and this means an insurance, a responsibility for every loss, save only such as result from the acts of God or the public enemy,⁴ and this is the rule

and allow the attendance of pupils, and it thereby prevented performance by the plaintiff. Admitting that the circumstances justified the officers, and yet there is no rule of justice which will entitle the district to visit its own misfortune upon the plaintiff. He was not at fault. He had no agency in bringing about the state of things which rendered it eminently prudent to dismiss the schools. It was the misfortune of the district, and the district, and not the plaintiff, ought to bear it.”

¹ *Gleeson v. Virginia Midland Ry. Co.*, 140 U. S. 435, 439.

² *Baily v. De Crespigny*, L. R. 4 Q. B. 180; *Canham v. Barry*, 15 C. B. 597, where the court said: “A man might, by apt words, bind him-

self that it shall rain to-morrow, or that he will pay damages.” *Mayor of Berwick-upon-Tweed v. Oswald*, 3 E. & B. 653, where the court said: “There is nothing to prevent parties, if they choose, by apt words, to express an intention so to do, from binding themselves by a contract as to any future state of the law.”

³ *Central Trust Co. v. Wabash R. Co.*, 31 Fed. Rep. 440, 441; *Wear Commissioners v. Adamson*, L. R. 1 Q. B. D. 546; *Nichols v. Marsland*, L. R. 2 Ex. D. 1.

⁴ *Gregory v. Wabash R. Co.*, 46 Mo. App. 574; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, where the court said: “The duty of a common carrier is to transport and deliver safely. He is made by law an insurer against all failure to

with regard to all common carriers. In the absence of an express stipulation to the contrary, common carriers are responsible for all loss save that caused by act of God and the public enemy.¹ The contract of longshoremen, bargemen, lightermen, canal-boatmen, and boatmen of every description, who engage in the business of carrying goods indifferently for all who may employ them, is, in the absence of an express contract regulating the terms, subject by the common law to the same implied liabilities and exceptions as that of a common carrier by land.² And ferrymen, proprietors of land vehicles, like stage coaches, water craft, express companies, and in fact all persons who make it a business to carry for hire the goods of such as choose to employ them, no matter what the method of carriage is, are common carriers, and liable as such.³

§ 220. Events exempting carrier.—A land-slide in a railway cut, caused by an ordinary fall of rain, is not “an act of God” which will exempt the railway company from liability to passengers for injuries caused thereby while being carried on the railway.⁴ So, also, a fire which originated in the battery room of an hotel is not “an act of God” absolving an inn-keeper from liability.⁵ But a snow storm of such violence as

perform his duty, except such failure as may be caused by the public enemy, or by what is denominated the act of God.” *Park v. Preston*, 108 N. Y. 434; *Merritt v. Earle*, 29 N. Y. 115; *Hutchinson on Carriers*, 2d ed., § 170 a.

¹ *Hutchinson on Carriers*, § 170 a; also, loss caused by act of public authority, and by act of shipper himself, and loss arising from inherent nature of the goods, are excepted from the carrier's common law liability.

² *Nugent v. Smith*, L. R. 1 C. P. D. 423; *Hutchinson on Carriers*, § 58 a, citing *Bowman v. Teall*, 23 Wend. 306; *Parsons v. Hardy*, 14 Wend. 215; *DeMott v. Laraway*, 14 Wend. 225;

Humphreys v. Reed, 6 Whart. 435; *Fuller v. Bradley*, 25 Pa. St. 120.

³ *Hutchinson on Carriers*, § 59, citing as to hackney coaches, *Bonce v. Dubuque*, etc., R. Co., 53 Iowa, 278; as to omnibuses, *Parmelee v. Lowitz*, 74 Ill. 116; *Dibble v. Brown*, 12 Geo. 217; *Parmelee v. McNulty*, 19 Ill. 556; as to street cars, *Levi v. Lynn*, etc., R. Co., 11 Allen, 300; and see, also, *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, 19 Wend. 251; *Dwight v. Brewster*, 1 Pick. 50; *Powell v. Mills*, 30 Miss. 231.

⁴ *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435.

⁵ *Fay v. Pacific Improvement Co.*, 93 Cal. 253; 26 Pac. Rep. 1099; 28 Pac. Rep. 943.

to prevent the moving of trains is an act of God.¹ And a furious wind which blows a car from the track is "an act of God," and the carrier is not liable, if the car took fire and burned from a lamp, after it had been turned over by the wind.² So, also, of an extraordinary flood;³ and the flood may be extraordinary without necessarily being unprecedented.⁴ And the occurrence of such a flood in each of two preceding years does not deprive a flood of its "extraordinary" character;⁵ but precautions must be taken against such rises of high waters as are usual and ordinary, and reasonably to be anticipated at certain seasons of the year.⁶ The fall of a sign caused by such a wind as was likely to occur at that season of the year is not attributable to an act of God.⁷ So, also, losses caused by fire, not originating in lightning,⁸ by explosion,⁹ by collision¹⁰ or by a landslide,¹¹ are not caused by an "act of God." But a loss caused

¹ *Black v. Chicago, B. & Q. R. Co.*, 30 Neb. 193; 46 N. W. Rep. 428; *Ballentine v. North Mo. R. Co.*, 40 Mo. 491; *Pruitt v. Hannibal, etc., R. Co.*, 62 Mo. 527; *Briddon v. Great Northern R. Co.*, 28 L. J. Ex. 51.

² *Blythe v. Denver & R. G. R. Co.*, 15 Colo. 333; 11 L. R. A. 615.

³ *Gleeson v. Virginia R. Co.*, 140 U. S. 435; *Long v. Pennsylvania R. Co.*, 147 Pa. St. 343; 14 L. R. A. 741; *Davis v. Wabash R. Co.*, 89 Mo. 340.

⁴ *People v. Utica Cement Co.*, 22 Ill. App. 59; *Pittsburgh R. Co. v. Gilleland*, 56 Pa. St. 445; *Smyrl v. Niolon*, 2 Bail. L. 421; *Faulkner v. Wright, Rice L.* 107.

⁵ *Norris v. Savannah R. Co.*, 23 Fla. 182.

⁶ *Gleeson v. Virginia R. Co.*, 140 U. S. 435, 440; *Dorman v. Ames*, 12 Minn. 451; *Ewart v. Street*, 2 Bailey L. (S. C.) 157; *Executors of Moffat v. Strong*, 10 Johns. 11; *New Brunswick, etc., Co. v. Tiers*, 24 N. J. Law, 697; *Great Western R. Co. v. Braid*, 1 Moore P. C. (N. S.) 101.

⁷ *St. Louis R. Co. v. Hopkins*, 54 Ark. 209; 12 L. R. A. 189. See, also,

Shipley v. Fifty Associates, 101 Mass. 251; *Hannem v. Pence*, 40 Minn. 127; *Murray v. McShane*, 52 Md. 217. A brick blown off a wall; land-owner held liable for damages. *Salisbury v. Herchenroder*, 106 Mass. 458. The case of a sign, hung over a street in a city, with due care as to its construction and fastenings, but in violation of a city ordinance which subjected its owner to a penalty for placing and keeping it there, being blown down by the wind in an extraordinary gale, and in its fall a bolt which was part of its fastenings, struck and broke a window in a neighboring building. It was held that the owner of the sign was liable for the injury of the window.

⁸ *Forward v. Pittard*, 1 T. R. 27; *Miller v. Steam Navigation Co.*, 10 N. Y. 431; *Story on Bailment*, § 507.

⁹ *Propeller Mohawk*, 8 Wall. 153.

¹⁰ *Plaisted v. Boston, etc., Navigation Co.*, 27 Maine, 132; *Hays v. Kennedy*, 41 Pa. St. 378.

¹¹ *Gleeson v. Virginia R. Co.*, 140 U. S. 435.

by an earthquake exempts the carrier from his common law liability.¹

§ 221. The same subject continued.—The true rule is that the non-performance of a contract is not excused by the act of God, where it may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible.² And the negligent act of a person, concurring with an act of God, which produces damages makes the party liable. The act of God must be the sole and proximate cause of the damage in order to exempt one from liability on that ground.³

§ 222. Physical impossibility at time of contracting—Known to the parties.—Obvious and absolute physical impossibility, apparent upon the face of the promise, and thus known to the parties, renders the promise void.⁴ Thus, a charter-party, exe-

¹ *Slater v. South Car. R. Co.*, 29 S. C. 96.

² *Williams v. Vanderbilt*, 28 N. Y. 217; *White v. Mann*, 26 Maine, 361. See the following cases where "act of God" is discussed: *Dunsbach v. Hollister*, 49 Hun, 352, where a quantity of sand was deposited opposite plaintiff's house and blew into the house; it was held that defendant could not excuse himself from liability because of the wind, it being his duty to remove sand. *Long v. Penn. R. Co.*, 147 Pa. St. 343; 14 Lawyers' Rep. Ann. 741; *Central R. Co. v. Kent*, 87 Geo. 402; *Norling v. Allee*, 37 N. Y. S. R. 409; *Hummel v. Seventh Street Co.*, 20 Ore. 401; 26 Pac. Rep. 277; *Smith v. Western R. Co.*, 91 Ala. 455; 11 Lawyers' Rep. Ann. 619, holding that a railroad is not bound to provide against unusual floods; *Columbus R. Co. v. Bridges*, 86 Ala. 448; *Coosa, etc., Co. v. Barclay*, 30 Ala. 120; *McHenry v. Philadelphia R. Co.*, 4 Harr. (Del.) 448; *Chicago R. Co. v. Sawyer*, 69 Ill. 285; *Fergusson v. Brent*, 12 Md. 33; *The Bark Charlotte*, 9 Bened. 1; *Merritt v. Earle*, 29 N. Y. 117; *Michaels*

v. N. Y. Cent. R. Co., 30 N. Y. 564; *Hays v. Kennedy*, 41 Pa. St. 378, contains an elaborate opinion distinguishing "act of God," "inevitable accident," "unavoidable dangers of the river navigation;" *Hays v. Kennedy*, 3 Grant (Pa.), 357; *Nugent v. Smith*, L. R. 1 C. P. D. 423, a leading case, containing Lord Cockburn's exposition of "act of God." The carrier undertook to carry a horse from London to Aberdeen, but after the ship got out to sea the horse injured herself through fright, caused by the rolling of the vessel. The court held that the carrier was not liable. *Cowley v. Davidson*, 13 Minn. 92; *Keystone, etc., Co. v. Dole*, 43 Mich. 370; *Dewey v. Union School Dist.*, 43 Mich. 480; *Harmony v. Bingham*, 12 N. Y. 99; *Vanderslice v. Newton*, 4 N. Y. 130.

³ *Dunsbach v. Hollister*, 49 Hun, 352. See also, cases in preceding note.

⁴ Where the impossibility is known to the parties at the time of making the agreement it seems obvious that there can be no intention of performing it on the one side, and no expect-

cuted on the 15th of March, covenanting that the ship would proceed from where she then lay on or before the 12th of February, was held void, and the owner having made the trip could recover freight, as the non-sailing on the 12th of February, being impossible, was not a condition precedent.¹ On the same principle a covenant to insure is not broken by the covenantor not insuring the very next minute after he has entered into a covenant to do so; and if no time be expressed, he must have a reasonable time in which to do it.² And all conditions annexed to estates, that contain in them matter at the time of making them impossible to be done, are void.³ "If a man be bound in an obligation, with condition that, if the obligor do go from the church of St. Peter in Westminster to the church of St. Peter in Rome within three hours, then the obligation shall be void, the condition is void and impossible, and the obligation standeth not."⁴

§ 223. Further illustration.—Where a person contracts to build a building of a certain kind of stone, and to complete the same within a specified time, the impossibility of procuring the stone, to be an excuse for delay, must have existed when the contract was made.⁵ A contract which in the very

tation of performance on the other, and therefore the essentials of a valid promise in regard to such act are wanting. The impossible act can not form the matter for a promise, or for the consideration of a promise; Leake on Contracts, 686. A. agrees with X. to discover treasure by magic. The agreement is void. Indian Contract Act, § 56.

¹ Hall v. Cazenove, 4 East, 477.

² Doe v. Ulph, 13 Q. B. 204.

³ Sheppard's Touchstone of Common Assurance, 132.

⁴ Coke on Littleton, 206 b.

⁵ Wright v. Meyer (Texas App. 1894), 25 S. W. Rep. 1122, where the court said: "Our view of the law on the question presented is that the impossibility of getting the stone, to be an excuse for the delay connected with it, must have existed at the time the contract

was entered into. A mutual mistake of fact would then be presented, which would relieve either party. The evidence shows that no such impossibility existed at that time. The inability of plaintiff to obtain the stone is due to causes that arose afterwards, without any agency or default on the part of defendant, and in some measure, if not altogether, by default of the plaintiff to take steps in time to secure the supply of stone. Plaintiff may have made a prolonged and honest effort to secure it, notwithstanding the difficulty or apparent hopelessness of doing so; but the authorities are clear that this, alone, would not avail him as a defense for a non-performance of his contract." Yetter v. Hudson, 57 Texas, 604; Dermott v. Jones, 2 Wall. 1.

nature of things is essentially impossible of performance, and known by the parties to be so, is void.¹ As between individuals, the impossibility which releases a man from the obligation to perform his contract must be a real impossibility, and not a mere inconvenience. And, while such an impossibility may release the party from liability to suit for non-performance, it does not stand for performance, so as to enable the party to sue and recover as if he had performed.²

§ 224. Legal impossibility at time of contracting.—Legal impossibility at the time of contracting renders the contract void. A promise to marry by one who is already married, and known so to be by the other, is a void promise;³ but if the fact that one of the parties is married is not known to the other, he is liable in damages for deception.⁴ Where a person being indebted to another agreed with the bailiff of his creditor that, in consideration of the bailiff discharging him from the debt, he would do certain work, it was held that as the bailiff could not legally discharge the debt of his master, the proposed consideration was impossible and the promise void.⁵ A covenant by a person to pay a sum of money to himself and others was held void.⁶ A bond was conditioned that, if the obligee should procure the formation of a company for taking the assignment of a patent, and in consideration thereof the obligor should

¹ *Bennett v. Morse* (Colo. App. 1894), 39 Pac. Rep. 582. In this case sixteen persons signed a contract attached to a note of W., which recited that the note "is secured by attached certificate of stock No. 44" of a specified corporation "for 5,000 shares of the par value of \$20 each;" and that if the note for \$2,500, with interest, is not paid by W. when due, "we will each purchase of the above-attached stock 400 shares, and pay therefor in cash 50 cents per share." It was held that such contract being joint, and in effect calling for the purchase of 6,400 shares to come out of 5,000, was impossible of performance and void.

² *Smoot's Case*, 15 Wall. 36, 46.

³ *Paddock v. Robinson*, 63 Ill. 99;

Haviland v. Halstead, 34 N. Y. 643. The syllabus of this case is: "An action for the breach of a contract of marriage, between parties in this state, can not be maintained where one of the parties was by law incapable of entering into the marriage relation at the time of making the contract."

⁴ *Kelley v. Riley*, 106 Mass. 339; *Wild v. Harris*, 7 C. B. 999; *Millward v. Littlewood*, 5 Ex. 775.

⁵ *Harvey v. Gibbons*, 2 Lev. 161.

⁶ *Faulkner v. Lowe*, 2 Ex. 595. "The covenant, to my mind, is senseless. I do not know what is meant, in point of law, by a man paying himself." Per Pollock, C. B.

pay him certain sums of money, the bond should be void; the patent contained a proviso that it should be void if assigned to more than five persons, and consequently the assignment to the company, which was intended to consist of more than five persons, was legally impossible; it was held that the possibility of such an assignment was the basis of the contract and that the bond was void.¹ But it was held that, where the defendant had covenanted that he would perfect in England a patent right granted in America so as to insure to the plaintiff the exclusive right of vending the article patented in the provinces of Upper and Lower Canada, he was not excused from performance, although it appeared that the power of granting exclusive privileges of this kind appertained not to England, but to the provinces, and were never granted except to subjects of Great Britain and residents of the provinces, and could not be granted to either the plaintiff or defendant, as both were citizens of the United States.²

§ 225. Impossibility caused by subsequent law.—No contract can be carried into effect which was originally made contrary to the provisions of law; or which, being made consistently with the rules of law at the time has become illegal in virtue of some subsequent law.³ Accordingly performance is excused by

¹ *Duvergier v. Fellows*, 5 Bing. 248.

² *Beebe v. Johnson*, 19 Wend. 500, where the court said: "It is supposed by the counsel for the defendant that a legal impossibility prevented the fulfillment of the covenant to perfect the patent right in England, so as to secure the monopoly of the Canadas to the plaintiff, and hence that the obligation was dispensed with so that no action can be maintained. There are authorities which go that length. Coke on Littleton, 206 b; Sheppard's Touchstone of Common Assurance, 164; 2 Coke on Littleton, 26; Platt on Covenants, 569; but if the covenant be within the range of possibility, however absurd or improbable the idea of the execution of it may be, it will be up-

held; as where one covenants it shall rain to-morrow, or that the pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation, it must appear that the thing to be done can not by any means be accomplished; for, if it is only improbable, or out of the power of the obligor, it is not in law deemed impossible. Now it is clear that the fulfillment in this case can not be considered an impossibility within the above exposition of the rule; because, for anything we know to the contrary, the exclusive right to make, use and vend the machine in the Canadas might have been secured in England by act of parliament or otherwise."

³ *Atkinson v. Ritchie*, 10 East, 534.

a supervening impossibility caused by operation of a change in the law.¹ But the fact that performance of a contract is rendered more burdensome and expensive by a law enacted after it is entered into does not excuse performance.² Accordingly a contract by an owner of land with a builder to erect houses is discharged and the owner excused from allowing the building to proceed where a subsequent ordinance appropriates the land for a street.³ Where the further prosecution of work in the alteration of a building is forbidden by the superintendent of buildings, as authorized by law, for a defect not occasioned by the contractor, and he is thus prevented from performing that which, by the terms of the contract, is made a condition precedent to payment, he is discharged from performance.⁴ An absolute contract to move a building from one lot to another was held discharged where the requisite permission could not be obtained from the city officials.⁵ But persons entering into a contract, relying on a decision of the highest court of the state, are bound in the performance thereof by the law as declared by a subsequent decision of the same court overruling the former decision as erroneous.⁶ The laying an

¹ *Baily v. De Crespigny*, L. R. 4 Q. B. 180.

² *Baker v. Johnson*, 42 N. Y. 126. The defendants entered into a contract to deliver a quantity of alcohol "on board vessel under the tax law, from 20th August to 31st August, 1862, duty paid." Subsequently the secretary of the treasury, by authority of law, postponed the time when the act to provide internal revenue was to go into operation, from the 1st of August to the 1st of September; in consequence of which there was no tax imposed on alcohol during the month of August. It was held that the defendants were bound to perform and that the performance had not been rendered impossible by the act of law.

³ *Heaver v. Lanahan*, 74 Md. 493; 22 Atl. Rep. 263; *Slipper v. Tottenham R. Co.*, L. R. 4 Eq. 112; *Baily v. De Crespigny*, L. R. 4 Q. B. 180; *Black*

v. Woodrow, 39 Md. 194; *Clark v. Marsiglia*, 1 Denio, 317.

⁴ *Heine v. Meyer*, 61 N. Y. 171. See, also, *Paradine v. Jane*, Aleyn, 26; *Mounsey v. Drake*, 10 John. 27; *People v. Bartlett*, 3 Hill, 570.

⁵ *Theobald v. Burleigh*, 66 N. H. 574; 23 Atl. Rep. 367. See, also, *Harvey v. Coffin*, 44 N. H. 563; *Kimball v. Cochecho Railroad Co.*, 23 N. H. 579; *Blake v. Niles*, 13 N. H. 459; *Melville v. De Wolf*, 4 E. & B. 844.

⁶ *Allen v. Allen* (Cal.), 27 Pac. Rep. 30, where, when the contract was made, the law, as declared by the supreme court of California, was that a conveyance absolute in form, but intended merely as security, did not pass the legal title to the grantee, but when the time for performance arrived the court had overruled this and held that a deed absolute in form, intended as a mortgage, did convey the title. It

embargo for an unlimited time does not extinguish a promise to deliver debentures, but operates a suspension only during the continuance of the law.¹ It is no bar to a *scire facias* against bail, that the principal, since the arrest, was duly enlisted as a non-commissioned officer in the service of the United States, and is holden to do duty as such.² A condition in a replevin bond, that the obligor shall prosecute his action of replevin to final judgment, is saved by his prosecuting it until the writ is abated by the death of the defendant.³ A ship was chartered to go from New Bedford to Savannah, there take a cargo of timber and carry the same to England. After the cargo was laden on board, an embargo took place, and it was agreed by the agent for the hirers and the master that she should return to New Bedford and there wait the ending of the embargo. After arriving at New Bedford, war was declared against England, which put a stop to the voyage. In the meantime the agent had sold the cargo. The purchaser was held entitled to the cargo notwithstanding the master had signed bills of lading promising to deliver the cargo in England.⁴ On the same principle, where a contract required the delivery of smooth-bore cannon to the claimants for alteration, and while the work was in progress the government orders it to be suspended, no damages can be recovered on a counterclaim for not finishing the work.⁵ A covenant by a lessor that neither he nor his assigns would permit any building upon a piece of land adjoining the devised premises was held to be discharged by a railway company subsequently taking the land under compulsory powers given them by statute, to build a

was held that this latter view of the law should have governed in the performance of the contract. See *Hughes v. Davis*, 40 Cal. 117; *Espinosa v. Gregory*, 40 Cal. 58; *Boyd v. Alabama*, 94 U. S. 645.

¹ *Baylies v. Fettyplace*, 7 Mass. 325.

² *Harrington v. Dennie*, 13 Mass. 93.

³ *Badlam v. Tucker*, 18 Mass. 284.

⁴ *Brown v. Delano*, 12 Mass. 370. See, also, *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417.

⁵ *Nourse v. United States*, 25 Ct.

Claims, 7. This case also decides that where a contract contemplates that the government shall decide when suspended work shall be resumed or the original contract be abandoned, unreasonable neglect to decide is equivalent to a decision. See, also, *Jones v. Judd*, 4 N. Y. 412; *Wadham v. Marlowe*, 8 East, 314; *Mills v. East London Union*, L. R. 8 C. P. 79; *Doe v. Rugeley*, 6 Q. B. 107; *Davis v. Cary*, 15 Q. B. 418; *Brown v. Mayor*, 9 C. B. (N. S.) 726.

railway station on it. "The defendant is discharged from his covenant by the subsequent act of parliament, which put it out of his power to perform it, on the principle expressed in the maxim '*lex non cogit ad impossibilia.*'" ¹

§ 226. The same subject continued.—Recovery pro tanto.—

If by the terms of a contract for work and labor the full price is not to be paid until the work is completed, and a complete performance becomes impossible by act of the law, the contractor may recover for the work actually done at the full prices agreed on.² Thus, where the defendant contracted with the state to construct a section of a canal, and made a sub-contract with the plaintiffs for a portion of the work, at so much per yard for excavation and embankment, payable monthly, except ten per cent., which was not to be paid until the final estimate, and before the completion of the plaintiff's job the work was stopped by the state officers, and the original contract terminated by an act of the legislature, it was held that the plaintiffs were entitled to recover the price agreed on for the work actually done by them.³ On a like principle, a contractor, after having started repairs on a house, is entitled to recover at the contract price for the work actually done, if, without his fault, the officials of the city stop the work.⁴ Where one employed to move a building and place it upon a certain lot is prevented by the city officials from fulfilling his contract by withholding the requisite permission, he is nevertheless entitled to recover for the services actually rendered by him in attempting to remove the building.⁵ But after a contractor knows that there is a legal impediment in the way of performance, he must cease at once and can not recover for the services rendered after knowledge of such legal impossibility is brought home to him.⁶

¹ Baily v. De Crespigny, L. R. 4 Q. B. 180. Nourse v. United States, 25 Ct. Claims, 7.

² Heine v. Meyer, 61 N. Y. 171; ⁵ Theobald v. Burleigh, 66 N. H. 574; Jones v. Judd, 4 N. Y. 412. 23 Atl. Rep. 367.

³ Jones v. Judd, 4 N. Y. 412.

⁶ Heaver v. Lanahan, 74 Md. 493;

⁴ Heine v. Meyer, 61 N. Y. 171; 22 Atl. Rep. 263.

§ 227. **Contracts of service.**—Contracts for personal services, which can only be performed during the life-time of the party contracting, are subject to the implied condition of his continuing alive and in health to perform them, and such contracts are revoked and nullified by his death or incapacity from illness.¹ Thus, if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract.² A painter is excused from performing his contract to paint a picture if his eyesight fails him.³ The contract of a singer, although absolute in form, is subject to the implied condition that she be in health at the time performance is due, and illness excuses her.⁴ If one man contract with another to serve him as an overseer for a year and dies before the expiration of that time, his estate is not liable to respond in damages for a failure to serve for the stipulated period.⁵ An agreement to work as a farm hand is revoked by the hand's illness.⁶ Sickness will also excuse delay in the performance of a personal contract.⁷ While sickness is generally an excuse for the non-performance of a personal contract, still the sickness must be such as could not have been provided against or foreseen. Thus, where a contract was made for the personal services of a man and his wife for the period of one year at a specified sum, and four months thereafter the wife left the service in anticipation of her confinement, it was held that she should have provided against this contingency, which

¹ *Taylor v. Caldwell*, 3 B. & S. 826, where the court said: "There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person, and such promises, e. g., promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party; and, therefore, in such cases, the contract is in terms broken if the promisee dies before fulfillment. Yet it was very early determined that if the performance is personal the executors are not liable. * * * In those cases the only ground on which the parties

or their executors can be excused from the consequences of the breach of the contract is, that from the nature of the contract, there is an implied condition of the continued existence of the life of the contractor."

² 2 Williams on Executors, 1560; *Marshall v. Broadhurst*, 1 Tyr. 348; *Wentworth v. Cock*, 10 A. & E. 42.

³ *Hall v. Wright*, E. B. & E. 746, 749.

⁴ *Robinson v. Davison*, L. R. 6 Ex. 269; *Spalding v. Rosa*, 71 N. Y. 40.

⁵ *Givhan v. Dailey*, 4 Ala. 336.

⁶ *Dickey v. Linscott*, 20 Maine, 453.

⁷ *Green v. Gilbert*, 21 Wis. 395; *Wolfe v. Howes*, 20 N. Y. 197.

could have been foreseen, and that the employer was justified in discharging both without pay.¹ A contract to board a person for a specified time is subject to revocation on account of the death of either party.² An attorney at law is excused from completing his contract to render legal services, if he becomes too ill to properly do so.³ But the inability of an apprentice to work, caused by sickness without his fault, is no breach of his father's covenant in the indenture of apprenticeship, that he should "well and faithfully serve and give and devote his whole time and labor" to his master; nor is it ground for abatement or diminution of wages, which, in consideration of such a covenant, the master agreed to pay to him weekly during the whole term of apprenticeship, the master never having undertaken to terminate the contract.⁴ The sickness of an apprentice, however, discharges the contract on the side of the master, who is no longer bound by the articles.⁵ And generally in all contracts for personal services it is an implied condition that the death of either the employer or employee dissolves the contract.⁶

§ 228. The same subject continued—Recovery.—If a person renders personal services under an entire contract, which either his own, or his employer's sickness, or death, prevents him from fully performing, he can recover upon an implied assumption what those services are reasonably worth.⁷ Thus, where a

¹ *Jennings v. Lyons*, 39 Wis. 553.

² *Willington v. West Boylston*, 4 Pick. (Mass.) 101.

³ *Coe v. Smith*, 4 Ind. 79.

⁴ *Caden v. Farwell*, 98 Mass. 137. See, also, *Boast v. Firth*, L. R. 4 C. P. 1.

⁵ *Jackson v. Union, etc., Ins. Co.*, L. R. 10 C. P. 125.

⁶ *Farrow v. Wilson*, L. R. 4 C. P. 744, where the court said: "Generally speaking, contracts bind the executor or administrator, although not named. Where, however, personal considerations are of the foundation of the contract, as in cases of principal and agent and master and servant, the death of either party puts an end to

the relation." See, also, *Whincup v. Hughes*, L. R. 6 C. P. 78.

⁷ *Parker v. Macomber*, 17 R. I. 674, where the court said: "In case of the destruction of the fruits of the service so that neither party has the value of them, the loss must be adjusted according to the scope of the contract and the circumstances of the case, and different courts may come to diverse conclusions in cases which are very similar to each other. But when, as in this case, the defendant has received and retains the benefit of the service, we think that the plaintiff should recover. It is not just that one should benefit by the labor of another, and make no return, when the event which

man and his wife agreed to live with the wife's aunt and care for her, the death of the wife was held to give cause to the aunt to rescind the contract, but the husband was allowed to recover on a *quantum meruit* for the services he and his wife rendered before her death.¹ Where the plaintiff, having contracted to labor for the defendant six months at a specified price for the term, was taken unwell, and left the defendant's services, and was so unwell for about a month that he was unable to perform the full labor of a man, and then he recovered his health, but did not return to the defendant's employment, it was held that he was entitled to recover for his services, upon a *quantum meruit*, for the time he labored.² A sailor can recover *pro tanto* on a contract interrupted by his sickness;³ and so can a laborer.⁴ The same rule obtains in regard to a clerk.⁵ A servant, who, by his contract of hiring, agrees that, if he intends to leave his master's employ, he will give notice of such intention, and work ten full working days thereafter, and, in default thereof, forfeit all money that may be due him, may recover from the master wages previously earned, if he is kept from his work by sickness, gives reasonable notice thereof to the master, and is absent only so long as he is so disabled.⁶ A father may maintain an action upon a covenant with himself to pay wages to his minor son for services as an apprentice, and unless the master terminates the contract he is liable for wages, although the apprentice is unable to work from sickness.⁷

§ 229. Further illustrations of recovery.—A special agreement was made to the effect that if the laborer should be dis-

ends the service happens without the fault of either party, and is not expressly or impliedly insured against in the agreement which induced the labor. This conclusion seems now to be established by authority, as well as to rest in sound reason." *Cutter v. Powell*, 6 T. R. 320; *Bream v. Marsh*, 4 Leigh, 21; *Haynes v. Second Baptist Church*, 12 Mo. App. 536; *Carpenter v. Gay*, 12 R. I. 306; *Farrow v. Wilson*, L. R. 4 C. P. 744.

¹ *Parker v. Macomber*, 17 R. I. 674.

² *Seaver v. Morse*, 20 Vt. 620.

³ *Gray v. Murray*, 3 John. Ch. 167.

⁴ *Lakeman v. Pollard*, 43 Maine, 463.

⁵ *Dunlap v. Montgomery*, 123 Pa. St. 27.

⁶ *Harrington v. Fall River Works*, 119 Mass. 82.

⁷ *Caden v. Farwell*, 98 Mass. 137.

satisfied and wish to leave the service, he would give four weeks' notice before quitting, and then receive his pay; after he had begun to work under this agreement, he became sick and unable to work and left without giving the required notice; he was allowed to recover the value of his services.¹ The laborer can recover although there is an express contract that he is not to be paid until a definite amount of work is done.² And it seems that the recovery for partial performance is upon a *quantum meruit*, and not on the contract.³ But the recovery can not exceed the contract price, or the rate of it for the part of the service performed.⁴ The court of appeals of New York has decided that recovery for partial performance of a contract, where sickness prevents complete performance, is not confined to a *quantum meruit*, but is to be measured by the contract.⁵ But the recovery is subject to the damages sustained by the employer in consequence of the employe not being able to complete the full term of service.⁶ Where sickness interrupts the performance of a contract, either party may elect to rescind; the employe then recovers the value of his services without offering to return to work, although subsequently able.⁷

§ 230. Contracts for personal acts.—Contracts which have for their object some performance or matter which is strictly personal to the parties are in general construed as made upon the implied condition that the parties shall live long enough and continue practically capable to perform the contract. Thus, contracts to marry are determined by the death of either

¹ Fuller v. Brown, 11 Metc. (Mass.) 440.

² Fenton v. Clark, 11 Vt. 557.

³ Green v. Gilbert, 21 Wis. 395; Wolfe v. Howes, 20 N. Y. 197; Fahy v. North, 19 Barb. 341. See also, Givhan v. Dailey, 4 Ala. 336.

⁴ Coe v. Smith, 4 Ind. 79.

⁵ Clark v. Gilbert, 26 N. Y. 279.

⁶ Patrick v. Putnam, 27 Vt. 759. Neither the legal or equitable rights of the parties under such circumstances are affected by the fact that the sickness was occasioned by the voluntary performance of services

for the benefit and at the request of the employer which were different from those which the employe had contracted to perform.

⁷ Hubbard v. Belden, 27 Vt. 645. See, also, Dickey v. Linscott, 20 Maine, 453. Wolfe v. Howes, 20 N. Y. 197, holding that it is unnecessary that the plaintiff should set up in his complaint the excuse of illness for not fully performing his contract. It is a matter of reply to a defense interposing the contract. Dryer v. Lewis, 57 Ala. 551.

party.¹ If the promisee is able and ready to proceed with his work, where his personal services or acts are bargained for, nothing short of absolute physical impossibility will excuse the employer. Thus, small-pox will not excuse a school district from liability on a contract with a teacher the performance of which the district has prevented by closing the school.² But if at the place where the contract is to be performed, which can not be performed elsewhere, a contagious disease is prevalent, this excuses performance.³ Upon the same principle the death of a partner *per se* dissolves the firm, whether the partnership was for a fixed duration or not.⁴

§ 231. What are contracts for personal acts.—Whether a contract is one which is strictly personal, that is, to be performed by the parties themselves and not by agency, depends partly on the nature of the contract itself and partly on construction. Thus where a lumber manufacturer agreed to sell all the lumber to be sawed at his mill during five years, but died before the five years elapsed, it was held that this contract was a personal one and was abrogated by his death.⁵ A contract, the duration of which is not fixed, to pay a reasonable compensation for the board, tuition and clothing of a person whom the promisor is not bound to support, is terminated by the death of the promisor, and an action can not be maintained against his executor for anything subsequently furnished, although the executor has not given notice of the death.⁶ Where adjoining land-owners make an agreement relative to the duty of each in maintaining a partition fence, and one of them dies, his administrator is not bound by the contract for any future repairs.⁷ A ground rent covenant does not survive

¹ Chamberlain v. Williamson, 2 M. & S. 408.

² Dewey v. Union School District, 43 Mich. 480.

³ Lakeman v. Pollard, 43 Maine, 463.

⁴ Bates on Partnership, § 580.

⁵ Dickinson v. Calahan, 19 Pa. St. 227.

⁶ Browne v. McDonald, 129 Mass. 66.

⁷ Bland v. Umstead, 23 Pa. St. 316, where the court said: "All con-

tracts must be construed with reference to their subject-matter, and a contract defining an existing relation can have no operation when that relation ceases, for its foundation is gone. This is a contract intended to regulate the relation of adjoining owners, and it is involved in its very nature that it can not last longer than the relation."

against executors or administrators except as to the rents which accrued in the life-time of the decedent; the rents which accrued subsequent to the death of the covenantor are not payable out of his personal estate.¹ A contract to marry,² to write a book,³ to instruct an apprentice,⁴ to act as agent,⁵ are all personal contracts terminated by the death of either party. But if a contract with a deceased party is of an executory nature and his personal representative can fairly and sufficiently execute all that the deceased could have done, he may do so, and enforce the contract. The exception to this rule is when the contract is of a purely personal character, or requires, in its execution, the exercise of peculiar skill or taste.⁶ And, therefore, as a general rule the personal representatives of a deceased person can sue and be sued on all contracts of whatever description made with him, whether broken before or after his death.⁷ Thus a contract to build a house survives the death of either party;⁸ the personal representatives of the builder are bound to complete his building contracts,⁹ and the personal representatives of the owner are bound to permit the building to be done.¹⁰ It is, however, always competent for the parties to make any contract, no matter what the subject-matter, a personal one. If the intention is manifested by the parties in express terms in the contract itself, it effects the same object as where the law implies the intention from the subject-matter. Accordingly where by express terms the parties have excluded the idea of a substituted performance, no question, upon the subject-matter of the contract, can arise. The death of either party in such a case terminates the contract, as it would a contract construed from its subject-matter a personal one.¹¹

¹ Quain's Appeal, 22 Pa. St. 510.

² Chamberlain v. Williamson, 2 M. & S. 408.

³ Marshall v. Broadhurst, 1 Tyr. 348.

⁴ Baxter v. Burfield, 2 Strange, 1266.

⁵ Smout v. Ilbery, 10 M. & W. 1; Galt v. Galloway, 4 Pet. 332.

⁶ Smith v. Wilmington Coal Co., 83 Ill. 498.

⁷ Dicey on Parties, 206.

⁸ Reicke v. Saunders, 3 Mo. App.

566; Quick v. Ludburrow, 3 Bulst. 29;

Janin v. Browne, 59 Cal. 37.

⁹ Janin v. Browne, 59 Cal. 37.

¹⁰ Reicke v. Saunders, 3 Mo. App. 566.

It seems a contract to build a light-house is a personal one terminated by death. 2 Williams on Executors, 1593 n. (t).

¹¹ Shultz v. Johnson, 5 B. Monroe, 497, 501; Siler v. Gray, 86 N. C. 566.

§ 232. **Contracts to build becoming impossible.**—Where one covenanted to build a bridge and keep it in repair for a certain time, he was held bound to rebuild the bridge, although it was washed away by an extraordinary flood.¹ A railroad company contracted to pay a sum equal to one-third of all expenditures necessarily incurred in, by or through the operation, maintenance, renewal, repairs, or protection of a certain bridge; the bridge was blown down by a cyclone; it was held that the company was liable for one-third the amount expended in putting it in repair, notwithstanding its destruction by the cyclone.² Where one contracts to build a house on the land of another, and the house is, before completion, destroyed by fire, without his fault, he is not thereby discharged from his obligation to fulfill his contract;³ and in case of his refusal to proceed to build he is liable to refund all money advanced to him, and is also liable for damages for its non-performance.⁴ And this rule obtains although the contract provides that the employer shall furnish the materials.⁵ Where a carpenter entered into a contract to do the carpenter work and furnish the materials therefor, upon a brick building, but the mason work was to be done by another independent contractor, and after the brick work was nearly completed, and a part of the carpenter work done, the brick walls were blown down, it was held that the carpenter was discharged from further performance, and could recover *pro tanto* for his services.⁶ But

¹ *Meriwether v. Lowndes County*, 89 Ala. 362; 7 So. Rep. 198; *Brecknock v. Pritchard*, 6 T. R. 720.

² *Central Trust Co. v. Wabash R. Co.*, 31 Fed. Rep. 440.

³ *Cutcliff v. McAnally*, 88 Ala. 507; *Adams v. Nichols*, 19 Pick. 275; *Tompkins v. Dudley*, 25 N. Y. 272; *School District v. Dauchy*, 25 Conn. 530; *Fildew v. Besley*, 42 Mich. 100; *School Trustees of Trenton v. Bennett*, 27 N. J. Law, 513; *Wells v. Calnan*, 107 Mass. 514.

⁴ *Tompkins v. Dudley*, 25 N. Y. 272, where the court said: "No rule of

law is more firmly established by a long train of decisions than this, that where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

⁵ *Brumby v. Smith*, 3 Ala. 123.

⁶ *Schwartz v. Saunders*, 46 Ill. 18. If, however, the carpenter had contracted to erect an entire building for the defendant, and before it was completed it was destroyed, he would not be excused.

where the contract to build a complete house, for a specified sum, is not absolute and indivisible, but only a contract to do a part of the work and furnish a part of the materials, and a part built is destroyed by fire before completion of the whole, the contractor is discharged from further performance, and can recover for what he has done.¹ Where a contractor agreed to manufacture the iron work for a house and put up the same, the work to be at his risk until the building was completed, it was held the manufacturer did not assume the risk of the building, which was burned, but only his materials furnished, and therefore that the destruction of the building did not operate to prevent him from recovering the price of the iron work manufactured and ready to be delivered.² A contractor engaged to build a house in accordance with certain plans and specifications; when the building was nearly completed, it fell, owing to a lateral defect in the soil; it was held that the defects in the soil did not excuse the contractor from the performance of his contract, and that it was no defense that the building, so far as it was erected, was constructed in accordance with the plans and specifications.³

§ 233. The same subject continued.—Where a contractor agrees to build a house “fit for use and occupation,” he is liable in damages if the house sinks from a latent defect in the soil, although he has fulfilled his contract in building the house according to the plans and specifications.⁴ The courts of Virginia,⁵ Texas,⁶ and Tennessee⁷ do not hold to the doctrine that a builder must complete the building, if he undertakes the work by an absolute contract, although it be destroyed by fire or otherwise, without his fault, before completion; but allow the destruction of the building to form an excuse from further performance, and permit the contractor to recover the value

¹ *Cook v. McCabe*, 53 Wis. 250.

² *Rawson v. Clark*, 70 Ill. 656.

³ *Stees v. Leonard*, 20 Minn. 494.

⁴ *Dermott v. Jones*, 2 Wall. 1, where the court said: “It is a well settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he

must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse.”

⁵ *Clark v. Franklin*, 7 Leigh, 1.

⁶ *Hollis v. Chapman*, 36 Texas, 1.

⁷ *Wilson v. Knott*, 3 Hump. 473.

of his services.¹ And it may be laid down as a general rule that under a contract for building; the payments to be made in installments, as certain parts of the work are finished, if the structure, while in progress, be destroyed by inevitable accident, the builder is entitled to be paid all such installments as are fully earned; but that he has no claim for a proportional part of the next installment, partially earned.²

§ 234. Particular contracts concerning specific things. —

When from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfillment of the contract arrives some particular specified thing continues to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, the contract becomes impossible from the perishing of the thing without the default of the contractor.³ Thus where an agreement was made for giving a series of concerts at a music hall, by which one of the parties was to let the use of the hall for a certain daily payment, and the other party was to provide the performers and to take the money, but before the time arrived the hall was destroyed by fire, it was held

¹ And in *Wilson v. Knott*, 3 Hump. 473, it was held that proof of a custom among builders that the loss should fall on the contractor was inadmissible. And see *Parker v. Scott*, 82 Iowa, 266, where a man contracted to erect a church spire which was blown down before completion. It was held he could not recover, and the court said: "Counsel for Scott claim that recovery may be had for the value of the work and labor and materials upon the ground that when a party performs a contract in part he may recover the reasonable value of his work, with the right of the employer

to recoup by the amount of damages sustained by reason of the failure of the plaintiff to fully perform. This has been the law of this state, as announced by this court, for many years. *Pixler v. Nichols*, 8 Iowa, 106. But the principle has no application to the facts in this case. The part performance claimed was of no benefit to Leahy. He never accepted the unfinished spire, and, as it lay upon the ground in ruins, it had no value as a spire."

² *Richardson v. Shaw*, 1 Mo. App. 234.

³ *Taylor v. Caldwell*, 3 B. & S. 826.

that the agreement was impliedly conditional upon the continued existence of the hall, and was put an end to by its destruction, and that no claim could be made under it for not letting the hall.¹ So, also, where one is employed to do work in a particular building for a series of days, the burning of the building by inevitable accident will terminate the employer's liability for wages.² And an agreement that a bull shall serve a cow is dependent upon the bull's ability, and his death rescinds the bargain.³ Where the keeper of a stallion advertises "with the privilege of breeding back again next season, should the mare not prove with foal, the money due at the time of the service, or before the mare is removed," one putting a mare to the stallion, the mare not proving in foal, is liable for the fee, although he is deprived of the privilege of breeding back the next season by the death of the horse.⁴ Where a contract was to the effect that a certain sum should be paid "for publishing my advertisement in the Fifth Avenue, Union Square and Lyceum Theater programs, to occupy one inch on program page for the theater season," it was held that when one of the theaters closed this terminated the contract.⁵ Upon a covenant in a lease of a mill for years, to pay rent, the rent may be recovered after a destruction of the mill by fire, although the lessor does not rebuild.⁶ So equally where a carpenter agreed to lath and plaster a building for so much per square yard, and after he had done some work on it the house burned down, he was allowed to recover the value of his services.⁷

§ 235. The same subject continued—Further illustrations.—

Where the contractor was bound to follow the specifications and plans under which the work was to be done, which were so defective that by strictly following them in the construction of an arch the foundation of the building would not sustain

¹ *Taylor v. Caldwell*, 3 B. & S. 826.

² *Hall v. School District*, 24 Mo. App. 213, where a school-house burned; held to exonerate the district from payment of the teacher after the destruction of the building.

³ *Shear v. Wright*, 60 Mich. 159.

⁴ *Price v. Pepper*, 13 Bush, 42.

⁵ *Hazzard v. Hoxsie*, 53 Hun, 417.

⁶ *Fowler v. Bott*, 6 Mass. 63; *Baker v. Holtzaffell*, 4 Taunt. 45.

⁷ *Cleary v. Sohler*, 120 Mass. 210.

the weight thereof, the contractor was exonerated from blame because of the falling of the arch. And it was held he could recover *pro tanto*, and was not bound to rebuild the arch.¹ So, also, where a laborer contracted to varnish clock cases at certain prices per case, the work to be done in his employer's factory, and the factory was burned, together with a large number of cases, upon some of which it appeared that the laborer had performed work, some having been completed but not inspected, it was held that he could recover the contract price for the work completed; and also could recover upon a *quantum meruit* for that unfinished.² Upon the same principle one who had taken stock in a turnpike company was held not to be answerable in an action for the assessments, where the course of the road had been changed.³ A contract was made for the erection of certain machinery upon the premises of one of the parties, to be paid for on completion, and in course of the work the premises were destroyed by fire; it was held that both parties were excused from further performance, and that no liability accrued on either side.⁴ A contract to work coal mines is terminated by the exhaustion of the mines.⁵ Where a contractor agreed to manufacture new boilers for a ship, then at sea, and the ship-owners advanced the contractor some money on the contract, and after the boilers were nearly completed the ship was lost at sea, it was held that this terminated the contract and released the parties, but that the ship-owners could not recover back the money they advanced, nor did the boilers belong to them.⁶ A contract to supply water from a certain spring is terminated and the promisor excused from performance if the spring fails from drought or other natural cause.⁷ So, likewise, where for a certain sum a contractor agreed to contribute certain labor and materials towards the erection of a house on land of another, which, before comple-

¹ *Byron v. Mayor, etc.*, 22 J. & S. (N. Y. Super.); 54 Hun, 411.

² *Whelan v. Ansonia Clock Co.*, 97 N. Y. 293.

³ *Middlesex Turnpike Co. v. Locke*, 8 Mass. 268.

⁴ *Appleby v. Myers*, L. R. 2 C. P. 651, but this was on appeal from the

common pleas, where it was held that the contractor could recover the value of his services. See same case, L. R. 1 C. P. 615.

⁵ *Walker v. Tucker*, 70 Ill. 527.

⁶ *Anglo-Egyptian Co. v. Rennie*, L. R. 10 C. P. 271.

⁷ *Ward v. Vance*, 93 Pa. St. 499.

tion, was destroyed by fire, the contractor was held excused from further performance and recovered the value of his work.¹ But the general rule is that where work is to be done under a contract on a chattel or building which is not wholly the property of the contractor, or for which he is not solely accountable, as where repairs are to be made on the property of another, the agreement on both sides is upon the implied condition that the chattel or building shall continue in existence, and the destruction of it without the fault of either of the parties will excuse performance, and leave no right of recovery in favor of either for services rendered previous to the destruction.²

§ 236. Bailment.—The bailee is excused from his obligation to redeliver the goods, if, without his fault, they perish;³ and he is also in such case entitled to recover a compensation for any labor he may have done on the chattel previous to its destruction.⁴ But where a workman is to furnish the materials, as well as the work, if the thing perish before delivery,

¹ *Butterfield v. Byron*, 153 Mass. 517; 27 N. E. Rep. 667, where the court said: "The principle seems to be that when, under an implied condition of the contract, the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied assumpsit for what has properly been done by either of them."

² *Butterfield v. Byron*, 153 Mass. 517; 27 N. E. Rep. 667; *Lord v. Wheeler*, 1 Gray, 282; *Gilbert Manufacturing Co. v. Butler*, 146 Mass. 82; *Eliot, etc., Bank v. Beal*, 141 Mass. 566; *Appleby v. Myers*, L. R. 2 C. P. 651.

³ *Stewart v. Stone*, 127 N. Y. 500. In this case plaintiff contracted with defendant to the effect that defendant was to manufacture cheese and butter from milk delivered at his

factory by the plaintiff, to sell the products and distribute the proceeds in the manner stipulated. The factory was thereafter destroyed by fire and a quantity of milk and cheese thereby lost. In an action to recover the amount of the loss it was held, that the contract was one of bailment, and defendant only assumed the duty of ordinary care, and that the contract was put an end to by the destruction of the factory, and the defendant was not liable for the loss of the goods. Story on Bailments, § 25, 427; *Williams v. Lloyd*, W. Jones, 179, where a horse was loaned and died; *Head v. Tattersall*, L. R. 7 Ex. 7, where a horse was bought with option to return, it was held that the option could be exercised although the horse was injured while in bailee's possession.

⁴ Story on Bailments, § 427. *Contra*, 2 Kent's Commentaries (4th ed.), 590.

there is no recovery.¹ "However, all these doctrines prevail only in the absence of any contrary stipulations of the parties, who may by their contract vary and control the ordinary results of the law."²

§ 237. **Delivery of goods.**—"It is no excuse for the non-performance of a condition that it is impossible for the obligor to fulfill it, if the performance be in its nature possible. But if a thing be physically impossible, *quod nature fieri non concedit*, or be rendered impossible by the act of God, as if A. agree to sell and deliver his horse, Eclipse, to B. on a fixed future day, and the horse die in the interval, the obligation is at an end."³ But if the property has passed to the buyer, the common law fixes the risk where the title resides and he must lose, and can not recover back any money paid the seller.⁴ And the converse of this is equally true that if the property has not passed, the seller, although excused from performance, can not recover the price.⁵ A contract for the sale and delivery of a certain quantity out of a specific crop of potatoes was held to be impliedly conditional upon the crop producing that quantity; and upon a failure of the crop the seller was held not to be liable for the deficiency in the quantity contracted for.⁶ But upon a contract to raise, sell and deliver a specified quantity of beans of various kinds, no particular land upon which they were to be raised being specified, it was held, that the fact that unexpected early frosts so far destroyed the party's crop that he could not deliver the whole quantity specified did not excuse his non-performance of the contract.⁷ And the general rule is that if a contract is made for the sale and delivery of specified articles of personal property, under such circumstances that the title does not vest in the vendee, if the property is destroyed by an accident, the vendor is not liable to the vendee in damages for non-delivery.⁸ One who has

¹ *McConihe v. New York R. Co.*, 20 N. Y. 495; *Story on Bailments*, § 427.

² *Story on Bailments*, § 427.

³ *Benjamin on Sales*, § 861.

⁴ *Joyce v. Adams*, 8 N. Y. 291; *Benjamin on Sales*, § 319.

⁵ *Benjamin on Sales*, § 319. See *Rugg v. Minett*, 11 East, 210.

⁶ *Howell v. Coupland*, L. R. 1 Q. B. D. 258.

⁷ *Anderson v. May*, 50 Minn. 280; 52 N. W. Rep. 530.

⁸ *Dexter v. Norton*, 47 N. Y. 62.

entered into a contract to make and deliver a certain manufactured article within a specified time, having ample time for performance, can not, however, postpone performance to the last moment and then excuse it upon plea of an accident; in such case he takes the responsibility of the delay.¹

§ 238. **“Strikes.”**—A “strike” of workmen is no excuse for the failure to perform a contract.² But where the workmen abandon their work, and by violence and intimidation prevent other employes, who are ready and willing to work, from so doing, then this ceases to be a “strike.”³ And accordingly a common carrier is not liable for delay in the shipment of goods caused solely by the lawless and irresistible violence of strikers and their confederates.⁴ But if the workmen simply quit work because the employer does not pay, this will not excuse the performance of a contract by the employer.⁵ A common carrier may lawfully stipulate by special contract for exemption from liability for loss occurring by reason of delay in

¹ *Booth v. Spuyten Duyvil Mill Co.*, 60 N. Y. 487. See, also, *Stone v. Waite*, 88 Ala. 599; *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45; *West v. Van Tuyl*, 1 N. Y. Supl. 718; *Jones v. Anderson*, 82 Ala. 302; 2 So. Rep. 911, where the court said: “Where a contract imposes some duty not purely personal—that is, which may be done by others as well as the promisor himself—his inability to perform by reason of accident, want of means, insolvency, or other reason, does not excuse non-performance.” And see following cases where performance of delivery was excused and the seller allowed to recover the price from the buyer after the chattels perished: *Bissell v. Balcom*, 39 N. Y. 275, where cattle were drowned; *Seckel v. Scott*, 66 Ill. 106, butter sold, and destroyed by Chicago fire; *Ruthrauff v. Hagenbuch*, 58 Pa. St. 103; *Sweeney v. Owsley*, 14 B. Mon. 413; *Phillips v. Moor*, 71 Maine, 78; *King v. Jarman*,

35 Ark. 190; *Wing v. Clark*, 24 Maine, 366; *Townsend v. Hargraves*, 118 Mass. 325.

² *Nightingale v. Eiseman*, 121 N. Y. 288; *Blackstock v. New York R. Co.*, 20 N. Y. 48; *Budgett v. Binnington*, L. R. 25 Q. B. D. (1890) 321; *Beach on Railways*, §§ 730, 926, 932.

³ *Geismer v. Lake Shore R. Co.*, 102 N. Y. 563.

⁴ *Missouri Pacific R. Co. v. Levi* (Texas), 14 S. W. Rep. 1062; *International R. Co. v. Tisdale*, 74 Texas, 8; 4 Lawyers’ Rep. Ann. 545; *Southern Pacific R. Co. v. Johnson* (Texas), 15 S. W. Rep. 121; *Haas v. Kansas City R. Co.*, 81 Ga. 792; 7 S. E. Rep. 629; *Geismer v. Lake Shore R. Co.*, 102 N. Y. 563. But see *People v. New York, etc., R. Co.*, 28 Hun, 513; *Beach on Railways*, §§ 730, 926, 932; *Old Dominion S. S. Co. v. McKenna* (1887), 30 Fed Rep. 48.

⁵ *McLeod v. Genins*, 31 Neb. 1; 47 N. W. Rep. 473.

the transportation and delivery of goods occasioned by a strike.¹ Where a "strike clause" is inserted in a contract, exempting liability in case of failure to perform occasioned by a strike, the contractor is not thereby prohibited from conducting his business upon the same general principles which would have governed him had the clause not been inserted, nor is he required to resort to extraordinary or unusual means to prevent strikes, but he has the right to adopt such rules and regulations and pay such wages as are reasonable under the circumstances.² In the absence of any provision in a bill of lading fixing a time for unloading, the consignee's obligation to unload is to use all reasonable diligence under the circumstances; and demurrage will not run during a delay for which he was in no wise responsible, caused by a general strike of lighter-man.³ The duty imposed upon railroad companies by the "interstate commerce act," of receiving freight from connecting roads, is one which the federal courts will enforce by mandatory injunction notwithstanding a strike of employees.⁴

§ 239. Impossibility caused by the promisee.—It is a well-settled principle of law that if by any act of one of the parties the performance of a contract is rendered impossible, then the other party may rescind the contract.⁵ And this may be done although the contract may be performed in some other manner not very different.⁶ "Where the condition of a bond is possible at the time of making it, and, before the same can be performed, becomes impossible by the act of the obligee, there the obligation is saved."⁷ Where, by a building contract, damages for delay on the part of the contractor to perform his contract within the time limited were fixed and liquidated, and the work contracted for could not be completed until other work

¹ *Gulf, Colorado R. Co. v. Gatewood*, 89 Texas, 89; 10 Lawyers' Rep. Ann. 419.

² *Delaware R. Co. v. Bowns*, 58 N. Y. 573.

³ *Hick v. Rodocanachi*, 65 L. T. R. N. S. 300; 44 Alb. L. J. 462. But see *People v. New York, etc., R. Co.*, 28 Hun, 543.

⁴ *Chicago R. Co. v. Burlington R.*

Co., 34 Fed. Rep. 481. See, also, *Budgett v. Binnington* L. R. (1891), 1 Q. B. 35; *McFadden v. Compagnie Generale Transatlantique* (1887), 1 Railway and Corporation L. J. 112.

⁵ *Panama Telegraph Co. v. India Rubber Co.*, L. R. 10 Ch. App. 515, 532.

⁶ *Planche v. Colburn*, 8 Bing. 14.

⁷ *Coke on Littleton*, 206.

to be done by the owner was finished, it was held, that a failure on the part of the latter to finish his work in season to enable the contractor to complete his contract within the time specified was a sufficient excuse for delay, and discharged him from liability for the liquidated damages.¹ A subcontractor is excused from further performance if the contractor and owner cancel their contract.² Where a party, for a valuable consideration, gives to another an order payable out of a fund not then in existence, such party can not, by his own default, prevent the creation or realization of the fund and interpose the absence or failure of the fund as a defense to an action upon the order; and where an order is drawn upon a fund to be paid upon the happening of a condition, which order is accepted, the acceptor can not, by his own act, defeat the condition and then set it up as a defense in an action upon the acceptance.³ Where the obligation of one party to a contract requires of him the expenditure of a large sum in preparation to perform, and a continuous readiness to perform, the law implies a corresponding obligation on the other party to do what is necessary to enable the other to comply with his agreement.⁴ Thus, where the promiser agreed to pack a definite number of hogs and made all his preparations to do so, and was ready to do so, but the promisee refused to furnish the hogs to be packed, this excused performance by the promiser.⁵ Where a contract bound the government to make the bed of a pool "as dry as is reasonably practicable, by putting a coffer-dam across the head of the pool," this bound the government to erect a dam sufficient to exclude the water above it from entering the area which the contractor was to excavate, and the period of the exclusion must have been sufficient for the performance of the work, and the gov-

¹ Coke on Littleton, 206.

² *Weeks v. McCarty*, 89 N. Y. 566, where the court said: "The rule is well settled that where the work to be performed by the builder can not be performed until the other work provided to be done by the owner or his employes is finished, the failure by the latter to complete their work

in season to enable the builder to end his within the time limited by the contract is a sufficient excuse for his delay beyond the agreed period of completion." See, also, *Stewart v. Keteltas*, 36 N. Y. 388.

³ *Gallagher v. Nichols*, 60 N. Y. 438.

⁴ *Risley v. Smith*, 64 N. Y. 576.

⁵ *United States v. Speed*, 8 Wall. 77.

ernment failing in this, the contractor was justified in abandoning his work.¹ So, also, where the failure of the promisee to furnish the water required for irrigation as agreed caused the death of vines, for the protection of which the promiser had agreed to build a fence, it was held the promiser was not liable because of his failure to build the fence.² And again, a contractor, having provided machinery for an elevator, and delivered it on the owner's premises, being wrongfully prevented by the owner from completing the contract, can recover the full value of his labor and materials, though the owner afterwards finished the elevator, not using the contractor's materials.³ Where the promisee becomes surety on the bond in a replevin case, by means of which the goods are taken from the promisor, this excuses him from his contract of sale with the promisee.⁴ If one contracting party can show that the other prevented his performance, it is to be taken as *prima facie* true that he would have accomplished it if he had not been stopped.⁵ But one who entered into an agreement for the sale of property on which he had a lien for the payment of a debt is not relieved from liability by the failure of bidders to comply with the terms of the sale.⁶ In a case where a publisher engaged an author to write a treatise for a periodical, but, before he had completed it, the publisher abandoned the publication, it was held that the author could recover compensation without tendering or delivering the treatise.⁷

¹ *United States v. Speed*, 8 Wall. 77.

² *Skelsey v. United States*, 23 Ct. Cl. 61.

³ *Remy v. Olds*, 88 Cal. 537.

⁴ *Ellithorpe Air Co. v. Sire*, 41 Fed. Rep. 662.

⁵ *Ketchum v. Zeilsdorff*, 26 Wis. 514.

⁶ *McCreery v. Green*, 38 Mich. 172.

⁷ *Bradshaw v. McLoughlin*, 39 Mich. 480.

⁸ *Planche v. Colburn*, 8 Bing. 14. See, also, *Highton v. Dessau*, 19 N. Y. Supl. 395; *McCartney v. Glassford*, 1 Wash. St. 579; *Byron v. Mayor, etc.*, 54 N. Y. Super. Ct. 411; *Rayburn v. Com-*

stock, 80 Mich. 448; 45 N. W. Rep. 378; *Wood v. Malone* 131 Pa. St. 554; *Home Bank v. Drumgoole*, 109 N. Y. 63; *Holme v. Guppy*, 3 M. & W. 387; *Thornhill v. Neats*, 8 C. B. N. S. 831; *Russell v. Sa da Bandeira*, 13 C. B. N. S. 149; *Roberts v. Bury Commissioners*, L. R. 4 C. P. 755; *Westwood v. Secretary*, 11 Weekly Rep. 261, where a contractor undertook certain work subject to alterations to be done within a prescribed time and was held excused because employer ordered more than was possible to complete.

§ 240. Impossibility caused by the promisor.—"A promise is not excused by an impossibility of performance caused by the promisor; an act of the promisor rendering the performance on his part impossible, while it dispenses with the performance of all conditions precedent on the other part, constitutes at once a breach of contract."¹

§ 241. Alternative promises.—If a party contract to do one of two things, the fact that one part of this alternative promise is impossible of fulfillment does not relieve him from performing the other.² Thus, where the bailee of a chattel promised to return the chattel, or its value in money, he was held bound to pay its value, although it perished without his fault.³ Two physicians agreed to form a partnership; the articles were to the effect that they should divide the receipts should the partnership continue, but, if one withdrew from practice, the other should pay him a certain sum; before anything was done under this contract, one party declined to proceed with the business; it was held that this act did not prevent the other from recovering the sum agreed on as compensation for withdrawal from practice, he having elected so to do.⁴ An alternative contract to pay money, or convey land in a certain event, is not discharged by the death of the contractor rendering the conveyance of the land impossible.⁵ In accordance with the same principle, where a party has agreed to do two things, which are entirely distinct, and one of them is prohibited by law and the other is legal, such illegality of the

¹ Leake on Contracts, 709, citing: *Beswick v. Swindells*, 3 A. & E. 868, 883, a case of a bond; *Clarke v. Westrope*, 18 C. B. 765, where an incoming tenant agreed to buy the straw upon a farm at a price to be fixed by valuation and then consumed the straw before a valuation could be made, and so rendered it impossible, he was held to pay the value to be estimated by the jury; *Telegraph Dispatch Co. v. McLean*, L. R. 8 Ch. 658, where a business sold was to be paid for in installments dependent upon the profits,

and the buyer discontinued the business; it was held a breach; *Evans v. Wood*, L. R. 5 Eq. 9.

² *Drake v. White*, 117 Mass. 10; *Stevens v. Webb*, 7 C. & P. 60; *State v. Worthington*, 7 Ohio, 171.

³ *Drake v. White*, 117 Mass. 10.

⁴ *Frothingham v. Seymour*, 121 Mass. 409, where the court said: "The fact that the defendant, by his own act, had rendered one part of his alternative promise impossible of fulfillment does not relieve him from the other."

⁵ *State v. Worthington*, 7 Ohio, 171.

one stipulation can not be set up as a bar to a suit for a breach of the valid one. Thus, where a railroad company agreed to allow an express company to transport cars over its railway, their refusal to so allow the express company to transport trains was a breach of their stipulation, and it was held no defense that another stipulation of this contract was void and impossible because contrary to law.¹

§ 242. The same subject continued.—In a leading case, Vice-Chancellor Kindersley said: “It is impossible to lay down any universal proposition either way, but that the principle to be applied in each case is that it must depend on the intention of the parties to the bond, or covenant, or agreement, such intention to be collected from the nature and circumstances of the transaction and the terms of the instrument. And this, I think, will hardly admit of contradiction, that, if the court is satisfied that the clear intention of the parties was that one of them should do a certain thing, but he is allowed at his option to do it in one or other of two modes, and one of these modes becomes impossible by the act of God, he is bound to perform it in the other mode.”² Lord Coke, however, laid down the contrary rule, “that, where the condition of a bond consists of two parts in the disjunctive, and both are possible at the time of the bond made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other.”³ But where a man contracted to pay a certain sum for every ton of coal he should obtain from a mine, or, if he ceased to work the mine, he would pay a fixed sum instead, he was held bound to pay this latter sum, although the mine became exhausted.⁴ And where a bond was given conditioned either to pay the obligee a certain sum, or to surrender a person who had been arrested

¹Erie R. Co. v. Union Locomotive Co., 35 N. J. Law, 240. See, also, Year Book, 14 Henry VIII, 25, 26; Chesman v. Nainby, 2 Ld. Ray. 1456; Mallan v. May, 11 M. & W. 653; Price v. Green, 16 M. & W. 346; Gaskell v. King, 11 East, 165; Nicholes v. Stretton, 10 A. & E. (N. S.) 346; Chester v. Freeland, Ley R. 71; Sheerman v. Thompson, 11 A. & E. 1027.
²Barkworth v. Young, 4 Drewry, 1, 24, 25.
³Laughter's Case, Coke's Rep., pt. 5, 22.
⁴Marquis of Bute v. Thompson, 13 M. & W. 487.

to appear in an action at his suit by an appointed day, and the person to be surrendered died before that day, the bondsman was compelled to pay the bond.¹ Somewhat akin to this principle is the law that where, under the terms of a lease, the landlord covenants to insure, and the tenant has the option to purchase for a fixed sum, if, before the time for exercising the option, the buildings demised are burnt, and the landlord receives the insurance money, the tenant then exercising his option to purchase has no claim on the insurance money.²

§ 243. False assumption of impossibility—Provisions excepting impossibility.—A party who becomes involved in difficulties for which he is not responsible, if ultimately able to perform, is not to be deprived of the benefits of his contract because of an assumption by the other party that the difficulties will prove insurmountable. Thus, where a contract required a theatrical manager to furnish a hall for a concert, and to pay a certain sum after the entertainment, the fact that a most extraordinary snow storm prevailed in the vicinity, which early on the day of the concert rendered the streets of the village and the roads from the surrounding country practically impassable, and trains on the railroad to the village were suspended, and in consequence the manager thought it impossible for the performers to reach the village,—this did not excuse him from his duty to furnish the hall, the performers reaching the village by a special train.³ Of course “the contract may in express terms provide against contingencies interfering with the performance, by excepting certain events from the liability. Thus charter-parties and bills of lading; contracting for the carriage of goods by sea, being peculiarly liable to be interfered with by accidents over which the ship-owner has no control, are generally made with an exceptive clause restricting his liability.”⁴

¹ Warner v. White, T. Jones, 95. But where the condition of the bond has become impossible by act of God the obligation is discharged; as where the defendant was arrested as a fraudulent debtor, and he gave bond for his further appearance, it was held that this bond was not broken, and

the surety not liable, where the defendant failed to appear because he was taken sick. Scully v. Kirkpatrick, 79 Pa. St. 324.

² Edwards v. West, L. R. 7 Ch. Div. 858.

³ Hathaway v. Sabin, 63 Vt. 527.

⁴ Leake on Contracts, 698.

CHAPTER VII.

WARRANTY AND PERFORMANCE.

- § 244. Sales—Quantity.
- 245. Sales—More or less.
- 246. Insurance warranties—Nature and effect.
- 247. The same subject continued—Illustrations.
- 248. The same subject continued.
- 249. Insurance warranty distinguished from representations.
- 250. The same subject continued—Marine statute.
- 251. Insurance warranties not favored.
- 252. Description as warranty—Agent's mistake.
- 253. Insurer may waive breach—Effect of waiver.
- 254. Warranties in sales—Horses.
- 255. The same subject continued—Machinery.
- 256. Warranty of workmanship.
- 257. Statements in catalogues.
- 258. The same subject continued.
- 259. Construction of warranties.
- 260. The same subject continued.
- 261. To what defects a warranty extends.
- 262. The same subject continued.
- 263. Warranty of horses—Stallions.
- 264. Further illustrations—Soundness in horses.
- 265. Open defects.
- 266. Written contract excluding oral warranty.
- 267. The same subject continued—Illustrations.
- 268. Seller's oral warranty—Illustrations.
- § 269. Implied warranty excluded by written.
- 270. Implied warranty as affected by acceptance—Sale by sample.
- 271. The same subject continued—The federal doctrine.
- 272. Co-existing implied and written warranties.
- 273. Receipts and memorandum excluding oral warranty.
- 274. Substitution of warranties.
- 275. Implied warranty of identity—Genuineness of passage ticket.
- 276. Implied warranty of quality.
- 277. Warranty as to quality—Illustrations.
- 278. Implied warranty as to fitness—Latent defects—Fraud.
- 279. The same subject continued—Illustrations.
- 280. Vendor's warranty as to value.
- 281. Warranty of future state of an article.
- 282. Implied warranty of title.
- 283. Seller's implied warranty of title—Exception.
- 284. The same subject continued—When the seller is not in possession.
- 285. What constitutes breach of warranty of title.
- 286. The same subject continued.
- 287. Implied warranty of title by sheriffs and administrators.
- 288. Implied warranty of title to bonds.
- 289. General warranty covenant.

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| <p>§ 290. Covenants of warranty—Grantor's rights.</p> <p>291. Damages for breach of warranty.</p> <p>292. Covenant of seizin—Damages for breach.</p> | <p>§ 293. Performance of building contract.</p> <p>294. The same subject continued—Digging wells.</p> <p>295. Method of performance.</p> <p>296. Miscellaneous.</p> |
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§ 244. **Sales—Quantity.**—The vendor in a contract of sale must deliver the exact quantity contracted for. A tender of a larger bulk from which the buyer can select the quantity he bargained for is no tender, and the buyer can reject the whole of the goods tendered.¹ Thus, where the vendor wrote that he had a vessel of three hundred and seventy-five tons of coal, and the buyer telegraphed in reply, "Ship that cargo, three hundred and seventy-five tons, immediately," it was held that the buyer could reject the cargo because it contained three hundred and ninety-two tons.² So a tender of two hundred and six bales of cotton may be rejected when only two hundred are contracted for.³ A buyer was allowed to reject a tender of ten hogsheads of claret, when the vendor sent fifteen.⁴ It is the duty of the vendor to make the separation and to tender only such as the vendee is bound to accept; and a refusal to perform save by such a delivery in bulk is a breach of the contract, subjecting the vendor to an action for damages, and for any money paid or advanced upon it.⁵ Likewise the buyer may reject the goods if they are tendered mixed with other goods.⁶ If the delivery is of a quantity less than that sold, it may be refused by the buyer; and if the contract be for a specified quantity to be delivered in parcels from time to time, the purchaser may return the parcels first received, if the latter deliveries be not made, for the contract is not performed by the vendor's delivery of less than the whole quan-

¹ *Croninger v. Crocker*, 62 N. Y. 151; *Dixon v. Fletcher*, 3 M. & W. 146; *Rommel v. Wingate*, 103 Mass. 327; *Hart v. Mills*, 15 M. & W. 85; *Cunliffe v. Harrison*, 6 Ex. 903; *Nicholson v. Bradfield Union*, L. R. 1 Q. B. 620; *Levy v. Green*, 8 E. & B. 575.

² *Rommel v. Wingate*, 103 Mass. 327.

³ *Dixon v. Fletcher*, 3 M. & W. 146.

⁴ *Cunliffe v. Harrison*, 6 Ex. 903.

⁵ *Croninger v. Crocker*, 62 N. Y. 151.

⁶ *Benjamin on Sales*, § 689; *Levy v. Green*, 8 E. & B. 575, where the goods ordered were sent, but were packed in a crate with other goods not ordered.

tity sold.¹ Where an invoice of clothing was sold, amounting to twenty-two garments, the buyer was allowed to reject the whole because two small garments were lacking;² but it seems that the deficiency in the quantity must be such as would and ought to be regarded as material to the whole, in order to justify the buyer's rejection.³

§ 245. Sales—More or less.—Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of “about,” or “more or less,” or words of like import, the contract applies to the specific lot, and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. In such cases, the governing rule is somewhat analogous to that which is applied in the description of lands, where natural boundaries and monuments control courses and distances and estimates of quantity.⁴ But when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words, “about,” “more or less,” and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight.⁵ Thus, an excess of forty-five bushels of rye was held not covered by the words “more or less,” and the buyer was allowed to reject.⁶ But twenty-seven tons of coal was held to be covered by the words

¹ Benjamin on Sales, § 690; The Highlands Chemical Co. v. Matthews, 76 N. Y. 145.

² Smith v. Lewis, 40 Ind. 98.

³ Wright v. Barnes, 14 Conn. 518.

⁴ Brawley v. United States, 96 U. S. 168.

⁵ Brawley v. United States, 96 U. S. 168.

⁶ Cross v. Eglin, 2 B. & Ad. 106.

“more or less,” and the buyer was held to pay for it, he having contracted to buy one hundred tons, “more or less,” one hundred and twenty-seven tons being delivered.¹ A delivery of sixteen thousand feet of lumber is no compliance with a contract calling for a delivery of twenty-three thousand feet, “more or less.”² If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significance, then the contract is to be governed by such added stipulations or conditions. As, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and the variation from the quantity named will depend upon his discretion and requirements so long as he acts in good faith. So, where a manufacturer contracts to deliver at a certain price all the articles he shall make in his factory for the space of two years, “say a thousand to twelve hundred gallons of naphtha per month,” the designation of quantity is qualified, not only by the indeterminate word “say,” but by the fair discretion or ability of the manufacturer, provided he acts in good faith.³ And where an army contractor agreed to deliver at a certain army post eight hundred and eighty cords of wood, “more or less, as shall be determined to be necessary by the post commander,” and such post commander notified the contractor that only forty cords would be required, it was held that the contractor could not recover for any wood delivered above forty cords.⁴ A contract bound a party to supply six hundred thousand pounds, “more or less,” of oats to a military post; it was held that after the six hundred thousand pounds were

¹ *Cockerell v. Aucompte*, 2 C. B. 323; *Bourne v. Seymour*, (N. S.) 440. 16 C. B. 337.

² *Creighton v. Comstock*, 27 Ohio St. 548. See also, *McConnell v. Murphy*, 21 Weekly Rep. 609; *Moore v. Camp-* ³ *Gwillim v. Daniell*, 2 Crompt. M. & R. 61.

⁴ *Brawley v. United States*, 96 U. S. 168.

delivered, the buyer need take no further deliveries, and might buy elsewhere.¹

§ 246. Insurance warranties—Nature and effect.—In insurance contracts, the truth of all statements warranted to be true is a condition precedent to the liability of the insurer; for, if the statements so warranted are untrue, there is no contract. Where the policy recites that the statements made in the application are warranted to be true, and are the basis of the contract, and that any misstatements in the application should make the policy void, the answers in the application are warranties.² And when the statements in the application are made part of the policy, and declared to be warranties, it is a good defense to show that they were untrue, without further showing that the applicant knew or believed them to be untrue.³ No particular form of words is necessary to constitute a warranty. Any statement or stipulation upon the literal truth or fulfillment of which, in the intention of the parties, the validity of the contract is made to depend, amounts to a warranty. But no particular form of words will make a statement or stipulation a warranty, not even the use of the word 'warranty,' where it is apparent from the context or from the other parts of the contract that it is not the intention of the parties to make the validity of the contract depend on the literal truth or fulfillment of the statement or stipulation.⁴ A

¹ *Marriam v. United States*, 14 Ct. Cl. 289.

² *Bacon on Life Insurance*, etc., § 194.

³ *Provident, etc., Assur. Soc. v. Llewellyn* (1893), 58 Fed. Rep. 940, per Taft, J.: "In *Moulou v. American, etc., Insurance Co.*, 111 United States, 335; 4 Sup. Ct. 466, it was held that when there was any reason to doubt the meaning of the contract of insurance, it would be presumed that the statements of the applicant were to be regarded as representations, and not as strict warranties, and the agreement would be presumed to be a warranty only that the answers were made in good faith, and true to the knowledge of the insured. In that

case, however, the statements were referred to in the body of the policy as representations, and it was held that terms used in the policy controlled those used in the application. In this case, we do not see any room for doubt or construction. It is impossible to escape the meaning that the statements were intended to be warranties. Strict construction against the company can not destroy the necessary effect of plain language. Parties have a right to contract in this wise if they will. *Clemans v. Supreme Assembly, etc.*, 131 N. Y. 485; 30 N. E. Rep. 496; *Foot v. Ætna, etc., Insurance Co.*, 61 N. Y. 571."

⁴ *May on Insurance*, § 156.

charge that false representations in an application for life insurance, to the effect that the applicant's habits are "correct and temperate," will not avoid a policy based on the truth of such application, unless they were "willfully and intentionally made, and known at the time to be false," is error where such representations were warranted to be true.¹

¹Standard L. & Acc. Ins. Co. v. Lauderdale, 94 Tenn. 635; 30 S. W. Rep. 732, where the court said: "In the application referred to is the following statement: 'I hereby apply for insurance against bodily injuries caused solely by violent, external, and accidental means, to be based upon the following statement of facts, all of which I hereby warrant to be true. If found to be untrue in any respect, then, in every such case, the policy hereon shall be null and void.' Following the above, at division 11, letter a, is the following: 'My habits of life are correct and temperate.' The closing paragraph of said application is in the words following: 'I hereby agree that this application and warranty, together with all the premium paid [by] me, shall be the basis of the contract between the company and me.' We are of opinion the statements made by the assured in his application for the policy in respect to his habits were not mere representations, but absolute warranties. Those statements were made in respect to a material matter, that vitally affected the contract, and, if untrue, invalidated the whole insurance, whether the misstatement was willful and intentional or made through inadvertence. Indeed, in this view of the case, it is immaterial whether such statements be called 'representations' or 'warranties.' As stated by this court in *Boyd v. Vanderbilt Insurance Co.*, 90 Tenn. 212; 16 S. W. Rep. 470: 'If, however, the representation

be of a fact material to the risk, and be relied upon by the insurer, it is the undoubted general rule that such representation, whether made intentionally or through mistake and in good faith, avoids the policy.' The materiality of the applicant's statement in respect to his habits on the subject of temperance will not be controverted. Applications for life and accident insurance invariably contain questions bearing upon the habits of the applicant, especially in regard to the use of intoxicants. The use of intoxicating liquors and drunkenness are habits tending to shorten life, and for this reason such risks are avoided by well-regulated life insurance associations. *Schultz v. Mutual, etc., Insurance Co.*, 6 Fed. Rep. 672; *Kuecht v. Mutual, etc., Insurance Co.*, 90 Pa. St. 118. Accident insurance companies also avoid such risks for the reason that such indulgences render the assured incapable of discerning danger, and especially incapacitate him from avoiding its consequences after it is discovered. The statement, therefore, of the applicant in this case that his habits were correct and temperate was most material to the risk, whether it be called a 'representation' or 'warranty,' and, if untrue, it avoided the policy. It was, therefore, erroneous for the court to charge 'that, to have this effect, the misstatement must be willfully and intentionally made, and known at the time to be false.' The judgment is reversed, and the cause remanded for a new trial."

§ 247. **The same subject continued—Illustrations.**—A life insurance policy recited that the applicant warranted that the statements to be made to the medical examiner should be true and the basis of the contract, and, if any untrue statements should be made, the policy should be void. Following the questions propounded by the medical examiner were the following words, signed by the applicant: "I hereby declare that I have read the above questions and answers, and that the same are warranted to be true." It was held that the answers were warranties. And where, in a life insurance policy, the answers to the questions propounded by the medical examiners are made warranties, and among such questions is the following: "When and by what physician were you last attended and for what complaint?" to which the applicant answers that he never called a doctor in his life, previous attendance by a physician, though for a trivial sickness, shows a breach of the warranty, voiding the policy.¹ Where an application for life insurance, which was agreed to be a part of the contract, warranted the answers of the assured to questions asked therein to be "full, true and complete," and the policy was conditioned to be void if they were not so, and one of the questions demanded the name and address of each physician who had attended the assured within a given period; and the answer gave the name and address of a single physician, when, as a matter of fact, three physicians had attended the assured within the period named, it was held that the answer was untrue, and, being a breach of the warranty, vitiated the policy and destroyed the right

¹ Providence, etc., Assur. Soc. v. Reutlinger (1894), 58 Ark. 528, 253; West. Rep. 835, where the court said: "The answer averred that he had never called a physician to attend him in sickness. He warranted this statement to be true, and the evidence adduced at the trial of this case tended to prove that it was untrue, a breach of warranty. In Cobb v. Covenant, etc., Association, 153 Mass. 176; 26 N. E. Rep. 230, the court held that 'an applicant for benefit insurance, agreeing

that the contract shall be avoided if the answers made by him in his application are not true, makes their truth the basis of the contract.' In the application two questions were propounded to the applicant, as follows: (1) 'Have you personally consulted a physician, been prescribed for or specifically treated within the last ten years?' (2) 'If so, give dates, and for what diseases.' To the first he answered 'No,' and to the second no answer was made. The court said: 'While

to recover thereunder.¹ Where an application for a fire insurance policy on a cotton gin recites that the representations therein contained are the basis on which the insurance is effected, and both the application and the policy expressly state that the representations in the application are warranties, and that the insurance shall be void if the insured has made any misrepresentations, the failure of the insured to keep a barrel of water and two buckets in the same room and within ten feet of the gin stand, as he had agreed to do in the application as a condition of insurance, will bar a recovery for a loss sustained.²

§ 248. The same subject continued.—In Virginia the insured as well as the insurer is held strictly to the terms and conditions of their contract as it is expressed in the policy. Thus, a policy of fire insurance contained a clause that it was based upon a written application, the statements in which

the question whether the insured had a fixed disease, and what the disease was, might be an inquiry involved in considerable embarrassment, the question whether he had consulted a physician, or had been professionally treated by one, was simple, and one about which there could be no misunderstanding. Had it been replied to in the affirmative, the answer would have led to other inquiries. Indeed, the question which follows, which remains unanswered, is: 'If so, give dates, and for what diseases.' It is upon the existence of this latter question that the plaintiff founds an argument that it was necessary to show that the insured had some distinct disease permanently affecting his general health before it could be said that he had answered this question untruthfully. But the scope of the question can not be thus narrowed. Even if the insured had only visited a physician from time to time for temporary disturbances proceeding from accidental causes, the defendant had a right to know this, in order that it might make such further investigation

as it deemed necessary. By answering the question in the negative, the applicant induced the defendant to refrain from doing this."

¹Brady v. United Life Ins. Assn. (1894), 60 Fed. Rep. 727.

²Southern Ins. Co. v. White (1893), 58 Ark. 277; 24 S. W. Rep. 425, where the court said: "The following clause in the policy shows the effect of a breach of this warranty: 'This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated herein.' Johnson v. Maine, etc., Insurance Co., 83 Maine, 182; 22 Atl. Rep. 107; Cobb v. Covenant, etc., Association, 153 Mass. 176; 26 N. E. Rep. 230. This court, in the case of Mechanics', etc., Insurance Co. v. Thompson (1893), 57 Ark. 279; 21 S. W. Rep. 468, by Battle, J., held that the failure of the assured to perform an agreement of this kind would bar recovery."

should be treated as warranties; in the application the insured was asked if he would keep his account books in another building than his store-house and securely in an iron safe, and he answered that he would; it was held that this statement was a warranty. The policy also recited that it "shall be void if the assured has concealed or misrepresented in writing or otherwise any material fact concerning this insurance," and also that "this policy is made and accepted subject to the foregoing stipulations and conditions;" it was held that this clause would not permit the court to inquire into the materiality of the warranties.¹ In Arizona it has been held that the

¹ *Virginia, etc., Ins. Co. v. Morgan* (Va. 1893), 18 S. E. Rep. 191, where the court said: "'A warranty is an agreement in the nature of a condition precedent, and like that, must be strictly complied with.' May on Insurance, § 156. This is the language of the decided cases and of this court in *Lynchburg Insurance Co. v. West*, 76 Va. 575. And the author correctly adds that whether the fact stated or the act stipulated for be material to the risk or not is of no consequence, the contract being that the matter is as represented, or shall be as promised, and unless it proves so, whether from fraud, mistake, negligence, or other cause, not proceeding from the insurer or the intervention of the law or the act of God, the insured can have no claim. 'One of the very objects of the warranty,' he continues, 'is to preclude all controversy about the materiality or immateriality of the statement. The only question is, has the warranty been kept? There is no room for construction; no latitude; no equity. If the warranty be a statement of facts, it must be literally true; if a stipulation that a certain act shall or shall not be done, it must be literally performed.' Whether a statement is a warranty or not depends upon the intention of the parties, as does the nature and effect of the warranty, when there is one

which is to be gathered from the language used and the subject-matter to which it relates. Parties have the right to make their own contracts, and when the meaning of the contract is ascertained, effect must be given to it. It is not for the courts to add to or detract from it, but the contract must be enforced without regard to any hardship, real or supposed, to either party, or whether it is wise or unwise, provident or improvident. Thus, in *Jeffries v. Life Insurance Co.*, 22 Wall. 47, where the insured was asked in the application whether he was married or single, and falsely answered that he was single, it was held that the falsity of the answer defeated the recovery, as one of the express conditions of the policy was that the statements in the application were in all respects true. And in the course of the opinion it was said: 'There is no place for the argument either that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it. It is the distinct agreement of the parties that the company shall not be deceived to its injury or to its benefit. The right of an individual or a corporation to make an unwise bargain is as complete as that to make a wise one.' According to the authorities, warranties are of two kinds, viz. .

answers of an applicant that he has not consulted a physician since childhood, and does not remember the names and ad-

(1) Affirmative, or warranties *in præsentia*, as they are sometimes called, which affirm the existence of certain facts pertaining to the risk at the time of the insurance; and (2) continuing or promissory. An instance of the first class is *Insurance Co. v. Buck*, 88 Va. 517; 13 S. E. Rep. 973. There the insured, in answer to a question in the application, stated that a watchman slept on the premises at night. On the night of the fire the watchman was absent, but it was held that the policy was not thereby avoided, because the answer related to the present, and not to the future; in other words, that the statement was manifestly intended merely as affirmative of the usual and existing state of things, and had nothing promissory as to the future. But, as was said in the same case, a promissory warranty, *i. e.*, one which requires something to be done or omitted after the insurance takes effect and during its continuance, avoids the contract if not complied with according to its terms. The present case falls within the latter category, certainly as regards the promise to keep the books in an iron safe, or secure in another building. It is quite probable, in the nature of the case, that this stipulation was regarded as material, but whether it was or not—for with that we have nothing to do—the contract is express that the books would be thus safely kept; and if, as is conceded, the promise has not been fulfilled, there can be no recovery. A warranty may be in part affirmative and in part promissory. Thus, in an Iowa case, the building was described as ‘occupied for stores below, the upper portion to remain unoccupied during the continuance of this policy.’ In an action on the policy it was held that

so much of the statement as related to the lower portion of the building was an affirmative warranty merely, but that what related to the upper portion was a promissory warranty, which was broken if at any time during the life of the policy that portion of the building was occupied. *Stout v. City, etc., Insurance Co.*, 12 Iowa, 371. The main ground upon which the plaintiff relies in support of the judgment is a provision in the policy that the same ‘shall be void if the assured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof;’ and further, that ‘this policy is made and accepted subject to the foregoing stipulations and conditions.’ This language, it is contended, is inconsistent with an idea of a warranty, and shows that the answers in the application were intended as representations, none of which would avoid the policy unless false and material to the risk. The answer to this is that just as a policy may contain both affirmative and promissory warranties, so it may contain both warranties and representations, and the present is a case of that sort. In the application wherein the applicant affirms and warrants his answers to be true, and agrees that the same shall constitute the basis of the insurance, he was asked as to the dimensions of the storehouse, when it was built, etc. Now, as to the answers to these questions and the like, it would be absurd to say that they were anything more than representations, because they are merely descriptive, and were evidently so intended by the parties. *Wood on Insurance*, §138. On the other hand, looking, as we must, to the whole contract, it is equally clear

dresses of physicians who have attended him, "warranted to be true," and "offered to the company as a consideration of the contract," constitute a warranty which is broken on findings that applicant had received medical treatment within two years of his application, and did know the names and addresses of the physicians who attended him, and on a stipulated admission that such a one had been his physician within that time.¹

that the answer in regard to safely keeping the books was intended as a warranty. It is not descriptive of anything, and related not to matters depending upon opinions or judgment, as in *Lynchburg, etc., Insurance Co. v. West*, 76 Va. 575, and *National Bank v. Hartford Fire Ins. Co.*, 95 U. S. 673, in which cases the assured was asked as to the value of the property, but it constituted an undertaking to do a certain thing in the future, and is therefore not within the operation of the provision just quoted. To call such a stipulation a representation, or anything less than a warranty, is a misuse of terms."

¹ *Mutual Life Ins. Co. v. Arhelger* (Arz. 1894), 36 Pac. Rep. 895, where the court said: "If he had consulted any physician in a professional character, or received any treatment or advice at the hands of one, it was his bounden duty to disclose the fact in answer to the inquiries, for his warranty fully covers such matters. The appellant had a perfect right to make the questions and answers in the application a part of the contract and we have no right to make any other or different contract for the parties. Such answers were material to the policy. They were made so by its terms, and no rule of construction will be suffered to destroy the effect of plain language. We hold that the statements by the deceased in the application for the insurance about a physician were warranted to be true, and that the stipulation and the evidence show a clear breach of such warranty. The policy

is voided. *Dwight v. Germania, etc., Insurance Co.*, 103 N. Y. 341; 8 N. E. Rep. 654; *McCullum v. Mutual, etc., Insurance Co.*, 55 Hun, 103; 8 N. Y. Supl. 249; *Boland v. Industrial, etc., Association*, 74 Hun, 385; 26 N. Y. Supl. 433. It makes no difference whether the deceased knew them to be untrue or not. It is a good defense to show that, as a matter of fact, they were untrue, without showing that he knew or believed them to be untrue. *Provident, etc., Society v. Llewellyn*, 58 Fed. Rep. 940; 7 C. C. A. 579. Counsel for appellee directs our attention to the case of *Moulou v. Insurance Co.*, 111 U. S. 335; 4 Sup. Ct. 466, and thinks that case should govern this. The cases are clearly distinguishable. *Provident, etc., Society v. Llewellyn, supra*. In *Moulou v. American, etc., Insurance Co.* it was held, in effect, that there was doubt of the meaning of the contract, and it was therefore proper to consider the statements of the applicant as 'representations' and warranties only to the extent that they were made in good faith, and were true as far as the insured knew. The statements of the applicant were referred to in the body of the policy as being representations, and this expression was made to govern. But there is no doubt of the meaning of this contract. Read it as you will, it remains a strict warranty. The words used are plain, and are comprehended as soon as read. In such a case there is no room for construction, for the very good reason that there is no need of it."

§ 249. Insurance warranty distinguished from representations.—A warranty as to any fact contained in an insurance policy or other contract differs from a mere representation of such fact in that it precludes any controversy as to the materiality of such fact, and a breach of the warranty is a ground for avoiding the policy, while a false representation is not ground for avoiding the policy or contract unless the party to whom it is made relies upon it and be induced by it to enter into the contract or consent to terms disadvantageous to him.¹ Both warranties and representations are of two kinds, viz., affirmative and promissory. A promissory warranty is, of course, as valid and binding as any other kind, and it is not essential whether the fact or statement warranted to be true be material or immaterial to the risk. But a mere promissory

¹Selby v. Mut. L. Ins. Co. (1895), 67 Fed. Rep. 490. In Fidelity, etc., Co. v. Alpert (1895), 67 Fed. Rep. 460, Wales, J., says: "The assured warrants his statements to be true, and covenants that if they are untrue the policy shall be void, whether the statements were or were not material to the risk. The agreement of the parties is conclusive, and the question of materiality is no longer an open one. But, in the absence of a warranty of the character just described, the representations of the assured, when applying for insurance, may or may not be material to the risk, and this may be a subject on which minds will reasonably differ, and come to different conclusions. The materiality of a representation, then, becomes a matter of proof, to be found by the jury like any other fact, under all the circumstances of the particular case, and, in action on a policy, must be proved by the insurer, in order to prevent a recovery. This distinction between warranties contained in the contract and parol representations made by the assured as inducement to the insurer to assume the risk, is a well-settled rule of law. The principle has

been recognized by the highest authorities, and is nowhere more clearly defined than in the case of Anderson v. Fitzgerald, 4 H. L. Cas. 484, which went up from the courts of exchequer and exchequer chamber in Ireland, was elaborately discussed, and carefully considered. The lord chancellor, in his opinion, said: "There is a great distinction between that which amounts to what is called a warranty, and that which is merely a representation inducing a party to enter into a contract. Thus, if a person effecting a policy of insurance says, "I warrant such and such things here stated," and that is a part of the contract, then whether they are material or not is quite unimportant. The party must adhere to his warranty, whether material or immaterial. But if the party makes no warranty at all, but simply makes a certain statement, if that statement has been made *bona fide*, unless it is material, it does not signify whether it is false or not false. Indeed, whether made *bona fide* or not, if it is not material, the untruth is quite unimportant."

representation amounts to nothing if not material to the risk, and even then its violation does not vitiate the policy, unless it was made with a fraudulent purpose.¹ As a general rule, a warranty is a stipulation expressly set out, or by inference incorporated, in the policy, whereby the assured agrees "that certain facts relating to the risk are or shall be true, or certain acts relating to the same subject have been or shall be done." Its purpose is to define the limits of the obligation assumed by the insurer, and it is a condition which must be strictly complied with, or literally fulfilled, before the right to recover on the policy can accrue. It is not necessary that the fact or act warranted should be material to the risk, for the parties by their agreement have made it so. Lord Eldon says: "It is a first principle in the law of insurance that, if there is a warranty, it is a part of the contract; that the matter is such as it is represented to be. The materiality or immateriality signifies nothing. The only question is as to the mere fact."² On the other hand, representations are no part of the contract of insurance, but are collateral or preliminary to it. When made to the insurer at or before the contract is entered into, they form a basis upon which the risks proposed to be assumed can be estimated. They operate as the inducement to the contract. Unlike a false warranty, they will not invalidate the contract because they are untrue, unless they are material to the risks, and need only be substantially true. They render the policy void on the ground of fraud, "while a non-compliance with a warranty operates as an express breach of the contract."³

§ 250. The same subject continued—Maine statute.—Under the Maine statute providing that statements of description in a policy of insurance are representations, and that a change in

¹ 11 Am. and Eng. Encyc. of Law, Indiana, etc., Insurance Co. v. Rundell, 7 Ind. App. 426; 34 N. E. Rep. 588, followed. In Indiana, etc., Ins. Co. v. Byrket (1894), 1; 36 N. E. Rep. 779; 9 Ind. App. 443, it was held that a provision in an application for insurance that the applicant "warrants" the application to contain a full and true description of the property to be insured is not a warranty, but a representation.

² Providence, etc., Assur. Soc. v. Reutlinger (1894), 58 Ark. 528; 25 S. W. Rep. 835.

³ Providence, etc., Assur. Soc. v. Reutlinger (1894), 58 Ark. 528.

the property insured, or in its use or occupation, or a breach of any of the terms of the policy by the insured, does not affect the policy unless they materially increase the risk, the words "constant watch," occurring in a rider, attached to a policy issued in that state on the plant of a brick-manufacturing company, in the following words: "Steam pump, with sufficient hose to cover buildings. Constant watch,"—constitutes a representation and not a warranty. And under a provision in a policy of insurance making an application, survey, plan or description referred to in the policy a part of the contract, and a warranty by the insured, a rider attached thereto describing the property can not be construed a warranty.¹

¹ *King Brick Co. v. Phoenix Ins. Co.*, 164 Mass. 291; 41 N. E. Rep. 277, where the court said: "We are somewhat embarrassed in construing this statute by the fact that the decisions of the supreme court of Maine afford us but little assistance. The precise question here involved does not appear to have been decided. There are, however, expressions of opinion in several cases which show that the statute is to be liberally construed in favor of the insured. In *Campbell v. Monmouth, etc., Insurance Co.*, 59 Maine, 430, 434, the court, speaking of the statute in question, say that it 'was not designed to lay any additional stumbling block in the way of the policy-holder before his case could be heard upon its merits, and it should not be so construed as to give it that effect.' In *Emery v. Piscataqua, etc., Insurance Co.*, 52 Maine, 322, 325, it is said by the court: 'Warranties on these points [the valuation and interest of the insured] are to be treated as representations, and nothing more.' And in *Day v. Dwelling-House Insurance Co.*, 81 Maine, 244; 16 Atl. Rep. 894, it is said: 'Previous to the enactment of our present insurance law, policies had become so loaded down with provisos, limita-

tions, and conditions that in many cases they secured to the insured nothing better than an unsuccessful lawsuit, in addition to the loss of his property. And one of the purposes of our present statute was to put an end to this evil.' The words 'constant watch,' in the connection in which they occur, may, perhaps, amount to a description of the risk, and, if so, by the terms of the statute they constitute a representation, and not a warranty; but the description can not be said to be erroneous in this case, for the words in the statute, which follow the clause above cited, show that the words 'erroneous descriptions' refer to descriptions of the property as it really existed, and not to a promise as to the future. The words upon which the defendants principally rely are these: 'A change in the property insured, or in its use or occupation, or a breach of any of the terms of the policy by the insured, do not affect the policy unless they materially increase the risk.' But in this case there was no change in the property, or in its use or occupation. The word 'change' in the law of insurance means a permanent or habitual change, and does not include the temporary absence of a watchman of

§ 25¹. **Insurance warranties not favored.**—In an application for fire insurance, containing at its close a clause that “applicant warrants that the foregoing is a full and true exposition of all the facts and circumstances, conditions, situations, and value of and title to the property to be insured, and is offered as a basis of the insurance requested, and is made a special warranty,” the answer “yes” to the question, “Do you agree to keep merchandise and cash accounts?” is a

which the insured has no knowledge. *Shaw v. Robberds*, 6 Adol. & E. 75; *Houghton v. Manufacturers’, etc., Insurance Co.*, 8 Metc. (Mass.) 115; *Loud v. Citizens’, etc., Insurance Co.*, 2 Gray, 221, and cases cited. Was there a breach of any of the terms of the policy by the insured? This depends upon whether the assured absolutely promised that there should be a ‘constant watch,’—in other words, whether he warranted this, — or whether the words constitute a representation merely, and are governed by the familiar rules applicable to representations. Unless they amount to a warranty, there is no breach of the agreement. In this part of the case we assume, of course, that the first clause of the section is not broad enough to include a statement as to the future. It is a familiar rule of construction that a promise in regard to the future, which is not clearly made a warranty, is a representation only, and not a warranty. *Houghton v. Manufacturers’, etc., Insurance Co.*, 8 Metc. (Mass.) 115; *Daniels v. Hudson*, etc., *Insurance Co.*, 12 Cush. 416; *National Bank v. Hartford Ins. Co.*, 95 U. S. 673; *Garcelon v. Hampden, etc., Insurance Co.*, 50 Maine, 580. On the principles laid down in these cases, we can not regard the words ‘constant watch’ as constituting a condition precedent to the right to recover, and consider them as a representation that a constant watch would be kept. The duty was thus imposed upon the insured to use all reasonable care and to take all reasonable means to see that

a constant watch was kept. This was done by making a rule to that effect and providing a watch. No negligence or fraud is imputed to the assured. The loss was caused by the negligence of a servant, and this is a risk covered by the insurance. There was, therefore, no breach of the terms of the policy by the insured. *Shaw v. Robberds*, 6 Adol. & E. 75; *Dobson v. Sotheby*, 1 Moody & M. 90; *Houghton v. Manufacturers’, etc., Insurance Co.*, 8 Metc. (Mass.) 115; *Daniels v. Hudson*, etc., *Insurance Co.*, 12 Cush. 416; *Loud v. Citizens’, etc., Insurance Co.*, 2 Gray, 221; *Insurance Co. of North America v. McDowell*, 50 Ill. 120, 131; *Aurora Insurance Co. v. Eddy*, 55 Ill. 213, 219; *Mickey v. Burlington, etc., Insurance Co.*, 35 Iowa, 174. The defendants further rely upon certain provisions in the policies as showing that the words ‘constant watch’ constitute a warranty. In four of the policies the language is: ‘If an application, survey, plan, or description of property be referred to in this policy, it shall be a part of this contract, and a warranty by the insured.’ This clearly refers to some paper outside of the policy, and not to words in the policy itself. Moreover, if the clause were broader, and constituted a description of the property a warranty, it would be in conflict with the provisions of section 20, and void by section 21, which provides: ‘All provisions contained in any policy of insurance in conflict with any of the provisions hereof are null and void.’”

mere representation and not a warranty.¹ Forfeitures are not favored in law, and where the contract of insurance is equally susceptible of two interpretations, or is doubtful, the courts will resolve the doubt in favor of averting a forfeiture, always giving the stricter construction in favor of the insured.² Neither are statements or agreements of the insured which are inserted or referred to in a policy always warranties. Whether they be warranties or representations depends upon the language in which they are expressed, the apparent purpose of the insertion or reference, and sometimes upon the relation they bear to other parts of the policy or application. All reasonable doubts as to whether they be warranties or not should be resolved in favor of the assured.³ Nothing is better settled than the rule that a mere representation will not amount to a warranty, and that, in case of doubt whether a statement is a warranty or a mere representation, the latter construction will be given.⁴

§ 252. Description as warranty—Agent's mistake.—Although the policy provided that the description of the insured

¹ *Etna Ins. Co. v. Norman*, 12 Ind. App. 652; 40 N. E. Rep. 1116, where the court said: "It may be said, in the present case, if the company intended the statement that the appellee would keep a merchandise and cash account to be a promissory warranty, it would have been very easy either to make this a special warranty or to warrant the correctness of each statement made by the appellee in his application. This, as has been seen, was not done, and hence we can not, by construction, place a warranty where the parties have not done so by the plain provisions of the contract. The statement or promise to keep a merchandise and cash account must be regarded as a mere representation; and no fraud being charged, and as even the materiality of the matter is not shown, and it is not averred how the appellant was injured by the appellee's failure to keep such account, the falsity of the promise or represen-

tation can not be used to work a forfeiture."

² *Continental Insurance Co. v. Van-lue*, 126 Ind. 410; 26 N. E. Rep. 119; *Indiana, etc., Insurance Co. v. Rundell*, 7 Ind. App. 426; 34 N. E. Rep. 588. In the case last cited, Davis, J., speaking for this court, said: "If it was the purpose of the company to secure a warranty of the correctness of each statement of the applicant, why did it not stop with the express declaration of a warranty?"

³ *Continental Insurance Co. v. Rogers*, 119 Ill. 474; 10 N. E. Rep. 242; *Fitch v. American, etc., Insurance Co.*, 59 N. Y. 557; *Moulou v. American, etc., Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. 466; *Campbell v. New England, etc., Insurance Co.*, 98 Mass. 381; *Alabama, etc., Insurance Co. v. Johnston*, 80 Ala. 467; 2 So. Rep. 125; *National Bank v. Insurance Co.*, 95 U. S. 673.

⁴ 11 Am. and Eng. Encyc. of Law, 294.

property should be part of the contract, and a warranty by the insured, the fact that the agent misdescribed the property will not defeat a recovery on the policy, where the insured accurately described the property, and did not know of the error in the description until after the fire.¹

§ 253. Insurer may waive breach—Effect of waiver.—An insurer may waive a breach of warranty by the insured and

¹ *Dowling v. Merchants' Ins. Co.* 168 Pa. St. 234; 31 Atl. Rep. 1087, where the court said: "The fraud or mistake of an insurance agent within the scope of his authority will not enable his principal to avoid a contract of insurance to the injury of the insured, who acted in good faith; and the fraud or mistake of the agent may be proved by parol evidence, notwithstanding it is provided in the policy that the description of the property shall be a part of the contract and a warranty by the insured. This is clear upon principle, and it is abundantly sustained by authority. *Smith v. Farmers'* etc., Insurance Co., 89 Pa. St. 287; *Eilenberger v. Protective, etc., Insurance Co.*, 89 Pa. St. 464; *Susquehanna, etc., Insurance Co. v. Cusick*, 109 Pa. St. 157; *Kister v. Lebanon, etc., Insurance Co.*, 128 Pa. St. 553; 18 Atl. Rep. 447; *Meyers v. Lebanon Insurance Co.*, 156 Pa. St. 240; 27 Atl. Rep. 39. This case is much stronger for the plaintiff than those above cited. In all of these, written applications had been signed by the insured, and in each case the application was made a part of the contract. In this case no written application was made, and the policy was written by the agent, and not read by the insured until after the fire. The building insured was built for and used as a boarding house, and was erroneously described in the policy as 'occupied by the insured as a dwelling only.' The testimony was clear and uncontradicted that there was no mistake or decep-

tion on the part of the plaintiff, who fully and accurately described the property to the agent as a boarding house, and spoke to him of its capacity and use. It was seen and examined by the agent, and its use, which was apparent, was fully known to him. The misdescription was his act alone, in the face of light and knowledge, and was unknown to the insured until after the loss occurred. The defendant can not be released from its contract because the plaintiff, acting in good faith, accepted without examination the policy written by its agent. In *Swan v. Watertown, etc., Insurance Co.*, 96 Pa. St. 37, the insured signed an application which had not been finished. He directed another to fill it up, and expressed a doubt as to the manner in which it should be done. It was held that he knew facts to incite him to read the policy, and was charged with knowledge of its contents, and should, under the circumstances, be presumed to have accepted it as written. No such presumption arose in this case. Having made a full and frank disclosure of the facts to the company's agent, who was empowered to write the policy, and who, from observation, knew the character and use of the building, there was nothing to induce or warn the insured to read the policy, unless it was the anticipation of fraud or mistake, and this could impose no duty in protection of the rights of the defendant."

abide by the contract between them contained in the policy.¹ Where neither a policy of life insurance nor the application upon which it is granted contains any stipulation that a breach of a warranty contained in the application shall *ipso facto* nullify the policy, the breach of such a warranty renders the policy voidable, but does not render it void, nor entitle the insurer to defeat a recovery upon it, unless he have seasonably manifested an intention to rescind the contract, and returned or tendered a return of the premiums.²

¹Phoenix, etc., Ins. Co. v. Raddin, 120 U. S. 183, 197.

²Selby v. Mut. L. Ins. Co. (1885), 67 Fed. Rep. 490, where the court said: "Since the insurer may, in a case like this, waive a breach of warranty, it is obvious that the insured can not, before giving an opportunity to waive, take advantage of his own wrong by avoiding the contract; hence the validity of the contract depends upon the will of the insurer, rather than upon any inflexible rule of law. By this test, the contract, as it is set forth in the pleadings, is shown to be one which must necessarily be classed as voidable. In the argument and brief of counsel for the defendant, many cases have been cited in which courts have held, in actions upon insurance policies, that the right to recover is barred by breaches of warranty. But on examination I find that in the leading cases of Jennings v. Chenango, etc., Ins. Co., 2 Denio, 75, and Jeffries v. Life Ins. Co., 22 Wall. 47-57, the parties fixed the penalty for a breach of warranty by stipulating in the contract that, in case of the violation of any of the conditions upon which the same were based, the policies should become null and void; and it is probable that in other cases the facts were similar, or that the courts, in deciding them, failed to take note of the particular stipulations to which effect was given in cases which were supposed to be precedents and followed. I find, also, that, in the light of later decisions by the Supreme Court of the United States, many of these decisions must be regarded as erroneous. For example, in the case of Cooper v. Farmers', etc., Ins. Co., 50 Pa. St. 299, Mr. Justice Strong, in the opinion of the court, cites and follows Jennings v. Insurance Co., *supra*, holding that parol evidence is not admissible to show that the insured truly informed the agent of the insurers of particulars which the agent had incorrectly stated in the application written by him for the insured, the statements in the application having been made warranties. And in the case of Insurance Co. v. Mahone, 21 Wall. 152, the same learned justice wrote the opinion of the Supreme Court of the United States, in which it was ruled that parol evidence to show that the insured made true answers to questions in the application to the agent of the insurers, different from the answers as written by the agent, was admissible in an action on the policy, notwithstanding the fact that the answers as written by the agent were subsequently read to the insured, and voluntarily signed by him. I do not find in any of the authorities a reason given for departure from elementary principles in order to relieve an insurance company of the obligation to pay according to its promise while it retains the money paid upon the faith of that promise. The case of New York,

§ 254. **Warranties in sales—Horses.**—No special form of words is necessary to create a warranty.¹ A positive affirmation of quality or condition, as a fact, and not an opinion, accepted and relied upon by the buyer as a warranty, suffices to constitute a warranty.² At the time the sale of a horse was completed the buyer said to the vendor: "I have nothing to show that you warrant this horse as you represented him," to which the vendor replied: "The horse is just the same as when you drove him on Monday;" it was held that these words did not constitute a warranty.³ Where the buyer went to the seller before a sale by auction, and asked about a horse to be sold, and the seller told the buyer that the horse was only twelve years old and sound, this was held a warranty.⁴ A bill of sale of "one pair of black geldings, sound and kind," is a warranty.⁵ A direct affirmation of the ability of a horse to

etc., *Ins. Co. v. Fletcher*, 117 U. S. 519, 536; 6 Sup. Ct. 837, is relied upon by counsel for the defendant. But I do not regard that case as controlling, for this reason: the insurance company, before defending, made a lawful tender of the premiums received, and did everything necessary to a rescission of the contract; hence the question whether the contract was void or only voidable was not in the case. This answer is defective for the reason that it shows only a right to rescind the contract. A complete defense on the ground of a breach of the warranty could be made only by alleging that the defendant had claimed and exercised its right within a reasonable time, and that there had been an actual rescission of the contract, or at least the answer should disaffirm the contract, and plead a tender of the premiums. 3 Am. and Eng. Encyc. of Law, 929, 932; 2 Parsons on Contracts (7th ed.), 677, 681. This objection is not answered by saying that the legal representatives of the deceased may recover the premiums, and that the defendant is not required to make a tender to this

plaintiff. Conceding that a tender, to be valid, must be made to the legal representative, it is nevertheless essential to a rescission of the contract that the defendant should return, or at least offer in good faith to return, the premiums to whomsoever may be lawfully entitled to receive the same. No such repayment or offer having been made, the contract is operative, so that the plaintiff may enforce it in this action. *Foreman v. Bigelow*, 4 Cliff. 508, Fed. Cas. No. 4,934; *Gray v. National, etc., Association*, 111 Ind. 531; 11 N. E. Rep. 477."

¹ *Fairbank Co. v. Metzger*, 118 N. Y. 260; *Cross v. Garnet*, 3 Mod. 261; *Wilbur v. Cartright*, 44 Barb. 536; *Willard v. Merritt*, 45 Barb. 295; *Chapman v. Murch*, 19 Johns. 290; *Roberts v. Morgan*, 2 Cow. 438; *Cook v. Moseley*, 13 Wend. 277; *Warren v. Philadelphia Coal Co.*, 83 Pa. St. 437; *Polhemus v. Heiman*, 45 Cal. 573.

² *Naylor v. McSwegan*, 21 N. Y. Supl. 930.

³ *Holmes v. Tyson*, 147 Pa. St. 305.

⁴ *Crossman v. Johnson*, 63 Vt. 333.

⁵ *Hobart v. Young*, 63 Vt. 363.

labor, is a warranty.¹ But a mere statement by the seller of a horse, that he has driven him and found him all right, is not a warranty.² A statement that the horse is "sound, straight and all right, and just such a horse as you want," constitutes a warranty.³ In determining whether or not words constitute a warranty, they should receive their common acceptance; and where the buyer asked the seller whether the mules he was about to buy were "all right," and the seller said "yes," it was held that the seller warranted the soundness by an absolute and unqualified representation to that effect.⁴ Where the bill of sale was to the effect, "received one hundred pounds for a bay gelding got by Cheshire Cheese, warranted sound," it was held that there was no warranty that the horse was of the breed named.⁵ In determining whether an affirmation was intended as a warranty, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case there is a warranty, in the latter not.⁶

§ 255. The same subject continued—Machinery.—Where the buyer wrote to the seller ordering "one of your latest improved eight-tool fluting machines, so arranged as to flute both card and spinning rolls," and the seller in reply wrote "you may rely upon having a first-rate machine, which will do your work in a satisfactory manner," it was held that, if the seller knew what the work was for which this machine was bought, it would be an express warranty, and that oral evidence was admissible to show knowledge.⁷ And where a catalogue of an auction sale stated that a machine to be sold would be "put in first-class order, guaranteed," it was held to be a

¹ *Morgan v. Powers*, 66 Barb. 35.

⁵ *Budd v. Fairmaner*, 8 Bing. 48.

² *McMaster v. Smith*, 3 N. Y. St. Rep. 481.

⁶ *Benjamin on Sales*, § 613, citing *Pasley v. Freeman*, 3 T. R. 51; *Medina v. Stoughton*, 1 Ld. Raymond, 593.

³ *Murphy v. McGraw*, 74 Mich. 318; 41 N. W. Rep. 917.

⁷ *Whitehead Machine Co. v. Ryder*,

⁴ *McClintock v. Emick*, 87 Ky. 160. 139 Mass. 366.

warranty that the machine was in good order.¹ A contract to furnish machinery for a first-class oil-mill is not to be construed as meaning first-class of the particular manufacturer making the contract, but first-class generally.²

§ 256. Warranty of workmanship.—A warranty of good workmanship does not cover a defect in the plan of construction of the article manufactured, but relates only to the execution of the plan.³ Thus a warranty in a contract for the erection of blast furnaces for an iron company, that all the work shall be “done in good, workman-like manner, and of suitable material, and each part to be adequate in design, strength, capacity and workmanship for the purposes for which it is intended,” the work to be examined by the company’s superintendent bi-weekly, and finally accepted if to his satisfaction, is not a guaranty that the plant, as a whole, shall be adequate in design, strength, capacity and workmanship for the purpose intended.⁴ But where plaintiff, a machinist, contracted to make for defendants at a fixed price a certain piece of machinery from plans and models furnished by defendants and, after examining these last, guaranteed that the machine would work, the fact that the plans furnished plaintiff were defective will not relieve him from liability on his guaranty, since he should have known that they were defective before making the contract.⁵

¹ *Latham v. Shipley*, 86 Iowa, 543; 53 N. W. Rep. 342.

² *Van Winkle v. Wilkins*, 81 Ga. 93. See, also, *McLennan v. Ohmen*, 75 Cal. 558; *Naylor v. McSwegan*, 21 N. Y. Supl. 930.

³ *Case Plow Works v. Niles, etc.*, Co., 90 Wis. 590; 63 N. W. Rep. 1013.

⁴ *Sheffield, etc., Iron Co. v. Gordon* (1894), 151 U. S. 285; 14 Sup. Ct. Rep. 243.

⁵ *Giles v. San Antonio Foundry Co.* (Texas App. 1893), 24 S. W. Rep. 546, where the court said: “Appellee had possession of the drawings for the machine before the contract was executed, and should have known that

they were defective; and the fact that the drawings were furnished by appellants does not relieve it of its liability on its guaranty. This is not a case of a pattern being presented to a workman, and an order given for the manufacture of a piece of machinery in accordance with the model; but the model is placed in the hands of a machinist, his judgment and skill are invoked, and his opinion sought as to the practicability of the thing desired, and, after a thorough investigation, he not only represents that the machine will operate, but enters into a written guaranty to make it work properly. Unless it did work as in-

§ 257. **Statements in catalogues.**—The mere showing of testimonials received from other customers by a dealer in an attempt to sell his goods, or in the sale of them, can not be considered as a warranty that the goods sold shall conform to such testimonials, unless there is something said which expressly or impliedly guarantees that they shall equal in quality or performance the praise of the testimonials.¹ A statement in a catalogue of sale that the chattel would be “put in first-class order, guaranteed,” was held a warranty;² but where some pictures were sold at auction, a statement in the catalogue that they were the works of certain distinguished artists was held no warranty that such artists painted them.³ Where, however, the catalogue recited “four pictures, views in Venice, CANCELLETTI,” it was left to the jury to decide whether the seller meant to warrant the pictures as genuine works of the artist named.⁴ Where a buyer sent to the seller a printed form of order for a machine, upon the back of which was a printed warranty and the seller’s name printed at the bottom, and the seller sent the machine called for by the order, but did not sign the warranty, or fill up certain blank spaces in the form, it was held that the seller was bound by the warranty, and that its blank spaces could be filled up before trial.⁵ A statement in a letter of instructions from the seller to his drummer is not a warranty to be taken advantage of by a customer;⁶ but generally statements in advertisements are warranties.⁷ If the sale is at public auction the warranty need not be in the catalogue of sale; it may be made privately by the seller to a bidder.⁸ And

tended and contemplated by the contracting parties, appellee should not recover for anything for the machine.”

¹ *Richey v. Daemicke*, 86 Mich. 647.

² *Latham v. Shipley*, 86 Iowa, 543; 53 N. W. Rep. 342.

³ *Jewdine v. Slade*, 2 Esp. 572.

⁴ *Power v. Barham*, 4 A. & E. 473.

⁵ *Grieb v. Cole*, 60 Mich. 397.

⁶ *Wiggin v. Butcher*, 154 Mass. 447.

⁷ *Harrington v. Smith*, 138 Mass. 92; *Borrekins v. Bevan*, 3 Rawle, 23, where the court said: “From a

critical examination of all the cases, it may be safely ruled that a sample or description in a sale note, advertisement, bill of parcels or invoice is equivalent to an express warranty that the goods are what they are described or represented to be by the vendor.” *Bradford v. Manly*, 13 Mass. 139; *Henshaw v. Robins*, 9 Met. 83; *Bridge v. Wain*, 1 Starkie, 410; *Allan v. Lake*, 18 Q. B. 560; *Swett v. Colgate*, 20 Johns. 196.

⁸ *Bronson v. Leach*, 74 Mich. 713; 42 N. W. Rep. 174.

by the great weight of recent authority, positive statements in instruments evidencing contracts of sale, descriptive of the kind, or assertive of the quality and condition of the thing sold, are treated as a part of the contract and regarded as warranties, if the language is reasonably susceptible of that construction and it is fairly inferable that the purchaser understood and relied upon it as such.¹

§ 258. The same subject continued.—Where defendant ordered wagons of plaintiff upon the latter's blank form, upon which was indorsed a warranty agreeing to replace or pay for broken parts under certain conditions, if said parts were sent to the factory as evidence, the catalogue of the plaintiff, upon which the defendant also relied in purchasing, also containing a warranty as to the material and workmanship, and one lot of wagons was bought upon the representations of the catalogue alone, when in fact the wagons were made of defective material, and repairs for some parts were sent for, but never came, and one wheel was sent but never heard from, it was held that defendant was entitled to damages under the warranty in the catalogue, although the parts were not sent to the factory.²

¹ *Hobart v. Young*, 63 Vt. 363, 370; *Hastings v. Lovering*, 2 Pick. 214; *Henshaw v. Robins*, 9 Met. 83; *Brown v. Bigelow*, 10 Allen, 242; *Gould v. Stein*, 149 Mass. 570; *Osgood v. Lewis*, 2 Harris & Gill (Md.), 495; *Kearly v. Duncan*, 1 Head (Tenn.), 397; *Cramer v. Bradshaw*, 10 Johns. 484, where the words in a sale bill of slaves were "being of sound mind and limb, and free from all disease" and held a warranty; *Hawkins v. Pemberton*, 51 N.Y. 198; *Yates v. Pym*, 6 Taunt. 446, a description of bacon in a sale note as "prime singed," was held to be a warranty; *Bridge v. Wain*, 1 Stark. 410; *Shepherd v. Kain*, 5 B. & Al. 240. The advertisement of the sale of a ship described her as a "copper-fastened vessel," whereas she was only partially copper-fastened, and not what was called in the trade a copper-fastened vessel. It was held a warranty that she

was "copper-fastened." *Allan v. Lake*, 18 Q. B. 560; *Wetherill v. Neilson*, 20 Pa. St. 448; *Barrett v. Hall*, 1 Aik. 269, where the note was payable in "good cooking stoves," held no warranty because "good" is a very common term of praise in trade, and as used in the note, ascribed no particular quality to the stoves, and might well be regarded in that case as mere matter of opinion. *Wason v. Rowe*, 16 Vt. 525, where the term "considered sound" was held no warranty, the term "considered" being a mere expression of opinion. *Beals v. Olmstead*, 24 Vt. 114; *Drew v. Edmunds*, 60 Vt. 401; *Enger v. Dawley*, 62 Vt. 164.

² *Milburn Wagon Co. v. Nisewarner* (Va. 1894), 19 S. E. Rep. 846, where the court said: "The evidence shows that all the wagons were ordered 'upon the representations set forth in the catalogue;' and in the catalogue they

But in a case where the seller said to the buyer "they are a nice lot of eggs; you will lose hardly anything out of a case of eggs;" this was held no warranty.¹ Where wine was sold, "all to be delivered in merchantable order, the said goods to be approved by the buyer within three days after delivery;" it was held that the only legal effect of this language was to allow the buyer three days to examine the wine, there being no warranty that the wine was merchantable.² Where a contract called for

were expressly warranted to be 'well made, of good, thoroughly seasoned material, and of sufficient strength to carry the weight mentioned' in the catalogue. There is no evidence in denial of the fact that this was intended and understood by the parties as a warranty. It is certain the defendant was induced by it to enter into the contract in question, and there is no doubt she had a right to rely upon it. It is therefore, as it purports to be, a warranty, and was admitted as evidence, without objection, at the trial. *Mason v. Chappell*, 15 Gratt. 572; *Herron v. Dibrell*, 87 Va. 289; 12 S. E. Rep. 674; *Enger v. Dawley*, 62 Vt. 164; 19 Atl. Rep. 478. Now, is there any conflict between this and the warranty on the back of the printed order? The latter merely provides how ordinary breakages may be made good, and was not intended to affect the former in any way." In *Groetzinger v. Kann*, 165 Pa. St. 578; 30 Atl. Rep. 1043, after defendant had made complaint to plaintiffs that the leather which he had bought of them was not thoroughly tanned, plaintiffs wrote him: "Our leather is now thoroughly tanned. Will reship on Saturday, hoping the same will exist as before;" and defendant replied: "But if your leather is thoroughly tanned now, and all right in other respects, we would take it as before." It was held that these letters made a contract that the leather thereafter sent must be thoroughly

tanned. Green, J., said: "We have no hesitation in placing the contract within the line of cases illustrated by *Philadelphia Iron Co. v. Hoffman* (Pa. Supl.), 4 Atl. Rep. 848, in which the contract was for the sale and delivery of iron 'strictly neutral,' and we said: 'We are clearly of opinion that the contract of sale in this case created a warranty as to the quality of the iron.' *Holloway v. Jacoby*, 120 Pa. St. 583; 15 Atl. Rep. 487, is another instance of the same kind. The defendant offered by letter to sell plaintiff a car load of corn. Plaintiff replied by letter, saying: 'We will give 53c. per bushel for car corn, provided it is good, salable corn.' Defendant answered: 'We will accept your offer for one car load of corn.' We held that there was a warranty that it was good, salable corn. In *Pratt v. Paules* (Pa. Supl.), 4 Atl. Rep. 751, the plaintiff ordered slate from defendant, saying in his letter: 'Shipment must be strictly No. 1 in quality; no graybacks or scabs.' Defendant replied: 'Can fill your entire order at once.' We held that these communications created an express warranty, saying: 'He [plaintiff] was entitled to receive slate of quality No. 1, free from scabs and graybacks.'" See, also, *Holt v. Pie*, 120 Pa. St. 425, 440.

¹ *Hunter v. Stuge*, 12 N. Y. Supl. 557.

² *Gentilli v. Starace*, 14 N. Y. Supl. 764.

“Powelton coal of the same quality and kind as furnished” by the seller the preceding year, this was a warranty as to quality.¹ Where a customer sends an order to a dealer to furnish an article “the same as last,” the dealer by filling the order warrants the article to equal in all respects the preceding.² The mere option given the buyer to return goods is, however, no warranty. There is a wide difference between an option given to the buyer to return the goods if not satisfactory and a warranty of quality. The latter is continuous, and runs with the goods; but the former must be exercised within a reasonable time after the receipt of the goods, and the retention of the goods after the lapse of that reasonable time must be regarded as an acceptance, unless the option is extended in clear and unmistakable language.³ A warranty may be the result of several continuous negotiations. It need not necessarily be made on the very day of sale.⁴

§ 259. Construction of warranties.—Any affirmation of the quality or condition of the thing sold (not uttered as a matter of opinion or belief), made by the seller at the time of sale for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, if so received and relied on by the purchaser, is an express warranty. In cases of oral contracts it is the province of the jury, upon considering all the circumstances attending the transaction, to decide on the existence of these necessary ingredients to such a warranty.⁵ But when the contract is in writing, it is for the court to construe it, and to decide whether it contains a warranty or not.⁶ And where it is

¹ *Zabriskie v. Central R. Co.*, 131 N. Y. 72.

² *Moore v. King*, 134 N. Y. 596; 31 N. E. Rep. 624. See also, *Whittier Machine Co. v. Graffam*, 156 Mass. 415; *Harris v. Brain*, 33 Ill. App. 510; *Durfee v. Newkirk*, 83 Mich. 522.

³ *Childs v. O'Donnell*, 84 Mich. 533.

⁴ *Way v. Martin*, 140 Pa. St. 499.

⁵ *Shippen v. Bowen*, 122 U. S. 575, 581; *Hobart v. Young*, 63 Vt. 363; *Foster v. Caldwell*, 18 Vt. 176; *Bond*

v. Clark, 35 Vt. 577; *Osgood v. Lewis*, 2 H. & Gill (Md.), 495; *Henshaw v. Robins*, 9 Met. 83; *Oneida Society v. Lawrence*, 4 Cowen, 440; *Cook v. Moseley*, 13 Wend. 277; *Chapman v. Murch*, 19 Johns. 290; *Hawkins v. Berry*, 5 Gilman (Ill.), 36; *McGregor v. Penn*, 9 Yerger, 74; *Ottis v. Alderson*, 10 S. & M. 476.

⁶ *Hobart v. Young*, 63 Vt. 363; *Wason v. Rowe*, 16 Vt. 525; *Hastings v. Lovering*, 2 Pick. 214; *Henshaw v.*

clear, in the case of an oral contract, that the seller either has or has not warranted the condition of the property, there being no dispute as to the facts, the question of warranty is one of law.¹

§ 260. The same subject continued.—It is not always easy to determine whether the language used by the seller in his written contract should be construed as a warranty or as the

Robins, 9 Met. 83; *Brown v. Bigelow*, 10 Allen, 242, where the words "sound and kind," were held to constitute a general warranty of a horse. *Gould v. Stein*, 149 Mass. 570, holding that where a bought and sold note described the article as "Ceara scrap-rubber as per sample, of second quality," it did not admit of doubt that the note was intended to express the terms of the sale, and that the contract of the parties was to be found in what was thus written. *Osgood v. Lewis*, 2 Harris & Gill (Md.), 495, a leading case on this subject. There the bill of particulars contained a statement that the article was "winter-pressed spirm oil," and the question was, whether these words were *per se* a warranty; and it was held that they were. *Kearly v. Duncan*, 1 Head (Tenn.), 397; *Cramer v. Bradshaw*, 10 Johns. 484; *Foster v. Caldwell*, 18 Vt. 176; *Yates v. Pym*, 6 Taunt. 446; *Bridge v. Wain*, 1 Stark. 410; *Shepherd v. Kain*, 5 B. & Al. 240; *Allan v. Lake*, 18 Q. B. 560; *Wetherill v. Neilson*, 20 Pa. St. 448; *Barrett v. Hall*, 1 Aik. 269.

¹ *McClintock v. Emick*, 87 Ky. 160; *Hawkins v. Pemberton*, 51 N. Y. 198, where the court said: "It is not true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. If the contract be in writing, and it contains a clear warranty, the vendor will not be permitted to say that

he did not intend what his language clearly and explicitly declares; and so if it be by parol, and the representation as to the character or quality of the article sold be positive, not mere matter of opinion or judgment, and the vendee understands it as a warranty, and he relied upon it, and is induced by it, the vendor is bound by the warranty, no matter whether he intended it to be a warranty or not. He is responsible for the language he uses and can not escape liability by claiming that he did not intend to convey the impression which his language was calculated to produce upon the mind of the vendee." *Holmes v. Tyson*, 147 Pa. St. 305, where the court said: "It was contended, in the case in hand, that the question whether there was a warranty should have been submitted to the jury; as the warranty, if any, is to be found in the oral testimony, it would undoubtedly be the province of the jury to determine it, if there was a conflict of evidence. Had the language used been equivocal; had the one party asserted a warranty, and the other denied it, the matter should have been submitted to the jury. But the plaintiff's own testimony showed there was no warranty. There was the mere assertion of a fact, which the cases cited show was not a warranty." See, also, *Way v. Martin*, 140 Pa. St. 499; *Tewkesbury v. Bennett*, 31 Iowa, 83; *McLennan v. Ohmen*, 75 Cal. 558.

mere expression of his opinion.¹ While a general warranty does not extend to imperfections known to both parties, yet the seller may bind himself as against patent defects by an express warranty to that effect.² If the seller of unsound sheep warrants them to be sound, the buyer has a right to rely on the warranty, although he may have an opportunity to examine them.³

¹*Hazelton Boiler Co. v. Fargo Gas Co.*, 4 N. Dak. 365; 61 N. W. Rep. 151. In this case it appears that at a time when the defendant owned and operated a horizontal tubular steam boiler, plaintiff sold defendant an upright steam boiler, and gave the defendant a written warranty, which contained the following language: "We hereby guarantee that the boiler in regular practice, properly managed, shall evaporate ten pounds of water from one pound of good coal at 212 Fahrenheit, which we guarantee to be a saving of at least twenty per cent. in fuel over any horizontal tubular boiler." It was held (construing the language quoted), that the last clause, viz.: "Which we guarantee to be a saving of at least twenty per cent. in fuel over any horizontal tubular boiler,"—is a definite warranty of the fuel-saving capacity of the boiler sold, when compared with the horizontal tubular boiler. Said last clause is legally binding, and is not a mere expression of opinion or "puffing" on the part of the vendor. In *Sleeper v. Wood* (1894), 60 Fed. Rep. 888, it appeared that in March, 1888, certain packers of corn sold 2,000 cases "best packing of 1888 corn," with "usual guaranty against swells." The evidence showed conclusively that "swells," as used in the trade, included all cans whose contents were sour; that the "usual guaranty" was until July 1st, of the following year; and that it was customary before that time to notify the seller of the number of spoiled cans, and return the goods. The evidence

failed to show that the words "best packing of 1888" had any definite meaning in the trade. It was held that these words carried no implied warranty of quality, and that in the absence of any notice or return of the spoiled goods, according to the conditions of the warranty against swells, there could be no recovery for the spoiled corn. Carpenter, J., said: "Passing by the question whether there can be an implied warranty in any words of a written contract which contains an express warranty, we are unable to find any warranty implied in the words above quoted. There is no evidence to show that these words have any definite meaning in the trade here involved. It is clear that of themselves they do not import a definite warranty. Many witnesses were called to state the understanding of these words by the trade, but hardly any two of them agree in their interpretation. Some say it means 'the best corn packed that year;' some, 'the best corn packed that year in the state of Maine;' some, 'the extra corn, the finest grade;' some, 'the best corn that can be produced in Maine;' and some, the best quality of milky, white, tender, juicy and sweet corn. It is manifest that there is no evidence of a general custom of the trade which could interpret the warranty supposed to be contained in these words."

² *Watson v. Roode*, 30 Neb. 264; *Pinney v. Andrus*, 41 Vt. 631.

³ *First Nat. Bank v. Grindstaff*, 45 Ind. 158.

§ 261. To what defects a warranty extends.—Illustrations in cases of machinery.—The contract of sale of a harvesting machine provided that the machine should “work well;” it was held that if the draft of the machine was too heavy, or if it had too much side draft, the effect of which was to make the horses’ necks sore, it did not “work well” within the meaning of the warranty.¹ A warranty to the effect that “the said Vulcan Iron Works guaranty the workmanship and materials made up in their own shops, but do not guaranty boiler and other parts bought outside, nor the working of the machine as a whole,” was held not to extend to such matters as the relative capacity of the boiler and engines.² Where a machine is warranted, this warranty does not extend to the pulleys that operate it; a separate warranty is required for them.³ Where machinery is warranted “at the time of first starting,” this is to receive a reasonable construction, and the warranty will not be limited to such defects only as are discovered when the machinery is first started, unless the wording clearly requires such restriction.⁴ A warranty of a cotton press “that it will press domestic cotton, hand tied, seven bands, at the rate of sixty bales per hour, was held not a warranty that it would compress at the rate of sixty bales an hour for a day of ten hours, but that it was only to the effect that, under favorable conditions, it would compress cotton at the stipulated rate for a limited period of time.”⁵

§ 262. The same subject continued—Horses.—Where a horse was warranted as a “foal-getter,” and during one season was bred to eighty mares, and out of this number only fifteen were with foal, it was held that the warranty was broken.⁶ A general warranty that a mare is all right for livery purposes

¹ McCormick Harvesting Machine Co. v. Russell, 86 Iowa, 556; 53 N. W. Rep. 310.

² Cyclone Steam Co. v. Vulcan Iron Works, 52 Fed. Rep. 920.

³ Troy Laundry Machine Co. v. Henry, 23 Ore. 232; 31 Pac. Rep. 484.

⁴ Minnesota Thresher Co. v. Han-

son, 3 N. Dakota, 81; 54 N. W. Rep. 311. See, also, McCormick Harvesting Co. v. Brower, 88 Iowa, 607; 55 N. W. Rep. 537.

⁵ Hazlehurst Compress Co. v. Boomer Compress Co., 48 Fed. Rep. 803.

⁶ Watson v. Rcode, 30 Neb. 264.

can not be construed into a special undertaking that she is not with foal.¹ Where a horse was sold as "all right except that he would sometimes shy;" it was held that this amounted to a warranty of soundness, and that the warranty was broken if the horse was partially blind, although that caused him to shy.² But where a horse was warranted sound for one month, this warranty was held to only cover defects discovered within the month, and defects not discovered until after the lapse of the month, although existing at the date of sale, were excluded from the warranty.³

§ 263. Warranty of stallions.—When producers of and dealers in horses for breeding purposes sell one of such horses to one who they know desires a horse for such purposes, there is an implied warranty that the horse is reasonably fit for breeding purposes.⁴ A warranty of a stallion, sold for breeding purposes—that he was "sound and healthy, and, with proper handling, a foal getter,"—was a warranty that he could do reasonable service as a foal getter, and the requirements thereof were not satisfied where, with proper handling,

¹ *Whitney v. Taylor*, 54 Barb. 536.

² *Kingsley v. Johnson*, 49 Conn. 462.

³ *Chapman v. Gwyther*, L. R. 1 Q. B. 463.

⁴ *Merchants, etc., Bank v. Frazee*, 9 Ind. App. 161; 36 N. E. Rep. 378, where the court said: "Here the contract was to supply an article which the seller produced and was dealing in. The article was for a particular purpose, and the implication necessarily arises that the buyer relied upon or trusted in the judgment or knowledge of the seller. Hence the sale carried with it an implied warranty that the horse should be reasonably fit for breeding purposes. *Benjamin on Sales*, § 988. See also, *Conant v. National, etc., Bank*, 121 Ind. 323; 22 N. E. Rep. 250; *Brenton v. Davis*, 8 Blackf. 317; *Gurney v. Atlantic R.*

Co., 58 N. Y. 358; *Jones v. Bright*, 5 Bing. 533. In the case last cited, it was said by Best, C. J.: "The decisions, however, touching the sale of horses turn on the same principle. If a man sells a horse generally, he warrants no more than that it is a horse. The buyer puts no question, and perhaps gets the animal cheaper. But if he asks for a carriage horse, or a horse to carry a female or a timid and infirm rider, he who knows the qualities of the animal, and sells, undertakes, on every principle of honesty, that he is fit for the purpose indicated. The selling upon a demand for a horse with particular qualities is an affirmation that he possesses those qualities." We think there was, under the contract alleged, an implied undertaking that the horse was a reasonably sure breeder or foal getter."

only eight mares out of fifty-five served were gotten with foal.¹ In an action for a failure of a written warranty given on the sale of a stallion that the horse was registered in the Stud Book of England, it was held incompetent for the seller to prove by parol testimony that prior to the sale he informed the purchaser that the horse was not registered, as parol testimony is not admissible to contradict or vary a written contract.² Where the contract of sale of a stallion contains no express warranty, and states that he is "in bad fix," no warranty as to his foal-getting ability is implied.³

§ 264. Further illustrations—Soundness in horses.—The enlargement of a horse's bag is an unsoundness;⁴ and so is spavin.⁵ Lameness may or may not make a horse unsound. If it was only accidental and temporary, it would not be a breach of warranty; but if it was chronic and permanent, arising from causes which were beyond the reach of immediate remedies, it would be clearly a case of unsoundness.⁶ To constitute unsoundness the disease need not be incurable.⁷ Crib-biting is not of itself covered by a general warranty of soundness,⁸ but if it assume such a state that it affects the health and condition of the horse, so as to render him less able to perform service and of less value, this is unsoundness.⁹ But if the warranty is to the effect that the horse is "sound and right" any crib-biting at all is a breach of this warranty.¹⁰ Ossification of the cartilages;¹¹ the vavicular dis-

¹ *McCorkell v. Karhoff*, 90 Iowa, 545; 58 N. W. Rep. 913. In the somewhat similar case of *Davis v. Iverson* (S. Dakota, 1894), 58 N. W. Rep. 796, there was held to be no breach of the warranty.

² *Watson v. Roode* (1890), 30 Neb. 264, followed in *Watson v. Roode* 43 Neb. 348; 61 N. W. Rep. 625.

³ *Wood v. Ross* (Texas App. 1894), 26 S. W. Rep. 148.

⁴ *Watson v. Roode*, 30 Neb. 264.

⁵ *Fitzgerald v. Evans*, 49 Minn. 541; *Watson v. Denton*, 7 C. & P. 85.

⁶ *Brown v. Bigelow*, 10 Allen, 242; *Dickinson v. Follett*, 1 M. & R. 299.

⁷ *Thompson v. Bertrand*, 23 Ark. 730, the case of sale of a slave.

⁸ *Scholefield v. Robb*, 2 Moo. & R. 210.

⁹ *Washburn v. Cuddihy*, 8 Gray, 430.

¹⁰ *Walker v. Hoisington*, 43 Vt. 608. See, also, *Dean v. Morey*, 33 Iowa, 120, where it was held that the failure on the part of the seller to disclose his knowledge that the horse was a cribber furnished no cause of action to the buyer.

¹¹ *Simpson v. Potts*, *Oliphant on Law of Horses*, 224, Eng. ed. by Lloyd, 467.

ease;¹ thick wind,² and roaring,³ are all cases of unsoundness. Curby hocks is not unsoundness.⁴ Any injury or infirmity which renders a horse less fit for present use and convenience, even though the same be temporary and curable, is an unsoundness, constituting a breach of the warranty of the soundness of the horse.⁵ If animals sold are warranted sound, and are not so, but have an infectious or contagious disease, which they communicate to others, where the parties contemplate their being placed with other stock, the loss, not only in respect to the animals purchased, but to others to which the warranted animals communicate the disease, may be recovered, as well as the expense of taking care of and doctoring them.⁶

§ 265. Open defects.—Open and visible defects, or qualities of articles sold and warranted, are not reached, as a general rule, by the warranty, although they be inconsistent with its terms, the law presuming that the vendor did not warrant against defects and qualities whose existence is clear to the buyer and everybody else; but the seller can, of course, by express and appropriate language warrant against blemishes and defects which are patent, open and visible, as well as others.⁷

§ 266. Written contract excluding oral warranty.—When a contract is couched in terms which import a complete legal

¹ *Bywater v. Richardson*, 1 A. & E. 508.

² *Joliff v. Bendell*, Ry. & Moo. 136.

³ *Onslow v. Eames*, 2 Stark. 72.

⁴ *Brown v. Elkington*, 8 M. & W. 132.

⁵ *Roberts v. Jenkins*, 21 N. H. 116; *Elton v. Jordan*, 1 Stark. 102; *Garment v. Barrs*, 2 Esp. 673; *Watson v. Denton*, 7 C. & P. 85; *Kornegay v. White*, 10 Ala. 255; *Elton v. Brogdon*, 4 Camp. 281.

⁶ *Joy v. Bitzer*, 77 Iowa, 73; 3 Lawyers' Rep. Ann. 184; *Pinney v. Andrus*, 41 Vt. 631; *Marsh v. Webber*, 16 Minn. 418; *Smith v. Green*, 45 L. J. (N. S.) C. P. 28; *Bradley v. Rea*, 14 Allen, 20; *Packard v. Slack*, 32 Vt. 10. See following cases where

the soundness of horses is more or less discussed: *Watson v. Roode*, 30 Neb. 264; *Fitzgerald v. Evans*, 49 Minn. 541; *Postel v. Oard*, 1 Ind. App. 252; *Crossman v. Johnson*, 63 Vt. 333; *Hobart v. Young*, 63 Vt. 363; *Scroggin v. Wood*, 87 Iowa, 437; 54 N. W. Rep. 437, where it was held that the representation of the seller to the buyer, that the horse would not produce sorrel colts, was not a warranty. *McClintock v. Emick*, 87 Ky. 160.

⁷ *Fitzgerald v. Evans*, 49 Minn. 541; *Postel v. Oard*, 1 Ind. App. 252; *Watson v. Roode*, 30 Neb. 264; *Pinney v. Andrus*, 41 Vt. 631; *First Nat. Bank v. Grindstaff*, 45 Ind. 158; *Benjamin on Sales*, § 616.

obligation, with no uncertainty as to the object, or extent of the engagement, it is, in the absence of fraud, accident or mistake, conclusively to be presumed that the whole engagement of the parties and the extent and manner of their undertaking were reduced to writing. And hence where there is a written warranty on a sale of personal property, no prior or contemporaneous oral warranty can be shown; neither can an oral warranty be shown when the written contract of sale contains no warranty.¹ Whether a written contract fully expresses the terms of the agreement, and if so, thus excluding all warranties not expressed therein, is a question of construction for the court.²

§ 267. The same subject continued—Illustrations.—Where the seller by a written contract agreed to furnish a refrigerating machine, and the contract was silent as to any warranty, it was held incompetent for the buyer, in an action for the price, to recoup damages for breach of an oral antecedent warranty.³ Where a bull was sold, and a writing, stating the pedigree and also containing the phrase, "I have this day sold the above named bull to * * *, I hereby certify the above pedigree to be true," was given to the buyer, it was held that this writing evidenced the sale and contained an express warranty not implied by law, and that parol evidence was inadmissible to show a

¹ *Seitz v. Brewers' Refrigerator Co.*, 374; *Wilson v. Deen*, 74 N. Y. 531; 141 U. S. 510; *McQuaid v. Ross*, 77 Wis. 470; *Humphrey v. Merriam*, 46 Minn. 413; *Hobart v. Young*, 63 Vt. 363; *Lamson Consolidated Co. v. Hartung*, 18 N. Y. Supl. 143; *Rumely v. Emmons*, 85 Mich. 511; *Hungerford v. Rosenstein*, 19 N. Y. Supl. 471; *Chase v. Evarts*, 19 N. Y. Supl. 987; *McMullen v. Carson*, 48 Kan. 263; 29 Pac. Rep. 317; *Bradford v. Neill*, 46 Minn. 347; 49 N. W. Rep. 193. See, also, *Martin v. Cole*, 104 U. S. 30; *Gilbert v. Moline Co.*, 119 U. S. 491; *The Delaware*, 14 Wall. 579; *Naumberg v. Young*, 44 N. J. Law, 331; *Conant v. National State Bank*, 121 Ind. 323; *Mast v. Pearce*, 58 Iowa, 579; *Thompson v. Libby*, 34 Minn.

Robinson v. McNeill, 51 Ill. 225.

² *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510.

³ *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510, where the court said: "Since it [the contract] was in this instance complete and perfect on its face, without ambiguity, and embracing the whole subject-matter, it obviously could not be determined to be less comprehensive than it was. And this conclusion is unaffected by the fact that it did not allude to the capacity of the particular machine. To hold that mere silence opened the door to parol evidence in that regard would be to beg the whole question."

further express warranty against sterility.¹ Where a horse was sold and the receipt given for the purchase-money stated, "I do warrant the title and pedigree of this horse to be the same as always represented by myself," it was held that this excluded any oral warranty of soundness.² A contract of sale of stock in a corporation contained the statement, "there are no assessments against said stock, and none about to be made;" evidence was excluded which tended to show that the seller had also made oral representations that the corporation would not issue additional and preferred stock.³ In a conditional sale of chattels, the writing, specifying the conditions, names of the parties, and further details as to payment and delivery, is the contract, and binds both parties, although signed only by the buyer;⁴ and such writing must be looked to for any warranties, and no parol ones can be proven.⁵ A contract provided that, although the engine was warranted, the buyer, in order to take advantage of the warranty, must give the seller notice of its defects within one week after starting the engine; it was held that a parol agreement by the seller that he would not hold the buyer to the written warranty could not be proved.⁶ Where a contract contains express warranties on the part of the seller, parol evidence is, in the absence of fraud in its execution, inadmissible to show verbal warranties.⁷ Accordingly where the seller gives to the purchaser a written warranty, the purchaser can not maintain an action upon a contract of warranty not included in such written instrument received by him.⁸ And in an action to recover the price of a refrigerator,

¹ *McQuaid v. Ross*, 77 Wis. 470.

² *Bradford v. Neil*, 46 Minn. 347.

³ *Humphrey v. Merriam*, 46 Minn. 413. See, also, *Hatch v. Spooner* (1896), 37 N. Y. Supl. 296.

⁴ *Lamson Consolidated Co. v. Hartung*, 19 N. Y. Supl. 233; *Mason v. Decker*, 72 N. Y. 595; *Dent v. North Am. Steamship Co.*, 49 N. Y. 390; *Pierson v. Morch*, 82 N. Y. 503; *Sands v. Crooke*, 46 N. Y. 564; *McCrae v. Purmort*, 16 Wend. 460.

⁵ *Lamson Consolidated Co. v. Hartung*, 19 N. Y. Supl. 233. See, also,

Hungerford v. Rosenstein, 19 N. Y. Supl. 471.

⁶ *Rumely v. Emmons*, 85 Mich. 511.

⁷ *Zimmerman Mfg. Co. v. Dolph* (Mich. 1895), 62 N. W. Rep. 339.

⁸ *Farmers' Stock Assn. v. Scott*, 53 Kan. 534; 36 Pac. Rep. 978. In *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120; 58 N. W. Rep. 232, the court said: "It is well settled that, if the article is sold by a formal written contract which is silent on the subject of warranty, no oral warranty made at the same time or previously can be

on a written contract of sale which contains no warranty, parol evidence is not admissible to prove an express warranty.¹

shown, as the writing is conclusively supposed to embody the whole contract; nor can any additional oral warranty be ingrafted or added to one that is written. *Merriam v. Field*, 24 Wis. 640; *McQuaid v. Ross*, 77 Wis. 470; 46 N. W. Rep. 892; *De Witt v. Berry*, 134 U. S. 306; 10 Sup. Ct. 536. The ruling of the court in rejecting the evidence of *McGregor*, the tendency of which was to show a parol warranty, or that the plaintiff knew for what use the boiler was required, was correct. The instructions of the court were in accordance with these principles, and fairly submitted to the jury the question in respect to the warranty or guaranty contained in the contract."

¹ *McCray Refrig. Co. v. Woods*, 99 Mich. 269; 58 N. W. Rep. 320, where the court said: "The true rule is that a written contract can not be varied or added to by parol. The addition of a warranty is as objectionable as any other. Mr. Parsons, in his work on Contracts, at page 547, uses this language: 'A warranty in the sale of a chattel is an essential part of the bargain, and should be stated in the bought and sold notes.' In *Peltier v. Collins*, 3 Wend. 459, Marcy, J., remarked, in giving the opinion of the court: 'Suppose the contract had been with a warranty, and the memorandum in the plaintiff's sales book had been signed by the defendant, but the warranty clause omitted, and suppose the rice had been delivered and had proved to be of an inferior quality, could the defendant have shown the warranty by parol? The authorities to which I have referred show most abundantly that he could not.' Again, the author says (*Parsons on Contracts*, p. 548): 'It is clear that parol evidence of a war-

ranty not mentioned in the writing is not admissible in a suit brought by the purchaser for damages for breach of warranty;' citing *Reed v. Wood*, 9 Vt. 285. Mr. Parsons, on pages 589 and 590, again refers to the subject, saying: 'And where the contract of sale is in writing, and contains no warranty, there parol evidence is not admissible to add a warranty;' saying, in a note, that 'this was distinctly adjudged in *Van Ostrand v. Reed*, 1 Wend. 424. It rests upon the familiar principle that the writing is supposed to contain all the contract.' The general rule is too well understood to require the citation of authorities. But see 17 Am. and Eng. Encyc. of Law, p. 420, and note. Some Michigan cases are supposed to support the defendants' contention. *Phelps v. Whitaker*, 37 Mich. 72. This was an order for a windmill, signed only by the purchaser. The court said that the paper did not constitute such a contract as would exclude evidence of the conversation when it was made. *Trevdick v. Mumford*, 31 Mich. 467, holds that a deed and bill of sale made by the plaintiff were not meant to contain all of the obligations of the defendant. This is familiar doctrine, the papers being mere incidents of the contract, and made to carry out some of its provisions. *Parsons on Contracts*, 613; *Richards v. Fuller*, 37 Mich. 161, was similar to that of *Trevdick v. Mumford*, while *Weiden v. Woodruff*, 38 Mich. 130, was identical in principle with *Phelps v. Whitaker*, which it followed, as also was *Wood Machine Co. v. Gaertner*, 55 Mich. 453; 21 N. W. Rep. 885. Many of these cases cited in the Michigan cases referred to involve fraud and deceit, of which parol evidence may always be given. See *Nichols, Shepard & Co. v.*

§ 268. **Seller's oral warranty—Illustrations.**—Where the seller of hogs at auction states to those present, for the purpose of bidding, that the hogs are all right, intending thereby to effectuate a sale, and a person who is ignorant of the condition of the hogs purchases them, believing that the statement was so intended, and relying thereon, the statement constitutes a warranty that the hogs are sound.¹ In another case the defendant returned to plaintiff an engine purchased by him, and told plaintiff that it used too much steam, that it was not as economical as was represented, that the boiler was not big enough, and would not furnish steam enough; plaintiff then said that if defendant would get a certain sized boiler he would guaranty that the engine would do the work, and as economically as any other engine; defendant bought such boiler, and used

Crandall, 77 Mich. 401; 43 N. W. Rep. 875; Rumely & Co. v. Emmons, 85 Mich. 511; 48 N. W. Rep. 636; National, etc., Register Co. v. Blumenthal, 85 Mich. 464; 48 N. W. Rep. 622."

¹ Powell v. Chittick, 89 Iowa, 513; 56 N. W. Rep. 652, where the court said: "We may well apply the rule quoted by appellant from Bennett's Benjamin on Sales, § 613: 'It is rightly held by Holt, C. J., and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appears in evidence to have been so intended. In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter upon which the vendor has no special knowledge, and on which the buyer also may be expected to have an opinion, and to exercise his judgment. In the former case it is a warranty; in the latter it is not.' There is not a requirement of the rule for a warranty that could not have been found in this case under the evidence. That plaintiff, when he made the pur-

chase, was ignorant of the facts as to the disease of the hogs is not to be doubted, and the defendant certainly 'assumed to assert a fact' of which plaintiff was ignorant. There is testimony tending to show that the hogs were 'off feed,' or affected by over-feeding or change of climate, and that this condition was observable from inspection, and, when admitted, it is but a fact strengthening the claim in behalf of a warranty. Defendant had an opportunity better than the buyers to know the true situation and the buyers had a right to reply upon his special knowledge; and, as to the cause of the apparent condition, the buyers would not be expected to have an opinion. It is likely true that the remark that the hogs were all right was made to remove any apprehension. Under such circumstances, a purchase would most likely be made with reliance upon such a statement, and such a statement made under such circumstances would be designed to induce a purchase upon its reliance. Clearly the case is within the rule cited."

the engine over eight months; it was held that, whether there was a warranty, and, if so, whether defendant relied on it in good faith, were questions for the jury.¹ Where, at the time of purchasing a machine, it is orally agreed that the warranty shall be the same, with certain exceptions, as contained in another contract, the warranty is an oral one.²

§ 269. Implied warranty excluded by written.—Where an article is sold by a written contract which is silent on the subject of warranty, no express or oral warranty, made at the same time or previously, can be shown, nor can an oral warranty be added to one that is written. The fact that warranties of material and workmanship of certain wheels manufactured according to specifications were expressed in the contract, precludes any implied warranty that the wheels were otherwise suitable for the purpose for which they were intended.³ In an

¹ *Dake Engine Mfg. Co. v. Hurley* 99 Mich. 16; 57 N. W. Rep. 1044.

² *Aultman Co. v. Shelton*, 90 Iowa, 288; 57 N. W. Rep. 857.

³ *Case Plow Works v. Niles, etc., Co.*, 90 Wis. 590; 63 N. W. Rep. 1013, where the court said: "The contention of the plaintiff that it was not precluded by the warranties in the written contract from insisting upon an implied warranty that the wheels should be suitable for the purpose for which they were required, for reasons in addition to those already stated, can not, we think, be sustained. The fact that the limited warranties going to the question of suitability of the wheels were expressed in the contract by the strongest implication, excludes and negatives the idea that it was intended that other or more comprehensive warranties should exist, and repels any implication of law to that effect. The contract, as written, must be taken as the final and conclusive evidence of all that was intended or agreed upon. The familiar rule, '*Expressio unius est exclusio alterius*,' clearly applies. The demand of the purchaser for certain

specified warranties indicates that no others were intended or expected. Had the parties intended that there should be an implied warranty, there was no occasion to make any stipulation on the subject. The one introduced must be taken as covering the entire subject; otherwise it would be idle and unmeaning. Adjudicated cases on this point are numerous and conclusive. We have not been referred to any decision expressly on the point to the contrary. *Dickson v. Zizinia*, 10 C. B. 602; *Chanter v. Hopkins*, 4 Mees. & W. 399; *Baldwin v. Van Deusen*, 37 N. Y. 487; *DeWitt v. Berry*, 134 U. S. 306; 10 Sup. Ct. Rep. 536; *Carleton v. Lombard, Ayres & Co.*, 72 Hun, 254; 25 N. Y. Supl. 570, 575; *Whitmore v. South Boston Iron Co.*, 2 Allen, 52; *Deming v. Foster*, 42 N. H. 165; *Budd v. Fairmaner*, 8 Bing. 48; *Shepherd v. Gilroy*, 46 Iowa, 193. The case of *Merriam v. Field*, 24 Wis. 640, was relied on as establishing a contrary view. In that case there was an express warranty of title in the bill of sale but it was held that facts might

action for the price of a refrigerator sold under a written contract which contains no warranty, it is error to submit to the jury the question as to an implied warranty shown only from

be shown from which an implied warranty of quality would arise. Between these two subjects there was no dependent connection, but each stood by itself. There was not, as in this case, any qualified or restricted warranty upon the question of quality or suitability, and the case was ruled on the authority of *Bigge v. Parkinson*, 7 Hurl. & N. 955, where the warranty, as in *Merriam v. Field*, was on a separate and independent subject, namely, that the goods would pass inspection, and it was held that an express written warranty on that subject would not preclude an implied one that the goods were in fact fit for the purpose intended. The case of *Boothby v. Scales*, 27 Wis. 626, was also referred to, but in this case there was no express warranty by written contract, and it was held that an implied warranty of suitability might exist, although a handbill had been delivered at the time of the sale, and the agent of the vendor affirmed of the fanning mill that it possessed the capacities therein set forth. There was no written warranty on any subject, and the particular point litigated was that the agent making the oral affirmation had no authority to warrant the mill. The case, therefore, is no authority upon the point under consideration. As already stated, the plaintiff having specified the sizes and dimensions and materials of the particular plan or kind of wheel it desired, and its agents having looked over and examined wheels of that kind, manufactured by the vendor, which had been tested in their presence as to their quality and strength, the conclusion seems irresistible that, subject to defects in material and workmanship, the case falls within

that of *Boiler Co. v. Duncan*, 87 Wis. 120; 58 N. W. Rep. 232, and the plaintiff must be held to have obtained that for which it contracted, subject to such remedy as it may be entitled to on the warranties against defective material and workmanship; and, in this connection, it is proper to observe that a defect in the plan of the wheels is not a defect of workmanship, for workmanship has only to do with the execution of the plan, and it follows that the objection much relied on, that the plan for the wheels was defective and impracticable, is not covered by the written warranties. The plan relates to the question of suitability of the wheels for the purpose for which they were purchased, in relation to which, for reasons already stated, we hold that there was no implied warranty." In *Berthold v. SeEVERS Manufacturing Co.*, 89 Iowa, 506; 56 N. W. Rep. 669, it was held that where a purchaser of material to be delivered, instead of trusting to the seller's judgment, embodies in the contract specifications as to quality, there is no implied warranty that the material delivered is suitable. In *Wisconsin Brick Co. v. Hood* (1893), 54 Minn. 543; 56 N. W. Rep. 165, plaintiff and the defendants entered into a written contract whereby the former agreed to furnish and the latter to receive a certain quantity of bricks, at a stipulated price per thousand, "of the grade known as 'common brick,'" all to be "of good quality, and equal to sample sent." There was no finding of the court in reference to the sample. It was held, disregarding this omission in the findings, that there was no implied warranty in the sale that the bricks to be furnished should be reasonably fit for

the parol evidence of conversations between the parties at and before the time the written contract was made.¹

§ 270. Implied warranty as affected by acceptance—Sale by sample.—The general rule established by the authorities is that, in an executory contract for the sale of personal property, words descriptive of the kind, quality or nature of the property do not import a warranty that survives acceptance.²

the purpose for which they were purchased, of which purpose plaintiff was advised.

¹ *McCray Refrigerator Co. v. Woods* 99 Mich. 269; 58 N. W. Rep. 320, where the court said: "It is a rule of general application that warranties, whether express or implied, can only issue from the contract itself; and it must be a legal deduction, and can not depend upon extrinsic evidence, except as it may be necessary for the explanation of some latent ambiguity. 10 Am. and Eng. Encyc. Law, p. 110, and note 1; *Ottawa, etc., Flint-Glass Co. v. Gunther*, 31 Fed. Rep. 208; *Scott v. Hix*, 2 Sneed, 192; 62 Am. Dec. 458, 467. Parol evidence is not admissible to add to an ambiguous writing facts which may aid the implication of warranty. *Whitmore v. South Boston Iron Co.*, 2 Allen, 52, 58; *Johnson v. Cranage*, 45 Mich. 14."

² *Pottlitzer v. Wesson*, 8 Ind. App. 472; 35 N. E. Rep. 1030, where the court said: "The purchaser in such case has the right, upon inspection, to reject the goods if not of the particular description ordered; but, if he accepts the property after such examination, he can not complain of the defects disclosed by the examination. *McConnell v. Jones*, 19 Ind. 328; *Brown v. Foster*, 108 N. Y. 387; 15 N. E. Rep. 608; *Studor v. Bleistein* (N. Y. App.), 22 N. E. Rep. 243; *Pier-son v. Crooks*, 115 N. Y. 316; 22 N. E. Rep. 349; *Coplay Iron Co. v. Pope*, 108 N. Y. 232; 15 N. E. Rep. 335. In *McConnell v. Jones*, *supra*, there was an

agreement to sell wool 'to be washed on the sheep, to be put up in good, merchantable order, free from tags.' The court, in holding that there was no warranty in this case, say: 'According to the case of *Ricketts v. Hays*, 13 Ind. 181, the contract for the sale of the wool did not contain a warranty proper, but an agreement to deliver washed wool. * * * But, as it [the agreement] was given for wool, to be prepared and delivered at a future time, it amounted but to an agreement to deliver, at such future time, wool of a given character,—was but an executory agreement,—and a failure to deliver such wool worked, not a breach of warranty of a thing sold, but a simple breach of contract for the delivery of a given kind of article; and it seems that in a subsequent execution of such executory contract, if the party purchasing accepts the article delivered, in execution, after examining it, or with full opportunity to examine, although the opportunity is voluntary, and without any understanding with the other party, unimproved, he estops himself to deny that the article filled the requirements of the contract.' The case of *Day v. Pool*, 52 N. Y. 416, is not in favor of appellants. In that case the defects of the article sold were not discernible upon inspection, and there was a warranty of the quality of the syrup sold, which was obviously intended to survive the receipt and use of the syrup. It was, however, held

But where goods are sold by sample, with a warranty that they shall correspond with the sample, the vendee may recover damages for a breach of the warranty, although he has accepted the goods after an opportunity for inspection.¹

§ 271. The same subject continued—The federal doctrine.—

Where the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process, against which reasonable diligence might have guarded. This presumption is warranted, in part, by the fact that the manufacturer or maker, by his occupation, holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to

in that case that the vendee in an executory contract can not rely upon a warranty as to defects open and visible."

¹ *Meagley v. Hoyt* (1895), 88 Hun, 328, where the court said: "I am entirely satisfied that the contract between the parties was a sale of goods with a warranty that they should correspond to a sample furnished. The first five barrels were sold as a 'sample' of defendant's tallow, and it seems very plain to me that both parties understood that all tallow subsequently ordered and delivered should correspond to such sample. The letters

and plaintiff's evidence clearly indicate that. In this view of the case the refusal to nonsuit was no error, and even if the question was one for the court alone, its submission to the jury was harmless. In *Zabriskie v. Central V. R. Co.*, 131 N. Y. 72, 77, it is said: "The principle is well established that upon an executory sale of goods by sample, with warranty that the goods shall correspond with the sample, the vendee is not precluded from claiming and recovering damages for breach of warranty although he has accepted the goods after an opportunity for inspection."

devote it to that use.¹ But where a known, described, and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose, still, if the known, described, and definite article be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.²

§ 272. Co-existing implied and written warranties.—The Iowa rule is that while a warranty will not be implied in conflict with an express warranty, yet that an implied and an express warranty may exist under the same contract, if the express warranty does not relate to the obligations covered by the implied.³

¹ *Bridge Co. v. Hamilton*, 110 U. S. 108, 116.

² *Seitz v. Brewers', etc., Machine Co.*, 141 U. S. 510, 518; 12 Sup. Ct. Rep. 46. In *Pullman Palace Car Co. v. Metropolitan R. Co.* (1895), 157 U. S. 94; 15 Sup. Ct. Rep. 503, Harlan, J., cites the last two cases with manifest approval and for the purpose of distinguishing them.

³ *Bucy v. Pitts. Agricul. Works*, 89 Iowa, 464; 56 N. W. Rep. 541, where the court said: "There are authorities holding that, where there is an express warranty, none will be implied, upon the theory that, by the express warranty, the parties have stated in words that by which they agreed to be bound. It is held in this and many other states that this rule does not extend to the exclusion of warranties implied by law where they are not excluded by the terms of the contract. 'A warranty will not be implied in conflict with the express terms of the contract.' *Blackmore v. Fairbanks, Morse & Co.*, 79 Iowa, 282; 44 N. W. Rep. 548. The rule deducible from the authorities is that an implied and an express warranty may exist under the same contract as when the expressed does not relate to the obligations created by the implied; but when the

expressed warranty does provide as to the same obligation, it excludes the implied. In other words, the law will not imply anything as to matters about which the parties have expressly agreed. It is not clear to our minds why, under the pleadings, the case was submitted as upon an implied warranty, and not upon the alleged oral warranty, which, as is alleged, covered all and more than the implied warranty." The *Bucy* case cited above was an action by the purchaser of a threshing machine for breach of the implied warranty that the machine was reasonably suited to do the work for which purchased, plaintiff alleged that the machine was sold without any express warranty, which defendant denied. It was held that it was error to withdraw from the jury a written warranty incorporated in the contract of sale, not materially different from what the law would imply, but requiring plaintiff to give notice of defects within a certain time. In *Ober v. Blalock*, 40 S. C. 81; 18 S. E. Rep. 264, the court said: "The judge charged that the contract was, in effect, an express warranty that the article contained all the elements known to constitute what was called the 'Farmers' Standard Phosphate,'

§ 273. Receipts and memorandum excluding oral warranty.

—The fact that a mere informal memorandum or receipt is given by the seller does not preclude the buyer from proving an oral warranty.¹ Where, upon the sale of a horse, a bill of sale was executed by the seller, specifying the price and acknowledging its receipt, it was held that the instrument was to be construed as being a mere receipt for the purchase-money, and that an oral warranty of soundness could be proved;² and a mere bill of parcels given by the seller to the buyer does not exclude evidence of a warranty.³ The buyer gave his note for the price of a sulky, at the end of which note was, "No promise or contract outside of this note will be recognized;" and it was held

compounded by the formula of *G. Ober & Sons Company*, and no more; that it was silent as to anticipated results from its use. This was certainly the proper construction of the written contract. If so, the question arises whether, in addition to the express contract, the law will imply another, insuring good results from the application of the article. As we understand, it is only in cases where there is no express warranty that the law will imply one, or set up what is sometimes erroneously called the 'equitable condition of the sale.' The general rule very clearly is that, where the contract is reduced to writing, parol evidence is inadmissible to show that anything else was intended than what was expressed. The presumption always is, in the absence of proof, that the parties to any written agreement between them have, upon the subject-matter, expressed their whole agreement. Besides, there would seem to be an inherent difficulty, from the uncertainty incident to the subject, in attempting to estimate the fruits of the application of a fertilizer, for the results must always depend largely upon the manner of its application, the character of the soil, the seasons, climate, culture, etc. It is insisted, however, that the rule is

not always applicable, and it does seem that there is an exception in the case where the express warranty goes only to the title, as in *Wells v. Spears*, 1 *McCord*, 421. But this case was restricted by that of *McLaughlin v. Horton*, 1 *Hill* (S. C.), 383, as applicable 'only to a case where the express warranty is silent, for, if there is any stipulation in the written contract in relation to the quality of the thing sold, the law will imply nothing.' *Heyward v. Wallace*, 4 *Strob.* 181. There certainly were, in the contract here, 'express stipulations' as to the quality of the article—indeed, a warranty of the ingredients necessary to make the article sold—and we therefore concur with the judge, and think he committed no error."

¹ *Richey v. Daemicke*, 86 *Mich.* 647; 49 *N. W. Rep.* 516; *Gale, etc., Co. v. Stark*, 45 *Kan.* 606; *Storer v. Taber*, 83 *Maine*, 387; *McCormick Co. v. Martin*, 32 *Neb.* 723; *Filkins v. Whyland*, 24 *Barb.* 379; *Hersom v. Henderson*, 1 *Foster* (N. H.), 224; *Allen v. Pink*, 4 *M. & W.* 140; *Jeffery v. Walton*, 1 *Starkie*, 213.

² *Filkins v. Whyland*, 24 *Barb.* 379.

³ *Stacy v. Kemp*, 97 *Mass.* 166; *Hazard v. Loring*, 10 *Cush.* 267; *Hildreth v. O'Brien*, 10 *Allen*, 104.

that this did not estop the buyer from setting up the breach of a warranty.¹ A bill rendered by the seller to the buyer had at its bottom printed the following words: "Guaranty: The above cooling room is guaranteed to keep fresh meat a satisfactory length of time, if properly iced and regulated;" it was held that this was not such a warranty as excluded evidence of a parol warranty.² And if there be a formal written contract of sale, the existence of a separate oral agreement as to any matter on which the written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them.³

§ 274. Substitution of warranties.—An executory bilateral written contract may be varied by a subsequent oral agreement between the parties.⁴ Therefore parties who have bound themselves in an executory contract of sale without warranty are not precluded thereby from superseding such contract afterwards by an executed sale of the same property with warranty.⁵ But in order to do this, if the contract is in writing, it must be wholly superseded by the subsequent one. The contract can not rest partly in writing and partly in parol. Either the writing must control, or there must be shown an agreement to waive all that the writing contains and the substitution of the verbal warranty for the writing.⁶

§ 275. Implied warranty of identity—Genuineness of passage ticket.—Where a person authorized to sell engines for an engine company contracted to sell plaintiff an engine of a specific kind and knowingly delivered to him an engine of an inferior kind, it was held that he had authority to warrant the engine and did warrant it to be of that specific kind, and that

¹ Gale, etc., Co. v. Stark, 45 Kan. 606. Bartlett v. Stanchfield, 148 Mass. 394;

² Richey v. Daemicke, 86 Mich. 647; Stearns v. Hall, 9 Cush. 31; Courtenay v. Fuller, 65 Maine, 156.

³ Seitz v. Brewers', etc., Co., 141 U. S. 510, 517. ⁵ Storer v. Taber, 83 Maine, 387.

⁶ Rumely & Co. v. Emmons, 85 Mich.

⁴ Thomas v. Barnes, 156 Mass. 581; 511, 518.

plaintiff might retain it and sue both the agent and the company for damages.¹ There is in America an implied warranty of identity; namely that the article shall be of the kind or species it purports to be or is described to be,—that is, that the article delivered shall be the very thing contracted for.²

¹ *Alpha Mills v. Watertown Engine Co.*, 116 N. Car. 797; 21 S. E. Rep. 967, where the court said: "Exhibit 5 contains the contract for the sale of the engine, which, in our opinion, shows that Brem & McDowell acted as agents of the Watertown Company in making the sale; and that it also constitutes a sale with warranty (*Thomas v. Simpson*, 80 N. C. 4; *Love v. Miller*, 104 N. C. 582; 10 S. E. Rep. 685); and that plaintiff might retain the engine, and have an action against defendants for damages (*Lewis v. Rountree*, 78 N. C. 323; *McKinnon v. McIntosh*, 98 N. C. 89; 3 S. E. Rep. 840). An agent authorized to sell is authorized to make a warranty. *Hunter v. Jameson*, 6 Ired. 252. We do not think the fact that Brem was a member of the plaintiff corporation benefits the defendants. If he acted as the agent of the Watertown Company in making this sale—he was in its employ, and pay—he could not at the same time be acting for the plaintiff corporation; and, thus acting, it is not to be supposed that he would give plaintiff information injurious to his principal, and which would likely prevent a sale of its property. *De Kay v. Hackensack Water Co.*, 38 N. J. Eq. 158; *Hickman v. Green*, 123 Mo. 165; 27 S. W. Rep. 440; *Atlantic, etc., Bank v. Harris*, 118 Mass. 147; *Allen v. South Boston Railroad*, 150 Mass. 200; 22 N. E. Rep. 917. It has been held that, if the agent did not know of the defects at the time of making the sale, he would not be guilty of a moral fraud, but still it would be a legal fraud. *Peebles v. Patapsco Guano Co.*, 77 N. C. 233. But in this case the jury, by the seventh issue, find that

the agents had knowledge at the time of the sale that the engine was not a 150 H. P. engine. So it is not necessary to invoke the rule in the case of *Peebles v. Guano Co.*, *supra*."

² Benjamin on Sales (6th ed.) 636. This proposition is illustrated in the following cases: In *Henshaw v. Robins*, 9 Metc. (Mass.) 83, a sale and bill of parcels of two cases of indigo was made. It was shown that the article paid for and delivered was not indigo at all, but composed of Prussian blue, chromate of iron and potash, and worthless for any purpose. It was held that the description of the article inserted in the bill of parcels amounted to a warranty that the article was such as represented. In *Hawkins v. Pemberton*, 51 N. Y. 198, it was held that the sale of an article as blue vitriol amounted to a warranty that it was such. In *Wolcott v. Mount*, 36 N. J. Law, 262, it was held that a sale of seed which the seller said was early strap-leaf, red-top turnip seed was equivalent to a warranty that it was such, and that the purchaser might recover the difference between the market value of the crop raised and the same crop from such seed as was ordered. In *White v. Miller*, 71 N. Y. 118, it was held that, on a sale of "large Bristol cabbage seed" to a market gardener, there was an implied warranty that the seed was not only raised from such stock, but free from any latent defect arising from the mode of cultivation, and would produce that kind of cabbage. In *Jones v. George*, 61 Texas, 345, it was held that a sale by a druggist to a planter

But the seller of a ticket for passage issued by a common carrier does not, from the sale alone, undertake for anything beyond the genuineness of the ticket.¹

§ 276. **Implied warranty of quality.**—Where the testimony showed that the agent of the buyer cut the samples in the presence of the owner's agent; that the samples were good, clean, and undamaged cotton, and that the cotton in the bales had been damaged by fire and repacked; that the bales were so placed with other good cotton that only the side or edge of the bales covered with bagging was exposed; that samples were taken from this part of the bale; and that there would have been no sale if the samples had indicated in the least the real quality of the cotton in the bale,—it was held sufficient to warrant the charge of implied warranty.² Defendant, in Spokane Falls, telegraphed plaintiffs, in Omaha, inquiring the price of five car loads of "good potatoes," and, after some disagreement as to price, the sale was made, and the potatoes shipped to defendant; it was held that plaintiffs gave an implied warranty that the potatoes were of good, merchantable quality when shipped.³ A sale on an order, without opportunity to inspect, to ship "Barton" egg, stove, and chestnut coal, is on an implied warranty that it is merchantable, even if the title passes on the seller's delivering the coal free on board barge, and sending bill of lading to the buyer, by which the cargo is to be delivered to him, upon payment of the freight.⁴

of an article as Paris green implied a warranty that it was that substance. And see *Shaw v. Smith*, 45 Kan. 334.

¹ *Elston v. Fieldman*, 57 Minn. 70; 58 N. W. Rep. 830, where the court said: "Such tickets have come to be bought and sold, and passed from hand to hand, almost as any article of merchandise. By the mere sale of such a ticket the seller does not undertake to transport the buyer, nor contract that the carrier will do so, nor bind himself for anything except the genuineness of the ticket."

² *Wilkerson v. Randle* (Texas App. 1895), 29 S. W. Rep. 431.

³ *English v. Spokane Com. Co.* (1893), 57 Fed. Rep. 451, where the court said: "We are of opinion that there was an implied warranty that the potatoes should be of good, merchantable quality when shipped from Omaha. Benjamin on Sales (8th ed.), §§ 988, 989, 993; Schouler on Personal Property, § 354 *et seq.*; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108; 3 Sup. Ct. Rep. 537, and authorities there cited; *Pease v. Sabin*, 38 Vt. 432."

⁴ *Alden v. Hart* (1894), 161 Mass. 576; 37 N. E. Rep. 742, where the court said: "There was an implied warranty that the coal should be merchantable.

§ 277. **Warranty as to quality—Illustrations.**—Plaintiffs ordered from the defendant a No. 4 fire-proof safe; the order was in writing; it contained no reference to a warranty; a safe was delivered in compliance with the order, and received and used by the plaintiffs to store valuable papers; the building in which it was kept was afterwards destroyed by fire, and some of the contents of the safe were consumed; it was held that parol evidence was inadmissible to prove a warranty made at the time the order was given, and that the words “fire-proof safe” do not imply a warranty of the quality of the safe, or that it will protect its contents from fire for any definite period or under any given circumstances.¹ The article sold must

Murchie v. Cornell, 155 Mass. 60; 29 N. E. Rep. 207. The report recites that the court, trying the case without a jury, found as a fact that the coal was not merchantable, and ruled, against the plaintiffs’ objection, that the defendants had the right to reject the coal on its arrival at New Bedford. We think that this ruling was right. *Pope v. Allis*, 115 U. S. 363; 6 Sup. Ct. Rep. 69; *Cleveland Rolling Mills v. Rhodes*, 121 U. S. 255; 7 Sup. Ct. Rep. 882; *Wiley v. Inhabitants of Athol*, 150 Mass. 426, 434; 23 N. E. Rep. 311; *Smith v. Hale*, 158 Mass. 178; 33 N. E. Rep. 493; *Bryant v. Isburgh*, 13 Gray, 607; *Grimoldby v. Wells*, L. R. 10 C. P. 391.”

¹ *Diebold Safe Co. v. Huston*, 55 Kan. 104; 39 Pac. Rep. 1035, where the court said: “It is clear that the safe was delivered to the plaintiffs in compliance with the terms of the written order. Does this order contain what in law amounts to a warranty? There are no words in it of express warranty. Does an order, however, for a fire-proof safe, imply a warranty? It is contended that this is a case of a sale of an article of the vendor’s manufacture for a particular purpose, and imports a warranty that it is reasonably fit for that purpose and free from latent de-

fects arising in the process of manufacture, and not disclosed to the vendor. In the case of *Lukens v. Freind*, 27 Kan. 664, it appeared that the defendant was a miller; that two copper clasps accidentally fell into some bran which was sold to the plaintiff. The clasps were swallowed by one of the plaintiff’s cows, and killed her. It was held that, in the absence of express warranty, the plaintiff could not recover for his cow. The second clause of the syllabus reads as follows: ‘While, when an article is ordered from a manufacturer, to be by him manufactured for a specific and understood purpose, there is in some cases an implied warranty that the article, when manufactured, will be reasonably fit for the purpose intended, yet, when a purchase is made from him of a specific and completed article, he is to be regarded as a dealer, and his liability determined accordingly.’ There is nothing in this case indicating that the safe purchased by the plaintiffs was manufactured specially for them, but the fair inference is that it was one of a kind of safes which the defendants manufactured for sale to whomsoever would buy.” As to the effect of fire-proof, as applied to a safe or ware-

answer in kind to the description under which it is sold, and there is an implied warranty that the article delivered is such an article as the name under which it is sold indicates. When, however, the question arises whether an article is of a particular quality or degree of excellence, unless it is designated by some term which is descriptive of the article and calls for a particular quality, the general rule is that no warranty of quality will be implied.¹ The mere description of iron sold as mill iron in a bill rendered to the purchaser will not amount to a warranty that the same is of the quality or grade described, but will be regarded as a mere statement or expression of opinion as to the quality.²

house, see, *Hickey v. Morrell*, 102 N. Y. 454; *Knoxville, etc., Ins. Co. v. Hird*, 4 Texas Civ. App. 82.

¹ In *Wolcott v. Mount*, 86 N. J. Law, 262, it was said: "In general, the only contract which arises on the sale of an article by a description, by its known designation in the market, is that it is of the kind specified." In *Winsor v. Lombard*, 18 Pick. 57, it was held that, where a large number of barrels of mackerel branded under the inspection laws as No. 1 and No. 2 mackerel were sold in the spring with that description of them in the bill of parcels, it was not a warranty that the mackerel were free from rust, although it appeared that mackerel affected by rust are not considered as No. 1 and No. 2. In *Gossler v. Eagle, etc., Refinery*, 103 Mass. 331, it was held that "one who agreed to sell 'Manilla sugar' to refiners, and delivered to them what is usually called in commerce by that name, can, in the absence of fraud, misrepresentation, or warranty, recover the agreed price, although the article delivered contained more impurities than sugar known under that name usually does." The case of *Shisler v. Baxter*, 109 Pa. St. 443, seems to be opposed to *White v. Miller*, 71 N. Y. 118, holding that the sale of seed as Wakefield cabbage seed did not

amount to a warranty that it was such, but was a representation as to quality. In *Towell v. Gatewood*, 2 Scam. (Ill.) 22, a bill of sale of good first and second rate tobacco was made. The court refused to treat this as a warranty, but rather as an expression of opinion as to the quality of the article sold, concerning which the buyer should have relied on his own judgment or obtained an express warranty. In *English v. Spokane Com. Co.* (1893), 57 Fed. Rep. 451, defendant, in Spokane Falls, telegraphed plaintiffs in Omaha: "Wire price car strictly fresh eggs, new cases." Plaintiffs replied: "Car fresh eggs, 16. Track here for immediate acceptance." Defendant answered: "If eggs strictly fresh, 14 cents. Answer if accepted." Plaintiffs replied: "Offer eggs accepted." It was held that plaintiffs warranted the eggs to be strictly fresh at Omaha, and was not liable for deterioration naturally resulting during transportation. See, *Bull v. Robison*, 10 Exch. 342; *Mann v. Evertson*, 32 Ind. 355; *Leggat v. Sands Brewing Co.*, 60 Ill. 158.

² *Carondelet Iron Works v. Moore*, 78 Ill. 65. See also, *Ryan v. Ulmer*, 108 Pa. St. 332; *Dounce v. Dow*, 64 N. Y. 411; *Fraley v. Dispham*, 10 Pa. St. 320.

§ 278. **Implied warranty as to fitness — Latent defects — Fraud.**—The law implies a warranty by the manufacturer in a contract for the sale of machines that they are reasonably adapted to the purpose for which he made and sold them, and the question should be left to the jury, when the issue is raised, whether there was a breach of such warranty.¹ Plaintiff, the manufacturer, agreed to sell to a customer, and the latter purchased a certain quantity of bricks; to be “of the grade known as ‘common,’ ” which is a well-recognized kind or description in the market, “to be of good quality and equal to sample sent;” it was held, in the absence of a finding as to a sale by sample, that there was an implied condition of the contract, which was in writing, that the bricks should conform to the description, be of good material, and well made, according to the description, but none that they would answer the purpose for which they were purchased.² Defendant agreed to ship to

¹ *Kennebrew v. Southern, etc., Machine Co.* (Ala. 1895), 17 So. Rep. 545; *Snow v. Schomacker Manufacturing Co.*, 69 Ala. 111.

² *Wisconsin Brick Co. v. Hurd Refrigerator Co.* (Minn. 1895), 62 N. W. Rep. 550, where the court said: “There was an implied condition of this contract that the bricks should conform to the description, be of good material, and well made, according to the description, but none that they would answer the purpose for which they were purchased. As to this the rule of *caveat emptor* applies. *Goulds v. Brophy*, 42 Minn. 109; 43 N. W. Rep. 834. Part of the testimony stricken out related to an alleged defect in the clay used in making the bricks, and tended to show that plaintiff must have known of the unsuitability of the material. A good deal has been written on the subject, and the confounding of conditions precedent with implied warranties has resulted in great confusion and conflict in the decisions; but we hold the only just rule in such cases to be that, if a man-

ufacturer knowingly uses unsuitable and defective material in the manufacture of an article sold in the market by description, he is liable for any latent defect not disclosed to the purchaser. *Hoe v. Sanborn*, 21 N. Y. 552; *White v. Miller*, 71 N. Y. 118. See, also, title ‘Implied Warranty,’ particularly paragraph 7, 10 Am. and Eng. Encyc. of Law, 85; also, *Randall v. Newson*, L. R. 2 Q. B. Div. 102; 19 Moak. Eng. R. 243.” In *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120; 58 N. W. Rep. 232, the court said: “It was made plain that the defendant got the exact article or thing he bargained for; and, although it may have been stated that it was required for a particular purpose, still, as he did not exact an express warranty, he took the risk of its fitness for the intended use, and no warranty in that respect can be implied. *Benjamin on Sales*, § 657; *Chanter v. Hopkins*, 4 Mees. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288. In *Jones v. Just*, L. R. 3 Q. B. 197, 202, the rule was laid down that where a known, described, and de-

plaintiff a certain amount of paving stone according to dimensions set forth in specifications furnished by plaintiff. It was held that there was no implied warranty that the stone would be suitable for a particular work, in the absence of evidence that defendant knew what such work required, and agreed that the stone should be tested by its requirements.¹

finer article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined, and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.' Where the buyer in such case gets what he has bargained for, there is no implied warranty. *Seitz v. Brewers', etc., Machine Co.*, 141 U.S. 510, 519; 12 Sup. Ct. Rep. 46; *Goulds v. Brophy*, 42 Minn. 109; 43 N. W. Rep. 834; *Deming v. Foster*, 42 N. H. 165. The distinction seems to be between the manufacture or supply of an article to satisfy a required purpose and the manufacture or supply of a specified, described, and defined article, as in this case. In the former case there may be an implied warranty, but in the latter there is none."

¹*Talbot Paving Co. v. Gorman* (Mich. 1894), 61 N. W. Rep. 655, where the court said: "The exact point made by plaintiff appears to be that, inasmuch as the defendant knew what the specifications were, the law implied a warranty of fitness. A pertinent inquiry is, 'a fitness for what?' Was it fitness for the paving jobs that the plaintiff had on hand? If this be claimed, it is a sufficient answer to say that the evidence fails to disclose that the defendant knew what jobs he had. Moreover, if the law is to imply that the stone was to be fit for the job, it must be, because defendant knew what the job actually required, and had undertaken to provide that, and his liability would be tested by

that. But this was not so. He only knew what the specifications required. They might be right or wrong. He had no way of determining, and it was not left to defendant's judgment to make suitable stone for the jobs. He had simply undertaken to deliver certain stone of given dimensions. If he should deliver such he would be entitled to pay. If he did not, it could hardly be claimed that he could require acceptance on the ground that the stone was suitable, or better adapted, to the purpose of the plaintiff than as though made according to direction. Clearly, if plaintiff had furnished specifications, and had a right to insist on the stone being in conformity thereto, regardless of defendant's judgment, it could not sustain the proposition that the law should imply a warranty to make them conform to some other test; and manifestly it can not be said that knowledge of the use intended should require defendant to vary from his contract as to dimensions. The conclusion appears to us irresistible that no such warranty as this can be implied. *Breen v. Moran*, 51 Minn. 525; 53 N. W. Rep. 755, is cited as a case 'upon all fours' with this, but we infer from a perusal of that case that the contractor there undertook to furnish stone for a particular purpose which he understood. And in that case the court based the right to recover upon a warranty, and not the failure to perform a condition precedent; thus recognizing the rule of law stated. The distinction between conditions precedent and warranty is clearly recog-

§ 279. **The same subject continued—Illustrations.**—Plaintiff ordered from defendant certain wheels, which were warranted against defects in material and workmanship; the wheels were constructed according to specifications, and tested in plaintiff's presence before the contract was signed; it was held that, as there was no reliance on the judgment of the manufacturer that the wheels were otherwise suitable for the purpose for which they were intended, there was no implied warranty to that effect.¹ A vendor, with full knowledge of the

nized in the Minnesota cases cited in *Breen v. Moran*. See *Maxwell v. Lee*, 34 Minn. 511; 27 N. W. Rep. 196; *Thompson v. Libby*, 35 Minn. 443; 29 N. W. Rep. 150. An examination of the brief of the plaintiff's counsel will show that all of the cases cited are based on the existence of a warranty. In this respect they are in harmony with the cases cited by opposing counsel. See *Potter v. Lee*, 94 Mich. 140; 53 N. W. Rep. 1047. We notice one or two that seem to rest upon facts leading to the inference that a warranty may have been found from a bare promise to deliver goods of a given description. Such is perhaps the rule in South Carolina, and possibly other states. But if such can be called a warranty, it is an express warranty, and in this case would be a warranty to deliver stone according to specification, and not a warranty to deliver those fit for the purpose that plaintiff had in hand, whatever that may have been. The correctness of those decisions may be questioned in view of the English and American cases in opposition to them." In *Beasley v. Huyett, etc., Mfg. Co.*, 92 Ga. 273; 18 S. E. Rep. 420, per Blockley, C. J.: "There can be no doubt that it is a fraud for manufacturers of machinery to fill it with latent defects not discoverable in 30 days, and then sell it as good, but warranting the same only as against defects actually discovered within 30 days; they knowing that the exist-

ing defects are not discoverable within that time, and concealing both the defects and their knowledge of them. To do this would be practicing deceit and committing actual fraud. Those who commit actual fraud can not protect themselves against answering therefor by any form of warranty, or any limitations which they may introduce in the terms of the warranty. Fraud in the principal contract, the contract of sale, is not to be answered by setting up a collateral contract which was as much the offspring of the fraud as was the principal contract itself. The special plea, as finally shaped by the plea of fraud, should not have been stricken; and in striking the same, and in afterwards directing a verdict for the plaintiff, the court erred."

¹ *Case Plow Works v. Niles, etc., Co.*, 90 Wis. 590; 63 N. W. Rep. 1013, where the court said: "The contract was not for the manufacture of wheels generally, to satisfy a required purpose, but for the manufacture and delivery of a specific kind or plan of wheels, of specified dimensions and sizes. This was the essential matter of the contract. *Boiler Co. v. Duncan*, 87 Wis. 120, 124; 58 N. W. Rep. 232; *Chanter v. Hopkins*, 4 Mees. & W. 399; *Olivant v. Bayley*, 5 Q. B. 288; *Jones v. Just*, L. R. 3 Q. B. 197, 202; *Goulds v. Brophy*, 42 Minn. 109; 43 N. W. Rep. 834; *Seitz v. Machine Co.*, 141 U. S. Rep. 510; 12 Sup. Ct. 46; *Deming v.*

capacity of an engine, is liable for breach of warranty to one who purchased it for running a threshing machine, relying on his representation that it was suitable for that purpose, when in fact it was not.¹ Where plaintiff was not a manufacturer making windmills, but merely a dealer selling them ready made, unless he expressly warranted the mill to work satisfactorily, or fraudulently represented that it would work satisfactorily, he would be entitled to recover on a note given in payment therefor, even if it did not work satisfactorily.²

Foster, 42 N. H. 165. Where, however, a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied warranty that it shall be reasonably fit for the purpose for which it is to be applied. Benjamin on Sales (14th ed.), § 657; Jones v. Just, *supra*. The test in such cases is whether the purchaser trusts and relies upon the judgment of the manufacturer, and not upon his own. Brown v. Edgington, 2 Man. & G. 279; McQuaid v. Ross, 85 Wis. 492, 496; 55 N. W. Rep. 705. This case, we think, falls within the rule first stated, and that there was no implied warranty of suitability of the particular kinds of wheels, with specified sizes and dimensions, required by the plaintiff. It is insisted, however, that the plaintiff relied upon the representations made by the defendant's agent as to the plan or method of construction, and, in particular, the manner of securing the spokes in the hubs of the wheels; but these representations preceded the execution of the written contract, and the plaintiff took a limited warranty, incorporated in the written contract, in respect to material and workmanship, going to and covering in part the suitability of the wheels for the purpose for which the plaintiff desired

them. Where an article is sold by a formal written contract, which is silent on the subject of warranty, no express or oral warranty made at the same time or previously can be shown, nor can additional oral warranty be ingrafted upon or added to one that is written, as the written instrument is conclusively presumed to embody the entire contract. Merriam v. Field, 24 Wis. 640; McQuaid v. Ross, 77 Wis. 470; 46 N. W. Rep. 892; De Witt v. Berry, 134 U. S. Rep. 306; 10 Sup. Ct. 536. The rule on this subject is too firmly settled to require discussion, or the citation of other authorities. Evidence to show an express oral warranty of the wheels, made previous to the written contract, was, therefore, clearly incompetent."

¹ Rose v. Meeks (Iowa, 1894), 59 N. W. Rep. 30.

² Sellers v. Stevenson, 163 Pa. 262; 29 Atl. Rep. 715, where the court said: "The plaintiff was not a manufacturer making windmills to order, but a dealer selling them ready made. The circumstances, therefore, did not raise any warranty by implication. If there was no express warranty, there was none at all. Warren v. Philadelphia Coal Co., 83 Pa. St. 437; Ryan v. Ulmer, 108 Pa. St. 332; Shisler v. Baxter, 109 Pa. St. 443; Mahaffey v. Ferguson, 156 Pa. St. 156; 27 Atl. Rep. 21. The learned judge charged that 'there was no express guaranty proven.' In the absence of any evidence of fraudulent misrepres-

§ 280. **Vendor's warranty as to value.**—A vendor may give a warranty as to value as in respect of any other fact, and if he makes a representation as to value, which is intended as a warranty, and it enters as a constituent element into the transaction, it will then become a part of the contract, and may be enforced as a warranty. In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case there is a warranty; in the latter not.¹ Whether a particular affirmation made by a vendor on an oral contract for the sale of property was intended as a warranty is often a question for the jury.² Under the code of South Dakota the seller of personal property does not, except as therein specifically provided, impliedly warrant the quality of the thing sold. And an instruction to the jury that charging and receiving the full market price for a harvesting and binding machine imports a warranty by the seller that it will do as good work as other first-class machines is error.³

sensation, under this view, he should have directed a verdict for plaintiff."

¹ *Titus v. Poole* (1895), 145 N. Y. 414; 40 N. E. Rep. 228; *Benjamin on Sales*, § 932.

² *Shippen v. Bowen*, 122 U. S. 575; 7 Sup. Ct. Rep. 1283; *Henshaw v. Robins*, 9 Metcalf, 83, 88; *Oneida Mfg. Soc. v. Lawrence*, 4 Cowen, 440, 442; *Cook v. Moseley*, 13 Wend. 277; *Chapman v. Murch*, 19 Johns. 290; *Hawkins v. Berry*, 5 Gilm. (Ill.) 36; *McGregor v. Penn*, 9 Yerg. (Tenn.) 74, 77; *Ottis v. Alderson*, 10 Smedes & M. (Miss.) 476. In *Titus v. Poole* (1895), 145 N. Y. 414; 40 N. E. Rep. 228, in an action on an alleged warranty as to the value of bank stock, it appeared that the vendor stated that the bank was organized under the laws of Pennsylvania, and that he was one of the

early stockholders; that the stock was worth 100 cents on the dollar, and was good, high, dividend paying stock; and that in reply plaintiff said, "If the stock is all right, as you say, we will make the trade;" and that the deal was then consummated. It was held that the question whether there was a warranty was for the jury.

³ *McCormick Machine Co. v. Watson* (S. Dak. 1894), 57 N. W. Rep. 945, where the court said: "Section 3628 of the Compiled Laws is as follows: 'Except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty.' Section 3633 is as follows: 'One who sells or agrees to sell an article of his own manufacture, thereby warrants it to be free from any latent defects, not disclosed to the buyer, arising

§ 281. **Warranty of future state of an article.**—In the absence of express words to the contrary, all warranties, either express or implied, refer to the state of the chattel at the date of the sale.¹ Thus, in a suit for a breach of warranty of soundness, in the sale of a horse, it must be shown that the disease existed at the date of the sale.² The sellers sold twine stored in a ware-house, but not to be delivered until ware-house receipts for the same should be turned over, the sellers warranting that the twine sold was in good condition and a merchantable article; it was held that this warranty had reference to the condition of the twine at the time the contract was made, and not to the time when the ware-house receipts were turned over, although the buyers could not obtain possession of the goods without such receipts.³ But a party can by express contract warrant the future state of a chattel;⁴ and a custom may exist in a particular locality which will extend an implied warranty of soundness to the condition of the article for some future time.⁵

§ 282. **Implied warranty of title.**—A vendor in possession of personal property, which he undertakes to sell as his own, impliedly warrants that he has title to it, and that it is free from incumbrances.⁶ And a warranty of title is implied equally in a

from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper material therein. We think, therefore, that it was error to thus instruct the jury."

¹ *Postel v. Oard*, 1 Ind. App. 252. At common law an implied warranty extends only to defects existing at the time. *Garrett v. Heaston*, 5 Blackf. 349; *Stamm v. Kuhlmann*, 1 Mo. App. 296; *Luthy v. Waterbury*, 140 Ill. 664; *Upton v. Suffolk Co. Mills*, 11 Cush. 586, where it is held that a general agent has no implied authority to bind his principal by a warranty that flour sold will keep sweet during a sea voyage.

² *Stamm v. Kuhlman*, 1 Mo. App. 296.

³ *Luthy v. Waterbury*, 140 Ill. 664.

⁴ *Eden v. Parkison*, 2 Doug. 732.

⁵ *Fatman v. Thompson*, 2 Disney (Cincinnati), 482, where it was held competent to prove a custom in Cincinnati among tobacco dealers, that in all sales of tobacco the seller impliedly warranted the tobacco to remain sound and merchantable for four months after the sale.

⁶ *Close v. Crossland*, 47 Minn. 500; *Burt v. Dewey*, 40 N. Y. 283; *Gross v. Kierski*, 41 Cal. 111; *Linton v. Porter*, 31 Ill. 107; *Thompson v. Irwin*, 42 Mo. App. 403; *Hodges v. Wilkinson*, 111 N. C. 56; *Huntingdon v. Hall*, 36 Me. 501; *Long v. Hickingbottom*,

contract of exchange as upon a sale of personal property.¹ So, also, when a sale by an agent is made, and the purchaser, willing to trust the agent, while the principal is a stranger, takes written evidence of the sale signed by the agents, as principals, they must be held to have assumed the responsibility of principals; and none the less so because their business implies agency, and hence where an instrument in the form of a bill of sale was delivered by brokers to the purchaser, although not signed by them, it was held that the instrument was a contract of sale not subject to change by parol evidence, and that they were personally liable to him on their implied warranty of title.² The presumption of law is that there is no express agreement touching title, the seller impliedly warranting it, and if he desires to be relieved from the liability attending this warranty, he must set up and prove the special contract.³ The rule of implied warranty of title obtains in the case of buildings sold as chattels; if they are in possession of the seller he impliedly warrants title.⁴ Mr. Benjamin states the law to be, that in an executory agreement the vendor warrants, by implication, his title in the goods which he promises to sell; also in the sale of an ascertained specific chattel, an affirmation by the vendor that the chattel is his is equivalent to a warranty of title; and that this affirmation may be implied from his conduct, as well as from his words, and may also result from the nature and circumstances of the sale. But in the absence of such implication, and where no express warranty is given, the vendor, by the mere sale of a chattel, does not warrant his title and ability to sell, unless he knew he had no title, and concealed that fact from the buyer.⁵ "In every sale of a chattel, if the possession be at the time in

28 Miss. 772; *Dryden v. Kellogg*, 2 Mo. App. 87; *McCoy v. Artcher*, 3 Barb. 323; *Shattuck v. Green*, 104 Mass. 42; 2 Kent's Commentaries, 478. win, 42 Mo. App. 403; *Schell v. Stephens*, 50 Mo. 375; *Mills v. Hunt*, 20 Wend. 431; *Smyth v. Spalding*, 13 Mo. 529.

¹ *Close v. Crossland*, 47 Minn. 500; *Hunt v. Sackett*, 31 Mich. 18; *Patee v. Pelton*, 48 Vt. 182.

² *Sprague v. Rosenbaum*, 38 Fed. Rep. 386. See also, *Thompson v. Ir-*

³ *Hodges v. Wilkinson*, 111 N. C. 56. ⁴ *Dryden v. Kellogg*, 2 Mo. App. 87; *Huntingdon v. Hall*, 36 Me. 501; *Shattuck v. Green*, 104 Mass. 42.

⁵ Benjamin on Sales, § 627.

another, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril. But if the seller has possession of the article, and he sells it as his own, and not as agent for another, and for a fair price, he is understood to warrant the title.”¹

§ 283. Seller's implied warranty of title—Exception.—In sales of personal property by one in possession there is, as we have seen, an implied warranty on the part of the seller that he has a good title to such property;² but there is no such implied warranty in the case of judicial or official sales.³

¹ 2 Kent's Commentaries, 478.

² Jarrett v. Goodnow, 39 W. Va. 602; 20 S. E. Rep. 575, where the court said: “When a sale of chattels is made, there is an implied warranty of good title by the vendor, where the goods are in the vendor's possession. Byrnside v. Burdett, 15 W. Va. 702; Benjamin on Sales (6th ed., by Bennett), § 627 *et seq.*, and note 11, p. 631; full note to Scott v. Hix, 62 Am. Dec. 460; 2 Kent's Commentaries, 478. Some old English Text-books lay down that there is no implied warranty of title, but Mr. Benjamin says no case was ever so decided there. That old rule, repugnant to reason, if it really existed, was long since ‘wellnigh eaten away,’ as Lord Campbell well said; and now it is settled in England that there is such implied warranty, and it is universally admitted in America. But there is no implied warranty of soundness or quality of goods sold. Mason v. Chappell, 15 Gratt. 572; Benjamin on Sales, § 644, and note 13, p. 640. In this case the vendor, at the date of sale, had given a deed of trust on the property, and his warranty was broken at once. He was also guilty of fraud in the sale. Benjamin on Sales, § 628, says, ‘If the vendor knew he had no title, and concealed that fact from the buyer, he would be liable on the ground of fraud.’” Under the Georgia code,

§ 2651, “The seller in all cases (unless expressly or from the nature of the transaction excepted) warrants: (1) that he has a valid title and the right to sell; (2) that the article sold is marketable and reasonably suited to the use intended.”

³ Johnson v. Laybourn, 56 Minn. 332; 57 N. W. Rep. 933, where the court said: “It is well settled that in judicial sales the rule *caveat emptor* applies. Barron v. Mullin, 21 Minn. 374. The rule also applies to official sales; that is, sales made by and as officers of the law, such as sheriffs, constables, etc., under writs of execution, although they are not strictly judicial. The Monte Allegre, 9 Wheat. 616; Worthy v. Johnson, 8 Ga. 236; Hensley v. Baker, 10 Mo. 157; Chapman v. Speller, 14 Q. B. 621; Morgan v. Fencher, 1 Blackf. 10; Rodgers v. Smith, 2 Ind. 526; Bostick v. Winton, 1 Sneed, 525; Yates v. Bond, 2 McCord, 382; Bashore v. Whisler, 3 Watts, 490; Davis v. Hunt, 2 Bailey, 412; Stone v. Pointer, 5 Munf. 287. In case of such sales, official as well as judicial, the buyer is, unless the officer assumes to do more, bound to know that the latter sells only what he is authorized to sell, and to sell it just as it is. An assignee under the insolvent law is an officer of the court. His title and all his acts are official.”

§ 284. **The same subject continued—The seller is not in possession.**—The rule in America is that a person selling chattels of which he has not possession does not impliedly warranty the title. But the term “not in possession” only covers certain excepted cases, in which the vendor sells his mere naked interest.¹ Thus, where the vendor sold a note of which he was not in possession, he stating to the vendee that he did not know whether the note existed or not, it was held that there was no implied warranty of title.² Where an execution had been levied on a corporation’s property, and the buyer with knowledge of this fact bought the property from the corporation, the property at the time of the sale being in the possession of the sheriff, it was held there was no warranty of title to be implied.³ If a house is sold as a chattel, it being at the time in the occupation and on the land of another, the rule as to title is *caveat emptor*.⁴ Should a chattel subsequently come to the possession of a vendor by purchase, he having previously sold it while out of possession, a *bona fide* purchaser from him would have title as against the first vendee.⁵ In the absence of positive proof to the contrary, it is to be presumed that the vendor had possession at the time he sold the property.⁶ And if there be an affirmation of title where the vendor is not in possession, the vendor is subjected to the same liability as if he had possession of the property.⁷

¹ *Whitney v. Heywood*, 6 Cush. 82, 86, where the court said: “The principle is usually stated under this limitation of a vendor in possession, and I take it properly so. But possession here must be taken in its broadest sense, and as including possession by bailee of the vendor. The excepted cases must be substantially cases of sales of the mere naked interest of persons having no possession, actual or constructive; and in such cases no warranty of title is implied.” *Shattuck v. Green*, 104 Mass. 42.

² *McCoy v. Artcher*, 3 Barb. 323.

³ *Hopkins v. Grinnell*, 28 Barb. 533.

⁴ *Huntingdon v. Hall*, 36 Maine, 501.

This doctrine assimilates itself to a deed of land. There is no warranty in the conveyance of land except such as is contained in the deed.

⁵ *Scranton v. Clark*, 39 N. Y. 220.

⁶ *Long v. Hickingbottom*, 28 Miss. 772.

⁷ *McCoy v. Artcher*, 3 Barb. 323. See, also, *Fletcher v. Drath*, 66 Mo. 126, holding that the doctrine of *caveat emptor* applies to one advancing money and taking a deed of trust upon personal property, not in the possession of the grantor in the deed of trust. *Thompson v. Irwin*, 42 Mo. App. 403.

§ 285. **What constitutes breach of warranty of title.**—A buyer of chattels can not maintain an action upon the implied or express warranty of title, nor interpose the breach of such warranty of title, as a defense to an action for the price, without showing actual damage resulting from such breach of warranty.¹ If the vendor fraudulently represents himself to be the owner, when he knows to the contrary, such facts will bar a recovery for the price,² and the vendor is not entitled to have the property returned to him.³ But fraud in reference to the property, other than the title, would allow a return of the property if the buyer refused to pay the price.⁴ The purchaser of personal property, who takes and retains possession thereof, and uses and consumes the same, can not afterwards prevent a recovery of the price he agreed to pay by showing he had bought the title of a third person.⁵ A buyer is not required, before proceeding against his vendor upon the warranty of title, to wait for an actual deprivation by the true owner; he may surrender the property voluntarily, but must be then able to show conclusively that his surrender was to the paramount owner.⁶ The purchaser from a person without title was sued by the true owner for its conversion, and a judgment recovered against him for the value; before payment of this judgment by such purchaser he sued his vendor for breach of the implied warranty of title; it was held that only nominal damages could be recovered.⁷ The statute of limitations, upon an implied warranty of title does not commence to run until the buyer is disturbed in his possession by the true owner.⁸ In its operation and legal bearings, the warranty of title in case of sales of personal property is very like a covenant of war-

¹ *Hull v. Caldwell*, 3 South Dakota, 451; 54 N. W. Rep. 100; *Case v. Hall*, 24 Wend. 102; *Huntingdon v. Hall*, 36 Me. 501; *Sweetman v. Prince*, 26 N. Y. 224; *Sweetman v. Prince*, 62 Barb. 256; *Krumbhaar v. Birch*, 83 Pa. St. 426; *Linton v. Porter*, 31 Ill. 107; *Long v. Hickingbottom*, 28 Miss. 772; *Dryden v. Kellogg*, 2 Mo. App. 87; *Gross v. Kierski*, 41 Cal. 111; *Hodges v. Wilkinson*, 111 N. C. 56; *Burt v. Dewey*, 40 N. Y. 283.

² *Sweetman v. Prince*, 62 Barb. 256; *Case v. Hall*, 24 Wend. 102.

³ *Sweetman v. Prince*, 62 Barb. 256.

⁴ *Sweetman v. Prince*, 62 Barb. 256.

⁵ *Krumbhaar v. Birch*, 83 Pa. St. 426.

⁶ *Dryden v. Kellogg*, 2 Mo. App. 87; *Sweetman v. Prince*, 26 N. Y. 224; *Hodges v. Wilkinson*, 111 N. C. 56.

⁷ *Burt v. Dewey*, 40 N. Y. 283.

⁸ *Gross v. Kierski*, 41 Cal. 111.

ranty for quiet enjoyment in the sale of land. As respects an adverse title, according to the best authority, the warranty of title is not broken until an ouster or a surrender to the paramount claim of an adverse owner. Hence it is sometimes styled a "warranty of quiet possession."¹

§ 286. **The same subject continued.**—The courts of Massachusetts and Kentucky repudiate the doctrine that a buyer can set up a breach of warranty only when disturbed in the possession; and they allow a purchaser to maintain an action against the seller to recover damages, although the purchaser has not been deprived of possession.² If the property sold is incumbered, the buyer must pay off the incumbrance or be deprived of possession before proceeding against his vendor.³ Thus, where the vendee of mortgaged property does not surrender the same upon the demand of the mortgagee, but defends an action brought by him for the recovery thereof, an action by the vendee against his vendor for breach of the warranty of title is premature while the suit by the mortgagee is still pending.⁴ But if, in such suit, the buyer has been deprived of possession by claim and delivery proceedings, or replevin procedure, he may at once sue his vendor, although he answers in the suit brought against him.⁵ The mere fact that the buyer has been notified

¹ *Close v. Crossland*, 47 Minn. 500, 502; *Burt v. Dewey*, 40 N. Y. 283; *Case v. Hall*, 24 Wend. 102, where the court said: "Now, it would be highly inequitable to permit the vendee to retain the possession or enjoy the use of the property thus acquired, and put his vendor at defiance. Possibly, the owner may never claim, and enforce his title, or, if he does, the seller may settle with him. The breach implies no bad faith, and therefore, is compatible with perfect fair dealing between the parties; and the indemnity is complete by responding therefor after a recovery under the paramount title." *Matheny v. Mason*, 73 Mo. 677.

² *Grose v. Hennessey*, 95 Mass. 389, holding also that the measure of dam-

ages in such action is the value of the chattel; *Perkins v. Whelan*, 116 Mass. 542, holding that the statute of limitations runs from the time of sale; *Chancellor v. Wiggins*, 4 B. Mon. 201, holding that the warranty is like a covenant of seizin, broken at once if the vendor have no title, and from that time limitation commences to run.

³ *Hull v. Caldwell*, 3 S. Dak. 451; 54 N. W. Rep. 100; *Close v. Crossland*, 47 Minn. 500; *Hodges v. Wilkinson*, 111 N. C. 56; *American Electric Co. v. Consumers Co.*, 47 Fed. Rep. 43; *Harper v. Dotson*, 43 Iowa, 232.

⁴ *Close v. Crossland*, 47 Minn. 500.

⁵ *Hodges v. Wilkinson*, 111 N. C. 56. *Contra*: *Close v. Crossland*, 47 Minn. 500, holding that a provisional taking

that the chattel sold him infringes on another's patent, and he will be held responsible for damages, is no defense to an action for the price.¹ A vendee of personal property, with covenants of warranty, may discharge an existing lien upon the property purchased, and deduct the amount from the unpaid balance of the purchase price.² And in an executed contract of sale, the buyer, so long as he is not disturbed in the possession by an adverse claim, or an incumbrance, can not rescind the sale.³ But if the vendor fraudulently represents the property to be his when he knows it belongs to a stranger, this will allow a rescission without the buyer being disturbed in the possession.⁴ When the buyer has been deprived of the chattel by an adverse claim, he may elect to either rescind and recover the consideration, or sue on the warranty.⁵

§ 287. Implied warranty of title by sheriffs and administrators.—The rule of *caveat emptor* is strictly applicable to sales by administrators. The purchaser must inquire into title and quality before purchasing.⁶ And a purchaser of personal property at an administrator's sale, who has paid the money, can not recover it back, either from the administrator or distributees, on the ground of an implied warranty of title.⁷ The purchaser of property sold at sheriff's sale buys at his own risk, there being no warranty, express or implied.⁸ He also buys

in claim and delivery before the determination of the principal action decides nothing as to the title, and is not an eviction warranting an action by the vendee before the decision of the principal suit.

¹ *American Electric Co. v. Consumer's Co.*, 47 Fed. Rep. 43.

² *Harper v. Dotson*, 43 Iowa, 232.

³ *Hull v. Caldwell*, 3 S. Dak. 451; 54 N.W. Rep. 100; *Close v. Crossland*, 47 Minn. 500, where the court said: "Upon the general question of the remedy of the buyer in such cases, courts differ, but the doctrine more generally accepted is that the action should be solely upon the contract of warranty."

⁴ *Hull v. Caldwell*, 3 S. Dakota, 451; 54 N. W. Rep. 100.

⁵ *Hunt v. Sackett*, 31 Mich. 18. See, also, *McGiffin v. Baird*, 62 N. Y. 329, holding that the only effect of an express or implied warranty of title is to guarantee the buyer against eviction or injury from other parties, and until this occurs he is entitled to no indemnity. *Carter v. Walker*, 2 Rich. Law, 40; *Clark v. People's Co.*, 46 Mo. App. 248.

⁶ *Bingham v. Maxcy*, 15 Ill. 295.

⁷ *Prescott v. Holmes*, 7 Rich. Eq. 9.

⁸ *Neal v. Gillaspay*, 56 Ind. 451; *Brunner v. Brennan*, 49 Ind. 98; *State v. Prime*, 54 Ind. 450; *Hensley v. Baker*, 10 Mo. 157; *Hicks v. Skinner*, 71 N. C. 539.

subject to all equities against the owner, whether he knows of them or not.¹ The rule of *caveat emptor* obtains, and the sheriff is not liable, although by mistake he sells the wrong property.² Thus, where, by mistake, real estate belonging to one person is mortgaged by another as his property, and, under a decree of foreclosure, is sold at sheriff's sale to a purchaser who has no notice of such mistake, he can not, in an action against such sheriff and the judgment plaintiff, have such sale set aside, and recover back the purchase-money for such realty, bid and paid by him at such sale.³

§ 288. **Implied warranty of title to bonds.**—The vendor of securities, negotiable in form, is liable *ex delicto* for bad faith, and, *ex contractu*, there is an implied warranty on his part that they belong to him, and are not forgeries. Where there is no express stipulation, there is no liability beyond this.⁴ Thus, the vendor does not impliedly warrant that bonds are not fraudulent re-issues of genuine bonds.⁵ Where over-issued county bonds are sold in good faith, there is no implied warranty, and the purchaser can not recover the purchase-money paid.⁶ Under authority of an act of the legislature, a city issued certain bonds payable to a party named, or bearer; they became the property of a bank, which put them upon the market, and disposed of them; it having been held that the act of the legislature was unconstitutional, and the bonds void, the purchaser brought suit against the bank to recover the consideration money paid; it was held that the bank was not liable.⁷ Where one holding bonds in pledge for a loan, in pursuance of a sale made thereof by an owner, delivers the same to the purchaser, receives the purchase price, and then pays this over to the owner less his loan, such person is not liable al-

¹ Hicks v. Skinner, 71 N. C. 539.

² State v. Prime, 54 Ind. 450.

³ Neal v. Gillaspy, 56 Ind. 451.

⁴ Ætna Ins. Co. v. Middleport, 124 U. S. 534; Otis v. Cullom, 92 U. S. 447. See also, Louisiana v. Wood, 102 U. S. 294; Litchfield v. Ballou, 114

U. S. 190; Buchanan v. Litchfield, 102 U. S. 278.

⁵ Meyer v. Richards, 46 Fed. Rep. 727.

⁶ Sutro v. Rhodes, 92 Cal. 117.

⁷ Otis v. Cullum, 92 U. S. 447.

though the bonds are forgeries.¹ The declarations of the seller at the time of the sale, to the effect that he did not own the goods, are not admissible to vary a written warranty.² Upon a sale of property, by virtue of a chattel mortgage, the proceeding is notice to the public that the mortgagee is selling not his own title to the property, but merely what he has acquired, and no warranty of title is to be implied against the mortgagee.³

§ 289. General warranty covenant.—The general “warranty” clause in a conveyance is equivalent to the several special covenants in use under the common law, and is sufficient to compel the grantor, before receiving the full amount of the purchase-money, to discharge all liens on the property. And a grantee in possession under a general warranty deed made in good faith, the grantor being alive and solvent, can not defend in an action for the purchase-money, solely on the ground that the deeds of remote grantors prohibited the sale of liquors on the premises.⁴

¹ *Baker v. Arnot*, 67 N. Y. 448. See also, *Orleans v. Platt*, 99 U. S. 676; *Ætna Ins. Co. v. Middleport*, 124 U. S. 534; *Ripley v. Case*, 86 Mich. 261.

² *Koerper v. Jung*, 33 Ill. App. 144; *Wadhams v. Innes*, 4 Ill. App. 642; *Wadhams v. Swan*, 109 Ill. 46; *Beach v. Miller*, 51 Ill. 206; *Keegan v. Kinnaird*, 12 Ill. App. 484.

³ *Sheppard v. Earles*, 13 Hun, 651. And see, *Morley v. Attenborough*, 3 Ex. 500, the case of an auction sale, by order of a pawnbroker, of unredeemed pledged goods, and the court decided that the pawnbroker was not liable to a purchaser because he was deprived of possession by title paramount.

⁴ *Smith v. Jones* (Ky. App. 1895), 31 S. W. Rep. 475, where the court said: “This term, used by the grantor in a deed that he conveys by or with general warranty, has been often held by this court to be in substance equivalent to the several special covenants, in use,

under the common law; as that one is seized of the land sold, that he has good and perfect right to convey, that the land is free from incumbrances, that the grantee shall quietly enjoy possession, and that the grantor will warrant and defend the title against all claims of all persons. *Butt v. Riffe*, 78 Ky. 352, and *Pryse v. McGuire*, 81 Ky. 608, as well as in numerous other cases. So that in this case the covenant of general warranty is all sufficient for the protection of Smith in the full, complete, unrestricted use and enjoyment of the land sold, free from all incumbrances, and is sufficient to compel the grantor, before receiving the full amount of the purchase-money, to pay off and discharge all outstanding unpaid liens on the property; and this the evidence shows had been done before the rendition of the judgment for the purchase money, in fact before suit was brought.

* * * * * The pleadings admit

§ 290. Covenants of warranty—Grantee's rights.—The fact that if a grantee, who has been dispossessed, had taken possession of the land at the time of the conveyance to him, he would have acquired title by adverse possession, does not relieve his grantor from liability to him on his warranty of title; and in an action on a covenant of warranty, plaintiff may recover interest on the price paid for the land from the time it

that this clause appears in several of the deeds of the remote vendors of the plaintiffs in this case, but not in either of the deeds under which the grantors in this case obtained title, the last deed wherein this clause did appear being in 1872. It is not claimed by the defendant, Smith, that this property was suitable, either in its building or location, for saloon purposes, nor that he ever contemplated selling spirituous liquors on same, nor that he had been in any wise interfered with or prohibited in any way, by legal process or otherwise, from so doing; neither does he say that he has any apprehension of such proceedings, but simply that it is an incumbrance on the free, unrestricted use of his property, and that it has injured its salable value. As we have seen, his warranty in his deed is sufficient to protect him in this respect, should he ever be actually disturbed in this use and enjoyment of his property; and being in possession, protected by this warranty, and one of his grantors being amply solvent (worth, according to the evidence, \$20,000 or more), the uniform doctrine and practice in this court is, and for a long time has been, that the court will not interfere; that it will not cancel the contract where executed unless actual fraud has been perpetrated in procuring same; neither will it withhold or restrain a vendor in the collection of his purchase-money on such a record. An early, well-considered and interesting case

in this court on this question is *Simpson v. Hawkins*, 1 Dana, 303. Other cases have followed: *Taylor v. Lyon*, 2 Dana, 276; *Duvall v. Parker*, 2 Duv. 182; *Trumbo v. Lockridge*, 4 Bush, 415; and recently *English v. Thomasson*, 82 Ky. 280. In support of the title of plaintiffs in the court below, it is shown that they and those under whom they claim have had this property in actual, continuous, uninterrupted possession for more than thirty years—the extreme limit beyond which the law in Kentucky will not protect any claimant by reason of any disability. This sale was made in good faith, the grantor not doubting his title. He says he did not think at the time of telling Smith, his vendee, of this clause in the earlier deeds prohibiting the sale of liquor on the premises, because he says that said premises had long been deemed obsolete; that for thirty years whisky had been regularly sold in saloons (twenty or more) in the town of Ashland, without any protest by the Kentucky Iron, Coal and Manufacturing Company, who were the owners of all that tract of land whereon this city is built, and who had a similar clause inserted in all their deeds of conveyance of said lots; that in fact this same company built a fine hotel in said city, and sold same in 1890, wherein a saloon was then and now kept. It is clear that appellee was in good faith, and contemplated no fraud in the sale of his property; and when such is the case, and the con-

was paid, if he has not used or occupied the land.¹ All that is necessary for a vendee to recover on a covenant of warranty in his deed, is to show eviction and that the vendor was a party to the action or had notice of its pendency.² So, also, one claiming under a bargain and sale deed, with covenant of warranty against all persons claiming under the grantor merely, is not precluded from claiming as a *bona fide* purchaser.³

§ 291. Damages for breach of warranty.—The measure of damages for breach of warranty is the difference between the actual value of the defective articles, and their value had they been in accordance with the warranties—to which may be added compensation for the trouble and expense suffered, and any other special damages. Accordingly, in an action against a vendor for breach of warranty against defects and for the price paid, or agreed to be paid, it is competent to show what the goods would have been worth had they been as warranted. A manufacturer of wheels is liable, under his warranty against defective material, for using a grade of iron not suitable for the purpose for which the wheels were intended. In an action for breach of warranty in delivering articles not in conformity with the contract, the number of defective articles, and their value, must be established by competent evidence, and it can not be inferred that all were defective because some were.⁴

tract fully executed by deed, with clause of "general warranty," and the vendor living and solvent, as we have seen, the courts will not interfere, even though a defect was shown in the title."

¹Graham v. Dyer (Ky. 1895), 29 S. W. Rep. 346.

²Elliott v. Saufley, 89 Ky. 52. The court said in Woodward v. Allan, 3 Dana, 164: "As the defendant had notice of pendency of the ejectment, the judgment concluded him as to the title, and, therefore, no other proof of the adverse title was necessary on the trial." When the vendor is notified of the pendency of the action, he is bound by the recovery. Cummins v. Kennedy, 3 Litt. 118.

³Raymond v. Flavel, 27 Ore. 219; 40 Pac. R. 158.

⁴Case Plow Works v. Niles, etc., Co., 90 Wis. 590; 63 N.W. Rep. 1013, where the court said: "It is impossible to determine from the general terms of the finding upon what theory or basis the plaintiff's damages were assessed. The proper measure of damages was the difference between the actual value of the defective wheels delivered, and their value had they been in accordance with the written warranties; and the price paid, or agreed to be paid, for them was competent evidence of the latter value (Giffert v. West, 33 Wis. 617; Merrill v. Nightingale, 39 Wis. 247; Aultman, Taylor & Co. v. Hetherington, 42 Wis. 622;

Liability for breach of a covenant of warranty must be determined by the law in force when the contract of warranty was

Aultman & Co. v. Case, 68 Wis. 612; 32 N. W. Rep. 772), to which may be added compensation for the trouble and expense suffered, and other special damages incurred, in consequence of the wheels not being in conformity with the contract. *Sutherland on Damages*, §§ 670, 671; *Fisk v. Tank*, 12 Wis. 306; *Dushane v. Benedict*, 120 U. S. 630; 7 Sup. Ct. Rep. 696. The price for which the purchaser had sold the goods can not be shown, in order to modify the rule above stated, nor is it material whether he had sold them at all. *Muller v. Eno*, 14 N. Y. 597; *Medbury v. Watson*, 6 Metc. (Mass.) 246; *Brown v. Bigelow*, 10 Allen, 242; *Jones v. Just*, L. R. 3 Q. B. 197; *Bach v. Levy*, 101 N. Y. 511, 515; 5 N. E. Rep. 345. The court refused to allow the plaintiff damages on account of defective wheels which it had sold and disposed of to third parties, and for which it had received an amount equal to the purchase price of the same. Within the well-settled rule established by the cases cited, this was error prejudicial to the plaintiff, for which it is entitled, on its appeal, to a reversal of the judgment and a new trial. It was optional with the plaintiff to have certain of the specified wheels made with 8 steel or 10 iron spokes, and it insisted, in the main, on having them made with 10 iron spokes. It is claimed as a serious defect in the wheels that common iron was used for that purpose. There is evidence that the defendant figured on using common iron, but not that this fact was communicated to the plaintiff, or that any particular kind or grade of iron was discussed or agreed on. The evidence tends to show that refined iron ought to have been used. The stipulation against defective material is substantially an

agreement that material not suited to the purpose should not be used, and required that the iron for the spokes should be of the necessary grade and quality, if there was any such procurable in the market. The defendant could not comply with the contract by using a cheap and inferior kind of iron, unfit to be used in the manufacture of such wheels. In view of the facts presented by the record and the contentions of counsel on the question of damages, it is proper to add that the difficulty in assessing damages arises mainly out of the nature of the proof offered to show how many wheels were defective for want of conformity to the warranties in the contract, rather than out of any uncertainty as to the rule of damages. The fact that certain wheels were defective in these respects, the number of them, and the proper amount of damages, must be established by competent and satisfactory evidence. *Meageley v. Hoyt*, 125 N. Y. 771; 26 N. E. Rep. 719; *Leeds v. Metropolitan Gaslight Co.*, 90 N. Y. 26; *Houghkirk v. President, etc., of Canal Co.*, 92 N. Y. 219, 225. It can not be necessarily or fairly inferred that all the wheels were defective because quite a large number of them have been found to be so. It appears that out of nearly 14,000 shipped to agents, as sold and to be sold, 3,556 had been returned as defective, and 400, alleged to be so, remained in the hands of agents after notice had been given to agents and others, for a period of four months or more, inviting the return of all wheels claimed to be defective. This does not, in connection with the other evidence, justify the inference that wheels not so returned or held were defective, but tends, at least, to show that they were not. As already stated, the plaintiff must prove how

made. Under the South Carolina act of 1824, which provides that, in an action on a covenant, the measure of damages shall be the amount of the purchase-money at the time of the alienation, with legal interest, it is held that where, in an action for breach of warranty, it appears that a life-estate was conveyed to the grantee, and enjoyed by him and his grantees, the value of the life-estate should be deducted from the damages, although the grantee who brought the action enjoyed but a small portion of such life-estate.¹

many and what wheels were defective, by competent and satisfactory evidence. This can not be established by mere conjecture or guesswork." As to the buyer's remedy and procedure on a breach of warranty by the seller, see, *Ohio Thresher Co. v. Hensel*, 9 Ind. App. 328; 36 N. E. Rep. 716; *Marsh v. Low*, 55 Ind. 271.

¹ *Aiken v. McDonald* (S. C. 1895), 20 S. E. Rep. 796, where the court said: "It would be contrary to the plainest principles of justice that one who has lost only a portion of the thing purchased should be entitled to just as much damages as if he had lost the whole of the thing purchased. It is, however, contended by the counsel for respondents, and the circuit judge so held, that under the act of 1824, as construed in the case of *Lowrance v. Robertson*, 10 S. C. 8, the measure of damages adopted by the circuit judge is fixed by statute, and can not be departed from. This is undoubtedly true where there has been a total breach of the warranty; but it by no means follows that the same measure must be applied where there has been only a partial breach of the warranty. In the case of *Earle v. Middleton*, *Cheves*, 127 (decided in 1840), the action was upon a covenant of warranty in a deed from Middleton to Earle, purporting to convey 1,020 acres of land, and the breach assigned was the loss of 131 acres by paramount title in a third person. Plaintiff recovered

judgment for the value of the 131 acres, and the judgment was affirmed. In that case *O'Neill, J.*, used the following language: 'The A. A., 1824, § 4, p. 24, enacts in affirmance of the rule as laid down in *Furman v. Elmore*, 2 Nott & McC. 189 (decided in 1812), *Bond v. Quattlebaum*, 1 McCord, 584 (decided in 1822), and the other cases decided at law, "that in any action or suit at law or in equity for reimbursement or damages, upon covenant or otherwise, the true measure of damages shall be the amount of the purchase-money at the time of the alienation, with legal interest." Testing the case before us by this act, or by the rule of law settled long before it was enacted, there can be no doubt that the jury adopted the true measure of damages in giving to the plaintiff the proportion of the purchase-money which the land recovered bore to the whole tract, with interest from the date of his deed.' The same doctrine was recognized and applied in the cases of *Wallace v. Talbot*, 1 McCord, 466, and *Crawford v. Crawford*, 1 Bailey, 128, where there was only a partial breach of the warranty by a deficiency in the number of acres of the land sold. The fact that these cases arose prior to the passage of the act of 1824 can not make any difference, if, as *O'Neill, J.*, *supra*, said (what is undoubtedly the fact), the act of 1824 was but an affirmance of the rule which had been

§ 292. Covenant of seizin—Damages for breach.—A written instrument, executed and delivered by the assignor of a lease contemporaneously with its assignment, stipulating that the lease “is genuine and in full force and effect,” and guarantying to the assignee “the rights and title of said lease,” is founded on a sufficient consideration, and amounts to a covenant of seizin by the assignor of the demised premises, and that the assignee shall peacefully enjoy the same during the term of the lease, according to its provisions. Such covenant is broken if the assignor have not the possession of the premises at the time of the assignment, and is unable to deliver the same to the assignee on account of a prior and paramount title and possession of another; and the assignee’s right of action for the breach of the covenant will not be affected by his subsequent purchase of the paramount title, and possession thereunder. The measure of the damages which the plaintiff may recover in such action is the amount of the consideration paid for the lease, with interest; and it is not essential to the recovery that the lease be reassigned or tendered back.¹

settled in this state ever since the case of *Furman v. Elmore*, *supra*. In addition to this, we have two cases in this state, which arose since the passage of the act of 1824,—*Lewis v. Lewis*, 5 Rich. Law, 12, and *Jeter v. Glenn*, 9 Rich. Law, 374,—in which there was a partial breach of warranty by outstanding estates of dower, and in which the same rule for the measurement of damages was applied. If, then, the rule requires that in case of a partial breach of the warranty by a failure of title to a portion of the thing conveyed there shall be an apportionment of the measure of damages fixed by the statute, based upon the relative values of that portion to which title fails and of that portion to which the title proves to be good, we do not see why, upon the same principle, there should not be a similar apportionment in a case where there

is a partial breach of the warranty by reason of a failure of the title to a portion of the estate conveyed.”

¹ *Wetzel v. Richcreek* (Ohio, 1895), 40 N. E. Rep. 1004, where the court said: “The question whether the defendants’ contract of guaranty, with respect to the measure of damages recoverable for its breach, may properly be classed with covenants of seizin, is fairly made on the charge of the court, and its consideration becomes necessary in the decision of the case. A covenant of seizin is defined to be ‘an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey,’ and extends not only to the land itself, but also to whatever is properly appurtenant to and passes by the conveyance of the land; and, though the covenant is usually found in conveyances of the fee, it is appropriate in leases and as-

§ 293. Performance of building contract.—The performance of a building contract need not be literal and exact. It is

signments of them. Indeed, it seems well settled that in leases the covenant, or its equivalent, will be implied, unless the terms of the lease exclude the implication. It is said in Rawle on Covenants, § 272: 'With respect to estates less than freehold, covenants for title were from the earliest times implied, not only from the words of leasing, such as *demisi, concessi*, or the like, but even from the relation of landlord and tenant, and such is the law at the present day, unless where, as in some of the United States, it has been altered by legislation.' And in § 273 that author says: 'The covenants for title thus implied from the words of leasing were and are two: First, a covenant that the lessor has power to demise; and, secondly, a covenant for quiet enjoyment—and both of these covenants are, of course, as are all common-law implied covenants, general or unlimited.' It is held by some authorities that no covenants are implied in the assignment of a lease. *Waldo v. Hall*, 14 Mass. 486; *Blair v. Rankin*, 11 Mo. 440. Other authorities, however, maintain the contrary doctrine. Thus, in *Souter v. Drake*, 5 Barn. & Adol. 992, 1002, it is said by Lord Denman that, 'unless there be a stipulation to the contrary, there is in every contract for the sale of a lease an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself, which implied undertaking is available at law as well as in equity.' And see *Bensel v. Gray*, 38 N. Y. Super. Ct. Rep. 447. This would seem to be the better rule, because it can hardly be supposed to be the intention of one party to purchase, or of the other to sell, the mere instrument of lease without any beneficial interest under it, but, rather, that the

subject of the purchase and sale is the right to enjoy the term purported to be demised, and all the benefits which it stipulates to confer on the lessee. But it is not deemed necessary to determine here what, if any, obligation may be implied from the assignment of the lease. It is, of course, competent for the parties to introduce into the assignment any covenant or stipulation pertinent to the subject which they have agreed upon, and it is not unusual for the assignor to covenant that the indenture of lease is good, that he has power to assign, that he will save the assignee harmless from former grants and incumbrances, and for quiet enjoyment. 2 Taylor on Landlord and Tenant, § 431. The instrument of guaranty executed by the defendants, and delivered to the plaintiff contemporaneously with the delivery of the assigned lease and the payment of the balance of its purchase price, was founded upon a sufficient consideration, and became a part of the contract of assignment. By it the defendants stipulated that the lease was in full force and effect at the time of its assignment and delivery to the plaintiff, and guaranteed to him 'the rights and title of said lease.' This amounts to an express covenant of the assignor's title to the term demised, and for its quiet enjoyment by the assignee. It has long been the law of this state that a covenant of seizin is not broken so as to give the covenantee a right of action if the covenantor had the actual seizin, though not the legal title, at the time of the conveyance, and the former is put in possession under it, until there has been an eviction under a paramount title. *Stambaugh v. Smith*, 23 Ohio St. 584, and cases there cited. And the same rule obtains in regard

in contemplation of law sufficient, if the contractor, acting in good faith in carrying out the contract according to its terms,

to a covenant for the quiet enjoyment of a lessee. Such eviction, however, may be constructive, as well as actual; as where the covenantee has purchased or taken a lease under the paramount title, even without any actual change of possession, when the validity of such title has been established by the judgment of a court of competent jurisdiction, and, under certain circumstances, when it has not been so established. In opposition to this doctrine it has often been urged, says Mr. Rawle, in his work on Covenants for Title, § 142, 'that it confounds all distinctions between a covenant for seizin and a covenant for quiet enjoyment or warranty; and it has also been argued that an analogy exists to the rule which prohibits a tenant from disputing his landlord's title, unless there has been an actual eviction under the paramount claim. But, in answer to such analogy, it may be said, first, that whatever may have been the origin of this rule, or its earlier application, it is now well settled that, whenever the landlord's title is insufficient for the security of the tenant, the relation between them may be renounced, and the latter may protect himself under the paramount title.' The only effect of the judgment establishing such title is that it makes a *prima facie* case of paramount title if the covenantor is not a party, and is conclusive evidence thereof if he is a party to the judgment; while if, without it, the covenantee surrenders the possession, or buys in the superior title to protect his possession, he does so at his peril, and assumes the burden of proving such superior title, to which he would have been compelled to yield. So, when a covenantee is unable to obtain possession in consequence

of an existing possession by a person claiming and holding under an elder title, it is equivalent to an eviction. Taylor on Landlord and Tenant, § 314. The evidence in the case before us was such that the jury might well have found, as shown by the verdict, that the defendants had broken their covenants in the contract of assignment of the lease to the plaintiff. The liability of the defendants on their covenants being established, the measure of the damages was not less than that authorized by the rule given in the charge to the jury. In *McAlpin v. Woodruff*, 11 Ohio St. 120, it is said that 'where a grantee of an estate in fee-simple, with warranty, is evicted, by paramount title, of his entire estate, the rule of damages is settled in Ohio to be the amount of the original purchase-money, with interest, not, however, to exceed the time limited by statute for the recovery of *mesne* profits from the time of eviction. So, if he be evicted of a definite portion of the premises, the damages are a proportional amount of the purchase-money with like interest. *King v. Kerr*, 5 Ohio, 154; *Foote v. Burnet*, 10 Ohio, 317; *Backus v. McCoy*, 3 Ohio, 211; *Clark v. Parr*, 14 Ohio, 118. In analogy to this rule it has been held that the rents reserved in a lease, where no other consideration is paid, must be regarded as a just equivalent for the use of the demised premises. The parties have agreed so to consider it. In case of eviction the rent ceases, and the lessee is relieved from a burden which must be deemed equal to the benefit which he would have derived from the continued enjoyment of the property.' But where a further consideration has been paid, in addition to the rent reserved, its amount or value may be re-

and intending and attempting to perform, does so substantially.¹ But while substantial compliance with the terms of a contract is sufficient to entitle a party to recover, the owner is entitled to a just allowance for slight or trivial defects.² And the fact that the defects are very trivial does not preclude the owner from recovering for them.³ All the owner can recover, however, is the difference between the value of the work as the contractor left it, and what it will cost to leave it completed in strict conformity with the contract.⁴ A stipulation that the contractor shall furnish releases from subcontractors before the last installment of the contract price shall be paid will not prevent the filing of a mechanic's lien by the contractor, in advance of the furnishing or procuring of such releases.⁵ Whether a contract has been substantially performed is a question of fact depending upon all the circumstances of the case to be determined by the trial court.⁶ Thus, a contract to build a barn is

covered. In the case of *Lock v. Furze*, 19 C. B. (N. S.) 96, where a tenant in possession had, in consideration of a premium of £400, obtained from the landlord a second lease, to commence when his old lease should expire, but before this time arrived the lessor died, it being discovered that the second lease was an excessive execution of a power, the lessee, upon being notified that it would not be recognized by the parties in interest, secured the premises at a much higher rent, and then sued on the covenant for quiet enjoyment contained in the lease, the court held 'that the measure of damages was, besides the £400 premium paid and the costs of preparing the void lease, the difference in value, as estimated by the jury upon the evidence, between the term professed to be granted to the plaintiff by his lessor and the seven years' term which he obtained from the reversioners—in other words, the value of the term he had lost.' This decision was, on appeal, affirmed in exchequer chamber, and was followed in the later case in

the court of exchequer of *Rolph v. Crouch*, L. R. 3 Exch. 44; and the rule it announces, it is said, prevails generally in this country. Taylor on Landlord and Tenant, § 317. At all events, in such cases the measure of damages is not less than the amount of the consideration paid, with the interest, and the trial court was not in error, we think, in applying that rule to the plaintiff's action."

¹ *Oberlies v. Bullinger*, 132 N. Y. 598; *Nolan v. Whitney*, 88 N. Y. 648; *Flaherty v. Miner*, 123 N. Y. 382.

² *Moore v. Carter*, 146 Pa. St. 492; *Sticker v. Overpeck*, 127 Pa. St. 446; *Monocacy Co. v. American, etc., Co.*, 83 Pa. St. 517; *Boteler v. Roy*, 40 Mo. App. 234; *Heckman v. Pinkney*, 81 N. Y. 211; *Glacius v. Black*, 50 N. Y. 145.

³ *Boteler v. Roy*, 40 Mo. App. 234, but he must plead the matter and ask recovery.

⁴ *Sticker v. Overpeck*, 127 Pa. St. 446.

⁵ *Moore v. Carter*, 146 Pa. St. 492.

⁶ *Nolan v. Whitney*, 88 N. Y. 648.

substantially performed and the contractor can recover, although he have left some large doors unhung.¹ An architect performs his contract to furnish plans, and substantially performs his contract if the only defect is a chimney which is inadequate.² A deviation from the plans by an error in measurement, by which the roof of the rear addition of the house is built five inches too low, does not preclude the contractor from recovery for a substantial performance.³ A contract to varnish and grain a building is substantially complied with, if the only thing left undone is some graining which will cost about five dollars to complete.⁴ Where it will take six hundred dollars to complete the work, this is not substantial performance;⁵ but defects in the plastering to the extent of two hundred dollars do not prevent the contractor from alleging substantial performance.⁶ And since the rule of exact or literal performance has been relaxed, and recovery may be founded upon substantial performance, that term, in its practical application to building contracts, has perhaps necessarily become somewhat indefinite; accordingly, the fact that the builder has in good faith intended to comply with the contract, and has substantially done so, in the sense that the defects are not pervasive, does not constitute a deviation from the general plan contemplated for the work, and is not so essential that the object of the parties in making the contract and its purpose can not, without difficulty, be accomplished by remedying them.⁷ Consequently, slight defects caused by inadvertence or unintentional omissions are not necessarily in the way of recovery of the contract price, less the amount, by way of damages, requisite to

¹ *Rose v. O'Riley*, 111 Mass. 57.

² *Hubert v. Aitken*, 5 N.Y. Supl. 829. An architect is bound only to exercise reasonable care, and to use reasonable means of observation and detection, in the supervision of the building.

³ *Oberlies v. Bullinger*, 132 N. Y. 598.

⁴ *Harlan v. Stufflebeem*, 87 Cal. 508.

⁵ *Flaherty v. Miner*, 123 N. Y. 382. This case presents the New York law in building cases. The following is

the syllabus: "The trial court charged that, if the plaintiff had not substantially performed, he could not recover the balance of the contract price; but, if he had, although a small and unimportant portion of the work remained to be done, he could recover the balance of the contract price, less the expense of performing that portion left undone. *Held*, no error."

⁶ *Nolan v. Whitney*, 88 N. Y. 648.

⁷ *Crouch v. Gutman*, 134 N. Y. 45; 31 N. E. Rep. 271.

indemnify the owner for the expense of conforming the work to that for which he contracted; and whether, having in view those guiding considerations, the contractor has proceeded in good faith, and whether the defects are slight in their relation to the work as a whole, are usually questions of fact, and upon their determination hinges the disposition of the question of substantial performance.¹

§ 294. **The same subject continued—Digging wells.**—The contractor is bound to construct the building substantially of the material and in the manner specified in the contract; and any deviation from the plans in regard to the material used is not a substantial compliance, although better materials are used. Thus, where the contract called for a particular kind and make of columns other columns substantially like them can not be substituted.² A stone wall can not be substituted for a brick one.³ A contract to make a cellar water-tight is not substantially performed if any water at all gets in the cellar.⁴ Where the contractor offers to do any work the owner desires to have done in completion of the contract, and the owner fails to designate any work unfinished, this shows a sufficient performance on the contractor's part.⁵ It is competent for a contractor to make his delivery of a building or a ship conditional upon the owner's releasing all claims for damages for non-performance. And the acceptance by the owner in such cases operates as a full and complete performance of the building contract, and estops the owner from afterward alleging anything to the contrary.⁶ If no particular distance is specified in a contract to dig a well, then only a reasonable depth

¹ *Crouch v. Gutman*, 134 N. Y. 45; 31 N. E. Rep. 271; *Glacius v. Black*, 50 N. Y. 145; *Phillip v. Gallant*, 62 N. Y. 256; *Woodward v. Fuller*, 80 N. Y. 312; *Nolan v. Whitney*, 88 N. Y. 648.

² *Linch v. Paris Lumber Co.*, 80 Texas, 23; 14 S. W. Rep. 701; 15 S. W. Rep. 208.

³ *Aldrich v. Wilmarth*, 4 S. Dak. 38; 54 N. W. Rep. 811.

⁴ *Weeks v. O'Brien*, 12 N. Y. Supl. 720.

⁵ *Dennis v. Walsh*, 16 N. Y. Supl. 257.

⁶ *Oregon Improvement Co. v. Roach*, 117 N. Y. 527. See, also, *McMaster v. State*, 108 N. Y. 542; *Linch v. Paris Lumber Co.*, 80 Texas, 23; 14 S. W. Rep. 701; 15 S. W. Rep. 208; *Coon v. Citizens' Co.*, 152 Pa. St. 644; *Scheible v. Klein*, 89 Mich. 376; *Phelps v. Beebe*, 71 Mich. 554; *Linch v. Paris Lumber Co.*, 80 Texas, 23; 15 S. W. Rep. 208.

need be dug.¹ And this is so although the contract provides that the work shall continue until water is found or the owner satisfied.² The contract diameter must be adhered to, and if it is not, no recovery can be had, even though the required depth is dug, and neither gas nor oil is struck, and this as a test of the territory is as effective as if the contract diameter had been adhered to;³ but if the owner takes possession of such a well after it is dug he is liable to pay the contractor the value of his services.⁴ A contract to dig a water-well is substantially performed when water is reached, and the omission to put on a screen at the bottom, and clean out the sand, does not prevent the contract from being substantially performed.⁵ A contract to test a country for oil is substantially performed if wells are drilled through the stratum to the usual depth at which oil should be found, and such wells need not be "shot, torpedoed or tubed," unless the drilling shows some promise of oil.⁶

§ 295. Method of performance.—Generally speaking, the stipulated methods for the execution of the thing contracted to be done is not of the essence of the contract. If the performance is efficient the compensation is due, although the performance may have been more economical than it would have been had the stipulated method of performance been followed. Thus where a city contracted with a fire company for the extinguishment of fires, and the contract stipulated that the company should keep a certain kind of apparatus, and a certain number of men, if the company fully accomplished the object of the contract, it may recover the stipulated compensation, although it did not provide the apparatus or number of men called for by the contract.⁷ So, also, a contract to furnish

¹ *Bohrer v. Stumpff*, 31 Ill. App. 139.

² *Bohrer v. Stumpff*, 31 Ill. App. 139.

³ *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19.

⁴ *Holmes v. Chartiers Oil Co.*, 138 Pa. St. 546.

⁵ *Madden v. Oestrich*, 46 Minn. 538; 49 N. W. Rep. 301.

⁶ *Rice v. Ege*, 42 Fed. Rep. 661.

⁷ *City of New Orleans v. Fireman's Co.*, 43 La. Ann. 447. See also, *Fresno Canal Co. v. Dunbar*, 80 Cal. 530, where it was held that a contract to supply water was complied with, although the ditch was so negligently constructed as to be an injury to the owner's land.

plans for a building to cost "about \$100,000" is complied with if the plans will entail an expenditure of \$102,000 to erect the house.¹ And an architect can modify his plans, if they call for an expenditure exceeding the designated sum, and after such modification the owner must accept them.² Upon similar principles a contract to maintain a college of "standard grade" is substantially performed where the scheme of studies is up to the average of other colleges of the state, and the professors and teachers are of good ability, and well qualified for their respective positions. The fact that their compensation is small does not affect their ability, nor necessarily their efficiency. And their teaching in the preparatory department does not prevent the college from being "standard grade."³

§ 296. Miscellaneous.—A contract to erect a combination passenger and freight elevator is performed, although gates have been omitted.⁴ And a contract by a stockholder in a corporation, to pay a sum of money for the negotiating of a sale of land belonging to the corporation, by a third person, is not performed by such third person if he, after having found a purchaser, fails to get the corporation to convey.⁵ In an action upon a contract to exterminate the prairie dogs upon a certain tract of land, it was held a sufficient performance if a large majority of them were destroyed.⁶ So, also, a hot-water pressure tank is built correctly, if the usual man-hole at the side is omitted, provided a man can pass between the tank and the ceiling.⁷ A corporation agreeing to erect a manufactory in a certain place does not perform its contract by erecting such manufactory in an adjoining place, even though its business is transacted in the place where it agreed to locate its manufactory; and it can not recover upon stock subscriptions, containing such agreement.⁸ An agreement to place a depot

¹ *Smith v. Dicky*, 74 Texas, 61; 11 S. W. Rep. 1049.

² *Marquis v. Lauretson*, 76 Iowa, 23.

³ *University of Des Moines v. Polk County, etc., Co.*, 87 Iowa, 36; 53 N. W. Rep. 1080.

⁴ *Horgan v. McKenzie*, 17 N. Y. Supl. 174.

⁵ *Curtis v. Watson*, 64 Vt. 549.

⁶ *Craig v. Weitner*, 33 Neb. 484; 50 N. W. Rep. 442.

⁷ *Logan v. Berkshire Apartment Co.*, 20 N. Y. Supl. 369.

⁸ *Auburn Bolt, etc., Works v. Shultz*, 143 Pa. St. 256.

in a town is substantially performed by placing it within one hundred yards of the city's corporation line.¹ And the widening of a street under a contract therefor is performed sufficiently to allow a recovery, although the second story of some buildings on such street project beyond and over the line of the lower story.² An agreement to remove the business of a corporation to a certain place is not complied with, if the corporation only erects a building; and subscriptions to this effect may be recovered, although the money was used in erecting the buildings.³ An unnecessary provision in a contract for the prevention of liens of subcontractors, which do not and can not accrue in favor of such subcontractors, need not be performed.⁴ A person obtaining subscriptions for the purpose of locating a business in a town is entitled, in the absence of an express stipulation to the contrary, after he has made an honest and faithful attempt to render the business a success, to close up the business, and the subscribers can not recover their subscriptions.⁵ A contract to deposit a certain sum in favor of a party is performed if the person with whom the deposit is to be made charges on his books the person who agrees to make the deposit, and gives credit to the one in whose favor the deposit is to be made, although no cash is passed.⁶ But advertising in one thousand and twenty-two papers, when the contract called for advertising in one thousand and seventy-five papers, is not a substantial performance.⁷ Where work is done under direction of a city engineer and in accordance with the usage of the city works department, the fact that the con-

¹ Fort Worth R. Co. v. Williams, 77 Texas, 121; 18 S. W. Rep. 206. See also, Texas, etc., R. Co. v. Marshall, 136 U. S. 393.

² City of Boston v. Simmons, 9 Cush. 373.

³ Fort Wayne Light Co. v. Miller, 131 Ind. 499; 14 Lawyers' Rep. Ann. 804. See also, the leading case of Texas, etc., R. Co. v. Marshall, 136 U. S. 393.

⁴ Griffith v. Happersberger, 86 Cal. 605.

⁵ Ayres v. Dutton, 87 Mich. 528. To a similar effect is, Texas, etc., R. Co. v. Marshall, 136 U. S. 393.

⁶ Rigdon v. Conley, 43 Ill. App. 593, where the court said: "Mere book-keeping, in most commercial transactions of magnitude, stands in the place of the actual handling of cash." See also, Russell v. Haddock, 3 Gilm. 233.

⁷ Dauchey v. Drake, 85 N. Y. 407.

tract specifications are departed from does not prevent the contractor recovering.¹

¹*Gillen v. Babcock*, 14 N. Y. Supl. Atl. Rep. 1086, holding that acts 941. See also, *Black v. Ostrander*, 1 which are merely indicative of intention to perform a voluntary promise, Colo. App. 272; *Hunt v. Elliott*, 77 Cal. 588; *Warren v. Tinsley*, 53 Fed. Rep. 689; *Gray v. Gannon*, 4 Hun, 57; which do not prejudice the promisee, are not irrevocable steps in the performance of such a promise. *Hume O'Dea v. Winona*, 41 Minn. 424; *Tulane v. Clifton*, 47 N. J. Eq. 351; 20 *v. Flint Co.*, 11 N. Y. Supl. 431.

CHAPTER VIII.

TENDER.

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| § 297. Tender defined. | § 320. Conditional tender. |
| 298. Necessity of tender—Illustration. | 321. The same subject continued. |
| 299. What constitutes a tender. | 322. Giving receipt. |
| 300. Statutory rules. | 323. To whom a tender should be made. |
| 301. Method of tender. | 324. Tendering at a bank. |
| 302. Continued readiness to pay. | 325. Tendering to an attorney at law. |
| 303. The same subject continued. | 326. Tender of money into court. |
| 304. Time of tender. | 327. By whom a tender may be made. |
| 305. Notes and bills. | 328. Tender under protest. |
| 306. Ordinary contracts. | 329. Place of tender. |
| 307. Tender of delivery of goods. | 330. Unliquidated damages. |
| 308. Producing the money. | 331. Effect of tender. |
| 309. Further illustrations. | 332. The same subject continued. |
| 310. Production of the money on a mortgage. | 333. Further illustrations. |
| 311. Money available for tender. | 334. Vendee's tender and demand of performance. |
| 312. Power of congress to pass legal tender acts. | 335. In cases of pledge and mortgage. |
| 313. Waiver of defect in tender. | 336. Tendering back borrowed stock. |
| 314. Tender of note or check. | 337. Tendering railroad fare. |
| 315. Contracts payable in gold or silver dollars. | 338. Tender excused. |
| 316. Amount of tender. | 339. Questions of practice. |
| 317. The same subject continued. | 340. Touching costs. |
| 318. Sufficiency of amount—Waiver. | |
| 319. Tender on severable debts. | |

§ 297. **Tender defined.**—"Tender," in its technical application, has reference to the discharge of debts and contracts to pay money, but sometimes it is used in reference to performance generally. Some misapprehension or confusion appears to have arisen from the mode of expression used in the books in treating of the necessity of a tender or offer by the parties,

as applicable to cases of mutual and concurrent promises. The word "tender," as used in such a connection, does not mean the same kind of offer as when used with reference to the payment or offer to pay an ordinary debt due in money, in cases where the money is offered to a creditor entitled to receive it and nothing further remains to be done, the transaction thereby being completed and ended; but it then means a readiness and willingness, accompanied with an ability on the part of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness. Such readiness, ability, and notice are sufficient evidence of, and indeed constitute and imply an offer or tender in the sense in which those terms are used in reference to agreements generally. It is not an absolute unconditional offer to do or transfer anything at all events, but is in its nature conditional only, and dependent on, and to be performed only in case of, the readiness of the other party to perform his part of the agreement.¹

§ 298. Necessity of tender—Illustrations.—Before a corporation can sue on its stock subscriptions it must tender stock to the subscribers.² A real tender is a condition precedent, *sine qua non*, to authorize a suit to rescind a judicial sale; when it is alleged, denied and not proved, the plaintiff's action must be dismissed.³ An offer in writing to pay the purchase price of land is such a compliance with a land contract as to cast on the vendor the necessity of tendering a deed.⁴ A party is never under the necessity of accepting a

¹Smith v. Lewis, 26 Conn. 110, 119, Adams v. Williams, 2 Watts & Sergeant, 227; Holloway v. Davis, Wright 41; Irvin v. Gregory, 13 Gray, 215; (Ohio), 129; Taylor v. Rhea, 10 Minor Browning v. Board of Comrs. Owen (Ala.), 414; School District v. Rogers, 8 County, 44 Ind. 11; Lynch v. Jennings, Iowa, 316; Berryhill v. Byington, 10 43 Ind. 276; Morton v. Lamb, 7 T. R. Iowa, 223; Winton v. Sherman, 20 121; Rawson v. Johnson, 1 East, 203; Iowa, 295.
Waterhouse v. Skinner, 2 Bos. & Pull. ³ Farquhar v. Iles, 39 La. Ann. 874.
447; Ferry v. Williams, 8 Taunt. 62; ⁴ Peckham v. Stewart, 97 Cal. 147; 31
Norwood v. Read, Plowd. 180. Pac. Rep. 928.

² Courtright v. Deeds, 37 Iowa, 503;

tender until it is due.¹ Accordingly a tender made before the money is due is void as well as unnecessary.²

§ 299. What constitutes a tender.—An offer to buy a claim is no tender. Thus a mere offer by the debtor to buy the notes and mortgage given by him to secure a debt, before a sale by the mortgagee, will give no equitable ground for setting aside the sale and allowing a redemption.³ Nor is the mortgagee bound to accept what is due him, and assign his notes and mortgage to the person offering to pay him.⁴ And a tender must always be made with an intent to extinguish the obligation.⁵ A mere allegation in a pleading that one tenders is no tender;⁶ and an offer, during vacation of court, to pay damages in a pending action, does not constitute a tender.⁷

§ 300. Statutory rules.—The Utah statute which declares that “an offer in writing to pay a particular sum of money is, if not accepted, equivalent to the actual production and tender of the money,” does not apply to a tender unless made in good faith, with ability to produce the money.⁸ The California civil code provides that unless an offer of performance be accepted,

¹ *Patch v. Collins*, 158 Mass. 468; 33 N. E. Rep. 567.

² *Berry Bros. v. Davis*, 77 Texas, 191; *Haskell v. Brewer*, 11 Maine, 258; *Ashburn v. Poulter*, 35 Conn. 553; *Wheeler v. Woodward*, 66 Pa. St. 158; *Wright v. Behrens*, 39 N. J. Law, 413; *Eaton v. Wells*, 22 Hun, 123; *Francis v. Deming*, 59 Conn. 108; *Pennypacker v. Umberger*, 22 Pa. St. 492; *Peoples*, etc., *Bank v. Norwalk*, 56 Conn. 547; *Emerson v. White*, 10 Gray, 351.

³ *Magnusson v. Williams*, 111 Ill. 450.

⁴ *Handy v. Munsell*, 109 Ill. 362.

⁵ *Chielhovitch v. Krauss* (Cal.), 11 Pac. Rep. 781.

⁶ *Alexander v. Oneida County*, 76 Wis. 56; 45 N. W. Rep. 21.

⁷ *Strusguth v. Pollard*, 62 Vt. 157; 19 Atl. Rep. 228.

⁸ *Hyams v. Bamberger*, 10 Utah, 3;

36 Pac. Rep. 202, where the court said: “Ordinarily, where a party makes a tender, independently of the statute, he must actually produce the money to the creditor. It must be in sight, capable of immediate delivery, and the creditor be allowed a reasonable time to determine the amount due, and to decide whether he will accept. A tender in writing under the statute is ‘equivalent to the actual production and tender of the money.’ To have this effect, however, the party tendering must have the ability to produce it, and must act in good faith. Nor does such a tender deprive the creditor of the allowance of a reasonable time in which to ascertain the amount due, and to determine whether he will accept; and if he accepts, and the debtor fails to produce the money, his tender will be of no avail. *Start-up v. MacDonald*, 46 E. C. L. 593;

the thing to be delivered need not be actually produced, and declares that all objections to the mode of an offer which could be stated at the time to the person making the offer, and could be then obviated by him, are waived unless then stated. It is held that, in case of an offer to pay money, actual production of it is waived unless demanded at the time.¹

§ 301. Method of tender.—It is not every offer to deliver that amounts to a tender. The offer must be made under circumstances which give to the other party the opportunity of examining and receiving the thing tendered. Thus an offer to deliver a large quantity of oil to a person in the highway is no tender.² If a thing be locked up in a box, so that the party to whom it is shown can not open it or see the contents, it is not properly tendered.³ The courts of California⁴ and Iowa⁵ allow a tender to be made in writing without the actual production

Moynahan v. Moore, 9 Mich. 9; 77 Am. Dec. 483; *Proctor v. Robinson*, 35 Mich. 284; *Smith v. Walton*, 5 Houst. 141, *Shugart v. Pattee*, 37 Iowa, 422. Where a person makes a tender in writing, the statute excuses him from actually producing the money at the time of making the tender, but it excuses no other act or requirement on his part which would be necessary to make a valid tender, independently of the statute. To hold otherwise would be to turn the statute, which was intended as a mere convenience, into an instrument of fraud to hinder and delay creditors in the collection of their claims. In *McInerney v. Lindsay* (1893), 97 Mich. 238; 56 N. W. Rep. 603, in an action on a note executed by M. and L., the latter, an accommodation maker, defending, plaintiff testified that when the note was due M. came to his house, laid some money on the table, and said he wanted another year, to which plaintiff replied that he would let it go, whereupon M. took the money, with-

out plaintiff having touched or counted it; that plaintiff then gave M. the note, on which he indorsed the interest, and M. then paid the interest to that time. *Held*, that this testimony did not show a payment or tender, authorizing the direction of a verdict for defendant L."

¹ *Green v. Barney* (Cal. 1894), 36 Pac. Rep. 1026, applying §§ 1496, 1501, of the civil code.

² *Startup v. Macdonald*, 6 M. & G. 593, where the court said: "In such a case it would be improper to say that which the jury have said here, that a tender had been made at all. There would, indeed, have been an offer to deliver, but an offer under circumstances which made acceptance impossible. Such an offer would be altogether nugatory and delusive and certainly would not amount to a tender."

³ *Isherwood v. Whitmore*, 10 M. & W. 757, 764, per Parke, B.

⁴ *Herberger v. Husman*, 90 Cal. 583.

⁵ *Casady v. Bosler*, 11 Iowa, 242.

of the thing. But this method is strictly construed and if the tender is not made by a sufficient instrument in writing, the thing must be actually produced.¹ If there be any fraud in a sale, the buyer is not required to tender back everything he received before he can rescind; a few minor things may be paid for in money, if consumed, while the bulk is tendered.² Where a person said to the sheriff who held an execution against his goods: "I tender you eighty dollars for that judgment," it was held a tender properly made.³ A tender of chattels, or other property not money, in order to be a bar to an action, or amount to payment, must be made in such manner as to vest the property in the creditor and enable him to recover its possession in a future action.⁴ And as of course a payment of money into court is always a proper form of tender.⁵

§ 302. Continued readiness to pay.—Tenders are always to be considered *stricti juris*; if a tender is not legal in every respect, even a court of equity will not support it, nor supply a defect. Nor are tenders more favored at law; the rules which govern them are strict, and must be strictly applied.⁶ Therefore a tender must always be kept good.⁷ "The principle of the plea of tender is, that the defendant has performed, so far as he could perform, his part of the contract, by being always ready to pay the debt, and actually offering to do it, but this replication shows that there was a time when the defendant was not ready to perform his part, viz., when the demand was made of

¹ Casady v. Bosler, 11 Iowa, 242.

² Hill v. Wilson, 88 Cal. 92; Tarkington v. Purvis, 128 Ind. 182; 25 N. E. Rep. 879.

³ Parmenter v. Fitzpatrick, 14 N. Y. Supl. 748.

⁴ Hughes v. Eschback, 7 D. C. 66.

⁵ Loughbridge v. Iowa Life Ins. Co., 84 Iowa, 141; 50 N. W. Rep. 568. See Sanders v. Bryer, 152 Mass. 141.

⁶ King v. Finch, 60 Ind. 420, 423; Shotwell v. Denman, Cox, 174; Littell v. Nichols, Hardin, 66; Gammon v. Stone, 1 Ves. Sen. 339, where the

court said: "If a tender is not legal, a court of equity will not support it; nor supply a defect of a tender against a rule of law, unless perhaps where fraud is used to prevent it." Hoyt v. Hall, 3 Bosw. 42.

⁷ Odum v. Rutledge, etc., R. Co., 94 Ala. 488; McLelland v. Cook, 94 Mich. 528; Dodge v. Fearey, 19 Hun, 277; Brooklyn Bank v. DeGrauw, 23 Wend. 342; Roosevelt v. Bull's Head Bank, 45 Barb. 579; Becker v. Boon, 61 N. Y. 317.

the whole amount of the note, at which time he ought to have been ready to pay the whole, as the whole was then due."¹ The failure to keep the tender good by using the money after tender destroys the attribute of a legal tender.² After a tender and its refusal, the money must be paid over on request; the failure to comply with the request destroys the effect of the tender.³ The burden of proof is on the one pleading tender to show that he set the money aside and has not had the use of it; if he has had the use of the money this destroys the effect of a tender.⁴ Thus, where, after making a tender, the party deposited the money to his own use, and a part of the sum was drawn out, and it was not shown that other money was kept ready to supply its place when called for, it was held the tender was not kept good.⁵ Where a mortgagor and mortgagee were riding together and the mortgagor made repeated offers of money to the mortgagee, and the settlement was interrupted by a quarrel, but before any costs were incurred the mortgagee offered to receive the amount due, which had previously been tendered, and the mortgagor then failed to pay, it was held that as the tender was not kept good the mortgage lien was not discharged.⁶ If, after a tender and refusal the debtor, with notice to the creditor, deposits the money with a third person, to be paid to the creditor whenever he shall call for it, the creditor is under no obligation to apply to the depository, and if the debtor, upon a subsequent demand, does not pay or tender the sum due, he loses the benefit of the previous tender.⁷

¹ *Cotton v. Godwin*, 7 M. & W. 147, per Parke, B.

² *Gray v. Angier*, 62 Geo. 596, where the defendant testified that "I used the money tendered Solomon in other ways, when Solomon refused to accept it." *Cothrans v. Mitchell*, 54 Geo. 498, holding that the time when the tender was made, with an averment of a continued and a present readiness to pay, are essential elements of a plea of tender. See also, *Fannin v. Thomason*, 50 Geo. 614.

³ *Carr v. Miner*, 92 Ill. 604.

⁴ *Thayer v. Meeker*, 86 Ill. 470, 474.

⁵ *Crain v. McGoon*, 86 Ill. 431.

⁶ *Parks v. Allen*, 42 Mich. 482.

⁷ *Town v. Trow*, 24 Pick. 168, where the court said: "It is therefore necessary that the person making the tender should always hold himself in readiness to meet a demand for the money or thing tendered; because the party to whom it is due has a right to call for it at any time, and if he fails to pay or deliver it on request, he loses the benefit of the tender. But this principle is to be received with reasonable limitations and qualifications. It does not impose upon the person making the tender the duty of having the money

§ 303. **The same subject continued.**—The effect of a tender can not be destroyed by a subsequent demand for any other sum than that due.¹ And when a tender is relied on it must be brought into court.² Where the mortgagor relies on a tender of a part of the mortgage debt and asks to have part of the premises released from the mortgage, this does not have the effect of discharging the lien, but the mortgagor must make his tender good by bringing the money into court.³ A complainant in equity, who relies for relief upon a tender, must allege all the facts substantially which are necessary in pleading a tender at law.⁴ But where a bill in equity alleged several tenders and concluded with the words “which complainants are now ready and willing to pay him, and have been ready and willing to pay him ever since,” it was held that the payment into court was not essential to the equity of the bill, and that an injunction to stay foreclosure proceedings would not be dissolved on account of the failure to pay the money into court.⁵ And, it seems, that in bills for specific performance by purchasers, tenders made to the vendor are not required to be absolutely technical to entitle the purchaser to

about his person or in his actual possession at all times and in all places. It would be sufficient to have it in readiness to be delivered at his residence or place of business, or, if a large sum, in some safe and convenient place of deposit. If a demand was made at a distance from the place where it was kept, he would have a right either to deliver it there or to take a reasonable time to produce and deliver it where the demand was made. Had the defendant, when called upon for the money, offered to accompany the plaintiff to his home or place of business, and there pay the money, or to pay it where they were, as soon as he could bring it, and actually used reasonable diligence for the purpose, it would have been a legal compliance with his demand.”

¹ *Dixon v. Clarke*, 5 C. B. 365; *Spybey v. Hide*, 1 Camp. 181.

² *Allen v. Cheever*, 61 N. H. 32; *Frost v. Flanders*, 37 N. H. 549; *Gilkeson v. Smith*, 15 W. Va. 44; *Hamlett v. Tallman*, 30 Ark. 505; *Becker v. Boon*, 61 N. Y. 317.

³ *Werner v. Tuch*, 127 N. Y. 217; 27 N. E. Rep. 845; *Breunich v. Weselman*, 100 N. Y. 609; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165; *Day v. Strong*, 29 Hun, 505. See also, *Weeks v. Baker*, 152 Mass. 20; 24 N. E. Rep. 905; *Darling v. Chapman*, 14 Mass. 101; *Edwards v. Farmers', etc., Ins. Co.*, 21 Wend. 467; *Kortright v. Cady*, 21 N. Y. 343; *Mitchell v. Roberts*, 17 Fed. Rep. 776; *Burtis v. Bradford*, 122 Mass. 129; *Boston, etc., Iron Works v. Montague*, 108 Mass. 248; *Gordon v. Clapp*, 111 Mass. 22; *Stone v. Jenks*, 142 Mass. 519.

⁴ *McGehee v. Jones*, 10 Geo. 127.

⁵ *McCalley v. Otey*, 90 Ala. 302.

relief.¹ A tender in court of a part of the demand in suit admits that the amount tendered was due at the date of the suit, and is therefore inconsistent with the claim that the suit was prematurely brought.² A proposition to pay off a chattel mortgage does not amount to a tender, and, even if it did, can not avail in replevin of the mortgaged goods unless kept good by payment of the money into court.³ An offer in a complaint to deliver up a draft is a tender without actually producing it in court.⁴ In an equitable action, where a party relies upon a tender of money, it is sufficient to keep such tender good, that he offers to bring the money into court and is ready to comply with the directions of the court in regard to it.⁵

§ 304. Time of tender.—All bills of exchange and negotiable notes are, by the law merchant, in the absence of a statutory provision to the contrary, entitled to grace; except those payable on demand or without specification of time—in which case on demand without grace is understood—or those expressly payable without grace.⁶ To find when a bill or note is due, in the absence of an express understanding to the contrary, add three days of grace to the nominal time of payment in the case of all notes and bills not payable on demand; the nominal time of payment is determined by excluding the day from which time is to run, and including the day of payment.⁷ By the law merchant, both in England and the United States, a month is construed to mean a calendar month in all cases of negotiable instruments, and of mercantile contracts.⁸ If a bill falls due on Sunday or on a legal holiday, if entitled to grace, it is

¹ *Thayer v. Meeker*, 86 Ill. 470.

² *Giboney v. German Ins. Co.*, 48 Mo. App. 185.

³ *Woolner v. Levy*, 48 Mo. App. 469.

⁴ *Berry v. American Central Co.*, 132 N. Y. 49.

⁵ *Breitenbach v. Turner*, 18 Wis. 140. See, also, *Mankel v. Belscamper*, 84 Wis. 218; 54 N. W. Rep. 500; *Levan v. Sternfeld*, 55 N. J. Law, 41; 25 Atl. Rep. 854; *Dunbar v. De Boer*, 44 Ill. App. 615.

⁶ *Daniel on Negotiable Instruments*, 3d ed., § 617. "And we have no hesi-

tation in saying * * * * that negotiable instruments payable at sight are, and should be, entitled to grace. The weight of authority in the United States is to this effect."

⁷ *Chalmers on Bills*, art. 20.

⁸ *Daniel on Negotiable Instruments*, 3d ed., § 624, citing *Thomas v. Shoemaker*, 6 Watts & S. 179; *McMurchey v. Robinson*, 10 Ohio, 496; *Lang v. Gale*, 1 M. & S. 111; *Matter of Swonford*, 6 M. & S. 226; *Webb v. Fairman*, 3 M. & W. 473; *Chalmers on Bills*, art. 20.

deemed to be due on the preceding day; if not entitled to grace, it is due on the succeeding day.¹ The law as to when suit may be instituted on a bill or note is thus summarized: "The authorities are in conflict as to when suit may be begun against the maker or acceptor. It is held that suit may be commenced (1) not until the day after the last day of grace, since the maker has the whole of that day in which to pay the note, and is not in default until its expiration.² (2) On the last day of grace after due demand and refusal.³ (3) On the last day of grace after reasonable hours for payment have elapsed."⁴ And Senator Daniel states the law thus: "The weight of authority supports the view that suit may be commenced on the last day of grace against the maker; but there are decisions of most respectable character to the contrary effect—that suit can not be brought on the last day of grace, nor on the last day of maturity, when there is no grace."⁵

§ 305. Notes and bills.—The tender of a debt before it is due is ineffectual.⁶ And a tender, before due, to pay a

¹ Chalmers on Bills, art. 20, citing *Reed v. Wilson*, 41 N. J. Law, 39; Pres., etc., *City Bank v. Cutter*, 3 Pick. 414; *Avery v. Stewart*, 2 Conn. 69; *Salter v. Burt*, 20 Wend. 205; *Barrett v. Allen*, 10 Ohio, 426; *Kuntz v. Temple*, 48 Mo. 71; *Daniel on Negotiable Instruments*, 627.

² Benjamin's Chalmers's Notes and Bills, art. 120, citing *Osborn v. Moncure*, 3 Wend. 170; *Bevan v. Eldridge*, 2 Miles (Pa.) 353; *McFarland v. Pico*, 8 Cal. 626.

³ Benjamin's Chalmers's Bills and Notes, art. 20, citing *Estes v. Tower*, 102 Mass. 65; *Ammidown v. Woodman*, 31 Maine, 580; *Daly v. Proetz*, 20 Minn. 411.

⁴ Benjamin's Chalmers's Bills and Notes, art. 20, citing *McKenzie v. Durant*, 9 Rich. L. 61. Cf. *Veazie Bank v. Winn*, 40 Maine, 62.

⁵ *Daniel on Negotiable Instruments*, 3d ed., § 1209, citing *Staples v. Frank-*

lin Bank, 1 Metc. (Mass.) 43; *Sleed v. Brett*, 1 Pick. 401; *New England Bank v. Lewis*, 2 Pick. 125; *Greeley v. Thurston*, 4 Maine, 479; *Flint v. Rogers*, 3 Maine, 67; *Estes v. Tower*, 102 Mass. 65; *Veazie Bank v. Winn*, 40 Maine, 62; *Vandesande v. Chapman*, 48 Maine, 262; *Dennie v. Walker*, 7 N. H. 199; *Wilson v. Williman*, 1 Nott & McC. 440; *McKenzie v. Durant*, 9 Rich. 61; *Ammidown v. Woodman*, 31 Maine, 580; *Coleman v. Ewing*, 4 Humph. 240; citing *contra*, *Osborn v. Moncure*, 3 Wend. 170; *Smith v. Aylesworth*, 40 Barb. 104; *Wells v. Giles*, 2 Gale, 209; *Walter v. Kirk*, 14 Ill. 55; *Cox v. Reinhardt*, 41 Texas, 591; also citing the following cases to the effect that suit can not be brought on the last day of maturity, when there is no grace: *Davis v. Eppinger*, 18 Cal. 381; *Moore v. Hollaman*, 25 Texas Supp. 81.

⁶ *Wyckoff v. Anthony*, 90 N. Y. 442, where the court said: "There is no

negotiable instrument is void; but in view of the fact that days of grace were originally an indulgence accorded by commercial usage for the benefit of the debtor, if the parties to a bill or note treat it as due on the day when by its terms it is payable, and a transaction at that time takes place between them, based on this assumption, and the rights of third persons have not intervened, the days of grace will be deemed waived, and the same legal consequences will follow as though the transaction took place on the day of the legal maturity of the paper. Thus where certain bonds were held as collateral security for a note, and the maker tendered the amount to the holder on the day the note fell due, barring days of grace, it was held this was a sufficient tender; that if the holder objected to the tender on the ground that the days of grace had not expired, he should have objected expressly on that ground, and not on another.¹ A tender may, as of course, be made at any time after a note payable on demand is given.²

§ 306. Ordinary contracts.—When an obligation falls due on Sunday the obligor is bound to tender a performance of it on the following Monday.³ Tender must be made a reasonable time before sunset on the given day; at least the tender must be continued till that time if the party who is to receive the article does not appear until that time;

doubt of the general principle that the tender of a debt before it is due is ineffectual. The debtor can not be compelled to pay the debt before maturity, and the creditor is not bound to accept payment before that time." *Richardson v. Harris*, L. R. 22 Q. B. D. 268, where the court said: "I do not think that there is any authority in English law for the proposition that the acceptor of a bill may tender the amount before the bill is due, and that such tender operates as a discharge of the bill. The only payment that can discharge the bill is a payment at or after maturity. If a payment is previously made, it is really

a purchase of the bill and does not operate as payment properly so-called, though it operates to put an end to the liability between the parties."

¹ *Wyckoff v. Anthony*, 90 N. Y. 442.

² *Norton v. Ellam*, 2 M. & W. 461, where the court said: "A tender of the amount of the note with interest *de die in diem*, at any time, would be a good plea."

³ *Avery v. Stewart*, 2 Conn. 69, 73; *Salter v. Burt*, 20 Wend. 205; *Sands v. Lyon*, 18 Conn. 18; *Carothers v. Wheeler*, 1 Ore. 194, 196; *Barrett v. Allen*, 10 Ohio, 426. *Contra*, performance must be tendered on Saturday: *Kilgour v. Miles*, 6 Gill & J. 268.

although, if he be present, a tender to him at any time on the day is good.¹ Where a statute prescribed that a tender might be made "until three days before the commencement of the term," it was held that three days must intervene between the day of tender and the day of the commencement of the term.² Where a tender is made, if the party to whom it is made object that it was not made in time, and make no further objection, but refuse to accept it, the tender will be taken *prima facie* to have been sufficient in amount.³ Where a mortgagee enters for a breach of a condition to pay interest, and the mortgagor tenders the principal, not yet due, together with the interest, and the mortgagee refuses to receive the money, he can not object that the tender was insufficient in respect to the interest alone, unless he showed a willingness to receive so much only as was due for the interest.⁴ The tender must be an actual one at the time. A mere offer at the time to tender, not coupled with the present ability to do so, is no tender.⁵ The word "between," when applied to contracts, excludes the two dates; thus where the seller agreed to deliver some hogs at any time "between" the 10th and 20th of November that the buyer might choose to call for them, it was held that a demand by the buyer on the 19th for the delivery of the hogs on the 20th of November was not a sufficient tender of performance.⁶ It seems a tender after the debt becomes due, and before suit, is of no effect.⁷

§ 307. Tender of delivery of goods.—"A contract to deliver goods is completely discharged by tendering the goods for acceptance according to the contract; and if acceptance is refused there is no further obligation to continue ready to deliver."⁸

¹ Larimore v. Hornbaker, 21 Ind. 430; Startup v. Macdonald, 6 M. & G. 593; Sweet v. Harding, 19 Vt. 587; 1 Parsons on Contracts, 445.

² Willey v. Laraway, 64 Vt. 566.

³ Bradshaw v. Davis, 12 Texas, 336.

⁴ Saunders v. Frost, 5 Pick. 259.

⁵ Hiatt v. Harris, 28 Ind. 379, where a seller of hogs which had been refused offered to go and procure other hogs immediately.

⁶ Cook v. Gray, 6 Ind. 335.

⁷ Poole v. Tumbridge, 2 M. & W. 223. See, also, Hume v. Peploe, 8 East, 168; Dobie v. Larkan, 10 Ex. 776; Dixon v. Clark, 5 C. B. 365.

⁸ Leake on Contracts, 3d ed., 740, citing the following from Coke: "If a man be bound in 200 quarters of wheat for delivery of 100 quarters, if the obligor tender at the day a 100 quarters, he shall not plead *emcore*

The American rule, where the buyer rejects a tender of a delivery of goods, seems to be, that the vendor has the choice of either one of three methods to indemnify himself: (1) He may store or retain the property for the vendee, and sue him for the entire purchase price. (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) he may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price.¹

§ 308. Producing the money.—A tender implies, on the part of the actor an offer to do the thing proposed, and a power and willingness then and there to do it as offered. In no view is that a tender, which the debtor had not the power, or the right to perform, if his offer is accepted.² And while the formal requisites of a tender of performance of a contract may be waived, to establish a waiver there must be an existing capacity to perform.³ Therefore, a mere offer to pay, it not appearing that the party had the money ready, does not amount to a tender.⁴ The bare refusal to receive the sum due, and the demand of a larger sum, is not enough to excuse the actual tender of the money.⁵ And the rule is that to make a legal tender there must either be an actual offer of the money produced, or the production of it must be dispensed with by the express declaration, or equivalent act, of the creditor.⁶ But a tender of money will be presumed sufficient if not objected to.⁷ Great importance is attached to the production of the money, as the sight

prist, because albeit it be parcel of the condition, yet they be *bona peritura*, and it is a charge to the obligor to keep them." Coke on Littleton, 207 a.

¹ *Dustan v. McAndrew*, 44 N. Y. 72; *Mason v. Decker*, 72 N. Y. 595; *Hayden v. Demets*, 53 N. Y. 426; *Smith v. Pettee*, 70 N. Y. 13; 2 Kent's Commentaries, 504; 2 Parsons on Contracts, 484; Sedgwick on Damages, 282; *Lewis v. Greider*, 49 Barb. 606; *Pollen v. LeRoy*, 30 N. Y. 549; Benjamin on Sales, § 788, 6th ed. Bennett.

See, also, *Startup v. Macdonald*, 6 M. & G. 593; *Howe v. Moore*, 14 N. Y. Supl. 236; *Cleveland v. Sterrett*, 70 Pa. St. 204; *Simmons v. Green*, 35 Ohio St. 104; *Berry v. Nall*, 54 Ala. 446; *Phelps v. Hubbard*, 51 Vt. 489.

² *Champion v. Joslyn*, 44 N. Y. 653.

³ *Eddy v. Davis*, 116 N. Y. 247.

⁴ *Fuller v. Little*, 7 N. H. 535.

⁵ *Dunham v. Jackson*, 6 Wend. 22.

⁶ *Thomas v. Evans*, 10 East, 101.

⁷ *Conway v. Case*, 22 Ill. 127.

of it may tempt the creditor to yield.¹ Accordingly in a case where one left some money with his clerk to pay and when the creditor came the clerk notified him that he had the money but the creditor said he would not receive the sum, nor anything less than the whole demand, but the clerk did not produce the money, this was held no tender.² But where the debtor placed upon a table, in the presence of the creditor, a package of bank notes and a few dollars in coin, and said to the creditor and his attorney, who was present, "There are one thousand four hundred dollars, count it if you please," this was held a sufficient production.³ Where, however, the debtor took a wagon and was proceeding to the residence of the creditor with the money to pay him, when he met the creditor on foot and the debtor stopped his wagon, and said to the creditor, "I have got the money here to pay you," and put his hand into his pocket to take out the bag which contained the money, and the creditor thereupon said, "I want nothing to do with such cut-throats as you," and walked away, the court held this a good tender.⁴

§ 309. Further illustrations.—Having the money in one's pocket and telling the creditor so, is not sufficient production, although the debtor asks the creditor to take it.⁵ But an offer to pay in bank notes and a declaration of the party that he would as soon take bank notes as specie, but that he would take neither, is a sufficient tender.⁶ A tenant said to his landlord, "Here is the rent," he holding the money in his hand in a desk, but not actually showing it to the landlord; the landlord said nothing and left the premises; it was held that there was no evidence of a tender, or of a dispensation with a tender.⁷ So, also, where the creditor was passing by in a wagon and the debtor said to him, "I want to tender you this money for labor you have done for me," at the same time holding in his hand a sum equal

¹ *Finch v. Brook*, 1 Bing. N. C. 253. *Strong v. Blake*, 46 Barb. 227; *Finch*

² *Thomas v. Evans*, 10 East, 101. *v. Brook*, 1 Bingh. N. C. 253.

³ *Hartsock v. Mort*, 76 Md. 281.

⁶ *Wheeler v. Knaggs*, 8 Ohio, 169.

⁴ *Sands v. Lyon*, 18 Conn. 18.

⁷ *Matheson v. Kelly*, 24 Up. Can.

⁵ *Bakeman v. Pooler*, 15 Wend. 637; C. P. 598.

to his indebtedness, and the creditor said nothing but proceeded, this was held no tender.¹ Ordinarily, however, in making a tender, actual production of the money is not necessary, if the creditor refuses to receive it.² Accordingly where the debtor said, "I am now ready to pay you the seventeen dollars which I owe you," having money in his pocket sufficient to pay the debt and intending to pay it, and the creditor said, "There have been costs made and you must settle with my attorney," it was held a good tender.³ It seems that a tender can not be made when the debtor has no money but a third person has the money on the spot, which he would loan.⁴ But if such person actually consents to loan it for the purpose of a tender then this is sufficient.⁵ The party must have the money within his control and where a debtor said "he could get the money in five minutes," it was held no tender.⁶ An offer of money in bags is a legal tender; and it is the duty of the receiver to count it, and see that there is enough.⁷ And a tender of money in a handkerchief, with a statement of the amount, was held a good tender.⁸ While the debtor need not count the money⁹ if he offers bank notes twisted up, he must declare their amount.¹⁰ But an offer of money in an envelope can not be a tender.¹¹

§ 310. Production of the money due on a mortgage.—In view of the serious consequences to the holder of a mortgage, upon the refusal of a tender—consequences which may often amount to the absolute loss of the entire debt—and in view of the strong temptation which must exist to contrive merely colorable or sham tenders not intended in good faith, in case of such a tender the evidence should be so full, clear and satis-

¹ *Knight v. Abbott*, 30 Vt. 577.

² *Guthman v. Kearn*, 8 Neb. 502;
Hazard v. Loring, 10 Cush. 267.

³ *Ashburn v. Poulter*, 35 Conn. 553.

⁴ *Sargent v. Graham*, 5 N. H. 440.

⁵ *Harding v. Davies*, 2 C. & P. 77,
where a third person present offered to go upstairs and fetch the sum, but was prevented by the creditor saying he would not take it, it was held a sufficient tender, although the debtor

did not at the time take notice of what was done, he being allowed to ratify the act by pleading.

⁶ *Breed v. Hurd*, 6 Pick. 356.

⁷ *Behaly v. Hatch*, 1 Walker (Miss.), 369.

⁸ *Davis v. Stonestreet*, 4 Ind. 101.

⁹ *Breed v. Hurd*, 6 Pick. 356, 357.

¹⁰ *Alexander v. Brown*, 1 C. & P. 288.

¹¹ *Strong v. Blake*, 46 Barb. 227.

factory, as to leave no reasonable doubt that it was so made that the holder must have understood it at the time to be a present, absolute and unconditional tender, intended to be in full payment and extinguishment of the mortgage, and not dependent upon his first executing a receipt or discharge, or any other contingency. And the holder must, in every case, have a reasonable opportunity to look over the mortgage and accompanying papers, to calculate and ascertain the amount due; and if such papers are not present, he must be allowed a reasonable time to get them and make the calculation. He can not be bound, under the penalty or at the hazard of losing his entire debt, to carry at all times, in his head, the precise amount due on any particular day.¹

§ 311. Money available for tender.—Legal tender is regulated by act of congress. The following is the substance of the legal tender acts: No foreign gold or silver coins are a legal tender in payment of debts.² Gold coins of the United States are a legal tender in all payments at their nominal value when not below the standard weight provided by law for the single piece, and when reduced in weight below such standard are a legal tender at valuation in proportion to their actual weight.³ Silver coins of the United States are a legal tender at their nominal value for any amount not exceeding five dollars in any one payment.⁴ The minor coins of the United States are a legal tender at their nominal value for any amount not exceeding twenty-five cents in any one payment.⁵ United States notes are lawful money, and a legal tender in payment of all debts, public and private, except for duties on imports and interest of the public debt.⁶ Also certain demand treasury notes are legal tender.⁷

§ 312. Power of congress to pass legal tender acts.—Congress has the constitutional power to make the treasury notes of

¹ *Potts v. Plaisted*, 30 Mich. 149. See, also, *Harmon v. Magee*, 57 Miss. 410; *Hall v. Norwalk Co.*, 57 Conn. 105; *Sheredine v. Gaul*, 2 Dall. 190; *Brown v. Gilmore*, 8 Maine, 107; *Benson v. Carmel*, 8 Maine, 110.

² Rev. St. (1878), § 3584.

³ Rev. St. (1878), § 3585.

⁴ Rev. St. (1878), § 3586.

⁵ Rev. St. (1878), § 3587.

⁶ Rev. St. (1878), § 3588.

⁷ Rev. St. (1878), §§ 3589-90.

the United States a legal tender in payment of private debts, in time of peace as well as in time of war.¹

§ 313. Waiver of defect of tender.—It is well settled that a tender in bank notes is good, unless objected to on the ground that they are not legal tender.² Thus where national bank notes were tendered and no objection was made on that ground it was held a good tender.³ And where a person has previously agreed to take bank bills he must do so and can not insist on a legal tender.⁴ Where a debtor sent bills of a certain bank to his creditor to take up a note, but the creditor refused to deliver up the note while at the same time he retained the bills, and the bank failed the next day, it was held the creditor

¹ *Juilliard v. Greenman*, 110 U. S. 421, where the court said: "It appears to us to follow, as a logical and necessary consequence, that congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. This power has been distinctly recognized in an important modern case, ably argued and fully considered, in which the Emperor of Austria, as King of Hungary, obtained

from the English court of chancery an injunction against the issue in England, without his license, of notes purporting to be public paper money of Hungary. (*Emperor of Austria v. Day*, 2 Giff. 628.) The power of issuing bills of credit, and making them, at the discretion of the legislature, a tender in payment of private debts, had long been exercised in this country by the several colonies and states; and during the Revolutionary War the states, upon the recommendation of the congress of the confederation, had made the bills issued by congress a legal tender, the exercise of this power not being prohibited to congress by the constitution. It is included in the power expressly granted to borrow money on the credit of the United States." *Maryland v. Railroad Co.*, 22 Wall. 105; *Railroad Company v. Johnson*, 15 Wall. 195; *Legal Tender Cases*, 12 Wall. 457; *Dooley v. Smith*, 13 Wall. 604. *Contra*, *Hepburn v. Griswold*, 8 Wall. 603. See *McCulloch v. State of Maryland*, 4 Wheat. 316.

² *Koehler v. Buhl*, 94 Mich. 496; *Fosdick v. Van Huse*, 21 Mich. 567; *Beebe v. Knapp*, 28 Mich. 53; *Lacy v. Wilson*, 24 Mich. 479.

³ *Koehler v. Buhl*, 94 Mich. 496.

⁴ *Warren v. Mains*, 7 John. 476.

must lose the amount of the bills.¹ A tender, partly in silver coin, and partly in bank notes, offered to be converted into silver, but the opposite party refusing to accept any money, was held to be good.² And a tender of bank notes is good even if at the time the bank is in a suspended state, unless objection is made on that ground.³ It seems that a clerk has authority to waive objection on the ground that legal tender is not offered. Thus, where a tender of bank bills was made to a clerk for goods purchased, and he made no objection on that ground, it was held a valid tender, although the claim had been lodged with an attorney for suit.⁴ Bank notes, however, are not cash and can not be tendered as cash;⁵ neither are they legal tender.⁶ A contract to pay a certain sum in money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made.⁷

§ 314. Tender of note or check.—The doctrine that bank bills are a good tender, unless objected to at the time on the ground that they are not money, only applies to current bills, which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered. Notes not thus current at their par value, nor redeemable on presentation, are not a good tender to principal or agent, whether they are objected to at the time or not.⁸ Therefore an offer to pay by check or draft is not a tender sufficient in law.⁹ But where a person has been in the habit of paying by check, and when the check is tendered it is refused on the ground that the contract is at an end, this is a good

¹ *Snow v. Perry*, 9 Pick. 539.

⁶ *Moody v. Mahurin*, 4 N. H. 296.

² *Brown v. Dysinger*, 1 Rawle, 408. See *Ball v. Stanley*, 5 Yerger, 199; *Noe v. Hodges*, 3 Humph. 162; *Williams v. Rorer*, 7 Mo. 556.

⁷ *Juillard v. Greenman*, 110 U. S. 421, 449; 1 Hale P. C. 192, 194; Bacon Ab. Tender, B. 2; Pothier on Contracts of Sale, No. 416; Pardesys, Droit Commercial, No. 204; *Searight v. Calbraith*, 4 Dall. 324.

³ *Seawell v. Henry*, 6 Ala. 226. See, also, *Wheeler v. Knaggs*, 8 Ohio, 169.

⁴ *Hoyt v. Byrnes*, 11 Maine, 475.

⁸ *Ward v. Smith*, 7 Wall. 447, 451-2.

⁵ *Coxe v. State Bank*, 8 N. J. Law, 172.

⁹ *Collier v. White*, 67 Miss. 133.

tender.¹ It seems that a certified check may always be tendered, if not objected to on that ground,² and so may a certificate of deposit.³ But a debtor holding his creditor's over-due promissory note has no right to tender it in payment of his debt.⁴ And a party to whom a check is sent in payment may elect to sue before he sends it back.⁵

§ 315. Contracts payable in gold or silver dollars.—Express contracts payable in gold or silver dollars can only be satisfied by the tender and payment of coined dollars, and a tender of notes of the United States declared to be a legal tender in payment of debts is not a good tender; such contracts can only be discharged by the payment of *specie*. The legal tender acts of congress only apply to debts which are payable in money generally, and not to obligations payable in commodities or obligations of any other kind.⁶

§ 316. Amount of tender.—A tender is not objectionable on account of being a larger sum than the amount due;⁷ but it is otherwise if the tender be made in bank bills.⁸ And a tender of a larger sum requiring change is not a good tender of a smaller sum.⁹ A demand of money tendered, in order to have

¹ *McGrath v. Gegner* (1893), 77 Md. 331; 26 Atl. Rep. 502, where the court said: "And such being the case, we take it to be well settled that, where a tender is made, whether it be by ordinary bank notes or by a check on a bank, and the tender is refused, not because of the character or quality of the tender itself, but on other grounds, the tender thus made and refused will be considered in law a lawful tender."

² *Harding v. Commercial Loan Co.*, 84 Ill. 251.

³ *Gradle v. Warner*, 140 Ill. 123; 29 N. E. Rep. 1118.

⁴ *Barker v. Walbridge*, 14 Minn. 469; *Cary v. Bancroft*, 14 Pick. 315; *Bellows v. Smith*, 9 N. H. 285. *Contra*, he may, *Foley v. Mason*, 6 Md. 37.

⁵ *Hough v. May*, 4 A. & E. 954. See

also, *In re Steam Stoker Co.*, L. R. 19 Eq. 416; *Towson v. Havre de Grace Bank*, 6 H. & J. 47; *Wilmarth v. Mountford*, 4 Wash. C. C. 79; *Walsh v. St. Louis Exposition*, 101 Mo. 534.

⁶ *Trebilcock v. Wilson*, 12 Wall. 687; *Bronson v. Rodes*, 7 Wall. 229; *Butler v. Harwitz*, 7 Wall. 258; *McGoon v. Shirk*, 54 Ill. 408.

⁷ *Patterson v. Cox*, 25 Ind. 261; *Tracy v. Strong*, 2 Conn. 659; *Bevans v. Rees*, 5 M. & W. 306; *Dean v. James*, 4 B. & Ad. 546; *Downing v. Plate*, 90 Ill. 268; 8 Cent. L. J. 283; *Nesbit v. Hanway*, 87 Ind. 400.

⁸ *Hubbard v. President Chenango Bank*, 8 Cow. 88.

⁹ *Robinson v. Cook*, 6 Taunt. 336; *Betterbee v. Davis*, 3 Camp. 70, where the court said: "If I tender a man twenty guineas in the current coin of

the effect, if not complied with, to avoid the tender, must be of the precise sum tendered.¹ But in all cases of redemption of mortgaged property, when the court is satisfied that the party has tendered or offered what he believed to be the true amount, and when he offers to pay whatever amount the court may find to be due, a party is not to be turned out of court because he was unable to tender the exact amount.²

§ 317. The same subject continued.—A tender of less than the sum due is not sufficient.³ Where the debtor had brought into court what he supposed justly due on the claim, and the costs up to that time, and upon the trial it appeared that he had brought in too little by forty-one cents, and the trial court directed the jury that they might find a verdict for the debtor, if the balance appeared to them a mere trifle, and they found accordingly, a new trial was granted for the misdirection of the judge.⁴ In Iowa a tender of a less amount than due is sufficient to discharge the debtor from costs and interest unless objection is made to the amount.⁵ A tender in admiralty

the realm, this may be a very good tender of fifteen, for he has only to select so much and restore me the residue. But a tender in bank notes is quite different. In that case, the tender may be made in such a way that it is physically impossible for the creditor to take what is due and return the difference. If £3 10s could be tendered by a note for £5, so it might by a note for £50,000."

¹ *Town of Thetford v. Hubbard*, 22 Vt. 440.

² *Downing v. Plate*, 90 Ill. 268; 8 Cent. L. J. 283; *Nesbit v. Hanway*, 87 Ind. 400. See, also, *Wade's Case*, 5 Co. 114; *Astley v. Reynolds*, 2 Str. 916; *Douglas v. Patrick*, 3 T. R. 683; *Dean v. James*, 4 B. & Ad. 546.

³ *Smith v. Anders*, 21 Ala. 782; *Baker v. Rowell*, 3 Strob. 25; *Patnote v. Sanders*, 41 Vt. 66; *Dixon v. Clark*, 5 C. B. 365.

⁴ *Boyden v. Moore*, 5 Mass. 365, where Parsons, C. J., said: "That the law will not regard trifles is,

when properly applied, a correct maxim. But to this point it is not applicable. In calculating interest, there may be, and probably must arise, fractions not to be expressed in the legal money of account. These fractions are trifles, and may be rejected. In making payments, it is sometimes not possible, from the value and divisions of the current coin, to make the exact sum. If the payment be made as nearly as it can conveniently be made the fractional part of a small coin may be neglected; it is a trifle. But the present case is not one of these trifles. A man may sue and recover on a note given for forty cents; also on a larger note where forty cents remain unpaid."

⁵ *Sheriff v. Hull*, 37 Iowa, 174; *Guengerich v. Smith*, 36 Iowa, 587; *Hayward v. Munger*, 14 Iowa, 516. But it does not preclude plaintiff from recovering whatever sum is due him. See *Guengerich v. Smith*, *supra*.

should always cover accrued costs.¹ The tender is not enough if the smallest amount of interest is not covered.² If a party tender less than is due he does so at his peril, although he may honestly believe that the amount tendered is all that is due the creditor.³ And a creditor may accept a tender of a less sum than is due without precluding himself from claiming the residue, unless it is made a condition of the tender that it be accepted in discharge of the whole.⁴

§ 318. Sufficiency of amount—Waiver.—An offer of less than the amount due, made on condition that it be accepted in full, is not a sufficient tender and does not defeat the right to recover interest from the time the demand was due.⁵ Accordingly payment into court of less than the amount due will not stop the running of interest. And an appeal on the ground that the amount paid into court and adjudged to appellant was not the full amount due, will not be dismissed because appellant withdraws the amount adjudged him by such decree.⁶

¹ The Enos B. Phillips, 53 Fed. Rep. 153.

² Weld v. Eliot Bank, 158 Mass. 339; 33 N. E. Rep. 519, where 15 days' interest on a small bank deposit not being tendered was held to render the tender inoperative. See, also, Crawford v. Osmun, 94 Mich. 533; Hoyt v. Smith, 4 Wash. St. 440; 30 Pac. Rep. 664; Riley v. McNamara, 83 Texas, 11; 18 S. W. Rep. 141.

³ Helphrey v. Chicago, Rock Island Co., 29 Iowa, 480.

⁴ Leake on Contracts, 865, citing Bowen v. Owen, 11 Q. B. 130.

⁵ Chapin v. Chapin (Mass. 1894), 36 N. E. Rep. 746.

⁶ McCalley v. Otey, 103 Ala. 469; 15 So. Rep. 945, per Coleman, J.: "The amount paid into court was not the full amount due, and the respondent was under no legal obligation to accept anything less than his entire debt. The fact that the complainant must lose the interest upon the money during the time it was in court can

not be attributed to any fault of the respondent. To make a plea of tender available to stop the accumulation of interest, it is indispensable that the entire amount due be tendered. The court should have allowed interest on the principal (\$1,200) to the 23d day of September, 1893, the date of the rendition of the decree. The motion to dismiss the appeal upon the ground that the appellant had accepted payment of the amount of the decree of the court must be overruled. This case is clearly within the principle declared in the case of Phillips v. Towles, 73 Ala. 406; 1 Brickell's Digest, p. 104, § 308. The principal (\$1,200) was admitted in complainant's bill to be due, and it was clearly shown that the amount tendered had not been kept good. Under no circumstances could the appellant be entitled to less than that decreed him. In fact, we hold that the error of the court consists in not decreeing to him the full amount of his claim. The case of

But where a tender is refused without objection to the sufficiency of the amount, but on other grounds, the amount can not afterwards be questioned.¹ And where objection to the sufficiency of a tender is made solely on a certain specified ground, the party is precluded from afterwards raising another objection, at least where it is trifling in its nature, and such that, if made at the time, the other party might have easily remedied it.² Where a vendee objects to the vendor's title, the latter is not obliged to tender a deed in order to enforce his rights under the contract of sale, since a tender need never be made where it is clear that, if made, it would be refused.³

§ 319. Tender on severable debts.—Where the creditor holds distinct claims against the debtor a tender may be made to any one claim.⁴ But the tender must always be specifically applied to the distinct claim the debtor tenders on, and the tender of a gross sum insufficient to cover the aggregate claims is no tender unless specifically applied.⁵ And a part tender is not good to one entire demand.⁶ If A., B. and C. have a joint

Hanson v. Todd, 95 Ala. 328; 10 So. Rep. 354, has no application, as will be seen by an examination of the case of *Phillips v. Towles*, and cases cited."

¹ *Hill v. Carter*, 101 Mich. 158; 59 N. W. Rep. 413; *Allen v. Atkinson*, 21 Mich. 351; *Flanders v. Chamberlain*, 24 Mich. 305.

² *Lathrop v. O'Brien*, 57 Minn. 175; 58 N.W. Rep. 987, per Mitchell, J.. "It appears that the amount of money demanded by plaintiff was \$3.50 less than the sum named in the contract. The evidence is silent as to why this deduction was made, but it is not a very violent assumption that it was designed to meet the cost of recording patents; and, if so, the defendant did not object to the sufficiency of the amount. But, however this may be, upon the facts proved and found defendant must be held to have waived the objections to the tender which he now urges." And see *Green v. Barney* (Cal. 1894), 36 Pac. Rep. 1026.

³ *Bucklen v. Hasterlik*, 155 Ill. 423; 40 N. E. Rep. 561, where the court said: "Where a vendee objects to a title, a tender of a deed which he declares he will not accept is unnecessary. *Hampton v. Speckenagle*, 9 Serg. & R. 212; *Teirnan v. Roland*, 15 Pa. St. 429; *Lyman v. Gedney*, 114 Ill. 388, 406, 410; 29 N. E. Rep. 282; *Hunter v. Daniel*, 4 Hare, 420-432; *Webster v. French*, 11 Ill. 254, 276, 278; *Sheplar v. Green*, 96 Cal. 218; 31 Pac. Rep. 42."

⁴ *East Tennessee R. Co. v. Wright*, 76 Geo. 532; *Robinson v. Ward*, 8 Q. B. 920; *Brandon v. Newington*, 3 Q. B. 915; *Jones v. Owen*, 5 A. & E. 222.

⁵ *Hardingham v. Allen*, 5 C. B. 793. Whether or not there was such specific appropriation is a question for the jury.

⁶ *Searles v. Sadgrave*, 5 E. & B. 639; *Hesketh v. Fawcett*, 11 M. & W. 356.

demand, and C. has a separate demand on D., and D. offer A. to pay him both the debts, which A. refuses without objecting to the form of the tender on account of his being entitled only to the joint demand, D. may plead this tender in bar of an action on the joint demand, and should state it as a tender to A. B. and C.¹ A demand of payment, to lay the foundation of a claim for interest, must be a separate demand of a debt or sum, which is afterwards proved or admitted to be due, and not a demand for such a debt or sum, together with another, which is afterwards proved or admitted not to be due.² A tender of a gross sum upon several demands, without designating the amount tendered upon each, is sufficient.³ Where a bankruptcy statute allows two or more creditors to bring bankruptcy proceedings against their debtor, such debtor can not forestall such proceedings by tendering one of the creditors his demand, so as to reduce the aggregate claims below the amount which the statute prescribes as requisite to issue a summons on.⁴

§ 320. Conditional tender.—Generally a tender must be unconditional.⁵ Thus the tender of payment made by the maker of a promissory note, on condition that the holder will dismiss an action against the maker in no way connected with the note, is bad.⁶ A tender is defective, if it be qualified by anything to be done on the other side.⁷ And equally a tender, on condition that a release of all demands shall be first delivered, is not good.⁸ Thus, there was no tender where the

¹ *Douglas v. Patrick*, 3 T. R. 683.

² *Goff v. Rehoboth*, 2 Cush. 475.

³ *Town of Thetford v. Hubbard*, 22 Vt. 440.

⁴ *In re Andrew*, L. R. 1 Ch. Div. 358. See, also, *Wright v. Behrens*, 39 N. J. Law, 413.

⁵ *Tompkins v. Batie*, 11 Neb. 147; *Cashman v. Martin*, 50 How. Pr. 337; *Rose v. Duncan*, 49 Ind. 269; *Appeal of Forest Oil Co.*, 118 Pa. St. 138; *Odum v. Rutledge*, 94 Ala. 488; 10 So. Rep. 222; *Henderson v. Cass County*, 107 Mo. 50; 18 S. W. Rep. 992; *Cass v. Higenbotam*, 27 Hun, 406; *Flake v. Nuse*, 51 Texas, 98; *Strong v. Blake*, 46

Barb. 227; *Irwin v. Gregory*, 13 Gray, 215; *Brooklyn Bank v. De Grauw*, 23 Wend. 342; *Moynahan v. Moore*, 9 Mich. 1; *Cothran v. Scanlan*, 34 Ga. 555; *Shaw v. Sears*, 3 Kan. 242; *Wagenblast v. McKean*, 2 Grant's Cases, 393; *Bickle v. Beseke*, 23 Ind. 18; *Hunter v. Warner*, 1 Wis. 141; *Saunders v. Frost*, 5 Pick. 259; *Balme v. Wambaugh*, 16 Minn. 116; *Green v. Smith*, 29 Hun, 166; *Holton v. Brown*, 18 Vt. 224.

⁶ *Rose v. Duncan*, 49 Ind. 269.

⁷ *Brooklyn Bank v. De Grauw*, 23 Wend. 342.

⁸ *Hepburn v. Auld*, 1 Cranch, 321.

debtor wanted an acknowledgment from his creditor that the sum was "in full discharge of all demands."¹ And where there is either an express or implied demand of a receipt in full it will not be a sufficient tender.² But the fact that the debtor uses language which merely explains what he claims and intends the tender to cover does not amount to the imposition of a condition.³

§ 321. The same subject continued.—Where there is no dispute as to the amount of the debt, a tender may always be restricted by such conditions as by the terms of the contract are conditions precedent or simultaneous to the payment of the debt or proper to be performed by the party to whom the tender is made.⁴ Thus, a condition that a mortgage should be discharged was held to be a proper one by which to restrict a tender, without destroying its effect.⁵ So a condition that certain diamonds deposited as collateral to the debt should be returned.⁶ A release that the party was entitled to have was allowed to be demanded.⁷ So, likewise, it was held that a demand of payment of a promisory note without an offer to return collateral securities was insufficient to charge an indorser.⁸ The maker or indorser is not bound to pay a negotiable note without receiving it as their voucher.⁹ And it has

¹ *Wood v. Hitchcock*, 20 Wend. 47. See *Roosevelt v. Bull's Head Bank*, 45 Barb. 579.

² *Sanford v. Bulkley*, 30 Conn. 344.

³ *Foster v. Drew*, 39 Vt. 51, *Bowen v. Owen*, 11 Q. B. 130; *Henwood v. Oliver*, 1 Q. B. 409. See, also, to the effect that a demand for a release destroys a tender: *Doty v. Crawford*, 39 S. Car. 1; 17 S. E. Rep. 377; *Draper v. Hitt*, 43 Vt. 439; *Richardson v. Boston, etc.*, 9 Metc. 42; *Loring v. Cooke*, 3 Pick. 48; *Thayer v. Brackett*, 12 Mass. 450.

⁴ *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165; *Wheelock v. Tanner*, 39 N. Y. 481; *Cass v. Higenbotam*, 100 N. Y. 253; *Saunders v. Frost*, 5 Pick. 259; *Ocean National Bank v. Fant*, 50 N. Y. 248; *Cutler v. Goold*, 43 Hun,

516; *Bailey v. County of Buchanan*, 115 N. Y. 297; *Smith v. Rockwell*, 2 Hill, 482.

⁵ *Wheelock v. Tanner*, 39 N. Y. 481.

⁶ *Cass v. Higenbotam*, 100 N. Y. 248.

⁷ *Saunders v. Frost*, 5 Pick. 259.

⁸ *Ocean Nat. Bank v. Fant*, 50 N. Y. 474.

⁹ *Halpin v. Phenix Ins. Co.*, 118 N. Y. 177; *Smith v. Rockwell*, 2 Hill, 482; *Daniel on Bills and Notes*, § 1228, 3d ed., citing *Crandall v. Schroepel*, 1 Hun, 557; *Davis v. Miller*, 14 Gratt. 1; *Moses v. Trice*, 21 Gratt. 556; *Hansard v. Robinson*, 7 B. & C. 90; *Inhabitants of Otisfield v. Mayberry*, 63 Maine, 197; *Wheeler v. Guild*, 20 Pick. 545; *Freeman v. Boynton*, 7 Mass. 483; *Best v. Crall*, 23 Kan. 482. *Contra*, *Baker v. Wheaton*, 5 Mass. 509.

been held that the debtor was justified in requiring that certain negotiable notes given to the creditor, and not due, should be delivered up to him as a condition of parting with the money tendered.¹ The obligee of a bond having the option to redeem has a right to demand as a condition of payment the surrender of the bond and all the coupons in the holder's possession.² A mortgagor has a right to attach, as a condition of payment of the debt secured, that the owner execute a satisfaction of the mortgage.³ But a tender coupled with an express or implied demand for a satisfaction piece before the money would be paid is insufficient to discharge the mortgage lien,⁴ and the same rule obtains in case of a chattel mortgage.⁵

§ 322. Giving receipt.—In England contradictory rulings seem to have been made as to whether a person tendering money may demand a receipt for the sum tendered. Lord Kenyon said that "it has been determined that a party tendering money could not in general demand a receipt for the money."⁶ This ruling was followed in a later case.⁷ But in another case it was held that a request for a receipt was not a condition.⁸ But where no objection is made on account of a demand of a receipt, and the creditor refuses the money because he considers the amount is not sufficient, it was held that he could not afterwards object to the tender because the party making it required a receipt.⁹ It is well settled in many jurisdictions that, while a receipt in the form of a general release

¹ *Cutler v. Goold*, 43 Hun, 516.

² *Bailey v. County of Buchanan*, 115 N. Y. 297.

³ *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165, where the court said: "In all these cases, the party making the tender has a legal right to insist, as a condition of payment, that the party to whom the tender was made do the things demanded, and for that reason coupling such condition to the acceptance of the tender did not destroy its effect."

⁴ *Jewett v. Earle*, 21 Jones & Spencer, 349; *Storey v. Krewson*, 55 Ind. 397.

⁵ *Moore v. Norman*, 52 Minn. 83; 53

N. W. Rep. 809. In this case, there was a demand for the notes as well as satisfaction of the mortgage. See, also, *Rowley v. Ball*, 3 Cow. 303; *Wild-er v. Seelye*, 8 Barb. 408; *Dooley v. Smith*, 13 Wall. 604; *Smith v. Rockwell*, 2 Hill, 482; *Bevans v. Rees*, 5 M. & W. 306.

⁶ *Cole v. Blake*, Peake N. P. C. (239) 179.

⁷ *Richardson v. Jackson*, 8 M. & W. 298.

⁸ *Jones v. Arthur*, 8 Dowl. Prac. Cas. 442.

⁹ *Richardson v. Jackson*, 8 M. & W. 298.

can not be required, the party tendering may nevertheless demand a simple receipt for the money tendered.¹

§ 323. To whom a tender should be made.—A tender of money to an agent authorized to receive payment is a good tender to the creditor himself.² Accordingly, a mortgage running to several mortgagees jointly to secure a joint debt may be paid to and released by either mortgagee, and a tender to either is good, and is operative as to the interests of all the mortgagees.³ And where two purchase together, a tender of a deed by the vendor to one of them is sufficient.⁴ So, also, generally, where two or more persons are interested, a tender to either is sufficient.⁵ The trustee is the person to whom a tender of money due the *cestui que trust* should be made.⁶ And a tender of money to a man's servant, if he be in the house, is a good tender.⁷ The assignee in bankruptcy is the proper person to whom a tender should be made of any debt due the bankrupt.⁸ But it seems that a tender can not be made to an executor, while in another state and on other business, before he has qualified, although after his appointment.⁹ A clerk in a re-

¹ Storey v. Krewson, 55 Ind. 397; Buffum v. Buffum, 11 N. H. 451; Saunders v. Frost, 5 Pick. 259; Salinas v. Ellis, 26 So. Car. 337; Strafford v. Welch, 59 N. H. 46; Wilder v. Seelye, 8 Barb. 408; Balme v. Wambaugh, 16 Minn. 116. *Contra*, Sanford v. Bulkley, 30 Conn. 344, holding no receipt can be demanded. The law of tender is aptly summed up by Abbott, C. J., in Peacock v. Dickerson, 2 Car. & P. 51, where he holds that "a party tendering money should tender it without making any terms, and should leave it still open to the one party to say that more was due; and to the other, that the sum tendered was sufficient." See also, Doty v. Crawford, 39 So. Car. 1; 17 So. E. Rep. 377.

² Goodland v. Blewith, 1 Camp. 477.

³ Flanigan v. Seelye, 53 Minn. 23; 55 N. W. Rep. 115.

⁴ Dawson v. Ewing, 16 S. & R. 371; Prescott v. Everts, 4 Wis. 314.

⁵ Beebe v. Knapp, 28 Mich. 53; Southard v. Pope, 9 B. Mon. 261.

⁶ Chahoon v. Hollenback, 16 S. & R. 425.

⁷ Anonymous, 1 Esp. 349, where Lord Kenyon said that, in the common transactions of life, this kind of intercourse, by the intervention of servants, must be allowed; and that if money was so brought to the house of the plaintiff, and delivered to his servant, who retired, and appeared to go to the master, it was evidence to be left to the jury, from which they might infer that a tender was made.

⁸ Cook v. Kelly, 9 Bos. 358.

⁹ Todd v. Parker, 1 N. J. Law, 45.

tail store is, however, always a proper person to whom to make a tender.¹

§ 324. Tendering at a bank.—The designation of the place of payment in instruments, as, for instance, bonds and notes payable at a certain bank, imports a stipulation that their holder will have them at the bank, when due, to receive payment, and that the obligors will produce there the money to pay them. If the instrument be not there lodged, and the obligor is there at its maturity with the necessary funds to pay it, he so far satisfies the contract that he can not be made responsible for any future damages, either as costs of suit or interest, for delay. When the instrument is lodged with the bank for collection, the bank becomes the agent of the payee or obligee to receive payment and a tender to the cashier is good.² But where the payee of a note, not payable at bank, placed the same in a sealed envelope, and deposited it in a bank as a special deposit, and by mistake the officers of the bank took the note out of the envelope and notified the maker of its maturity, and the maker tendered to the cashier the amount due, which he declined to receive, it was held not to be a valid tender.³ And where the tender is to the cashier, the note payable at bank not having been left there, coupled with a demand for the delivery of the note, and not kept good, such tender does not discharge a mortgage lien.⁴ Where an instrument is payable at bank a deposit in the bank of sufficient money to pay it works a tender.⁵

§ 325. Tendering to an attorney at law.—A tender to an attorney at law with whom a demand has been left for collection, is a tender to the principal.⁶ And this is so, although such attorney denies that he has authority to receive payment.⁷ But a

¹ Hoyt v. Byrnes, 11 Maine, 475.

² Ward v. Smith, 7 Wall. 447. See, also, Rowe v. Young, 2 Brod. & Bing. 165.

³ King v. Finch, 60 Ind. 420.

⁴ Balme v. Wambaugh, 16 Minn. 116.

⁵ Hill v. Place, 7 Robt. 389. See,

also, Bacon v. Dyer, 12 Maine, 19;

Wallace v. McConnell, 13 Pet. 136.

⁶ McIniffe v. Wheelock, 1 Gray, 600;

Billiott v. Robinson, 13 La. Ann. 529.

Contra, Thurston v. Blaisdell, 8 N. H. 367.

⁷ McIniffe v. Wheelock, 1 Gray, 600.

tender may be made to the creditor himself, although he has previously put the matter into his attorney's hands.¹ An attorney is bound by the acts of those whom he allows to represent him at his office. Therefore, after a letter is sent demanding payment, a tender to the clerk of the attorney at his office is good.² But the attorney's letter may be so framed as to preclude a tender being made to any but himself.³ A demand for payment "at my office," will warrant a tender to any one employed there.⁴ An attorney's clerk can not disclaim having authority to receive payment of a sum demanded by the attorney in a regular attorney's letter.⁵ Generally, in the absence of words to the contrary, an attorney's letter imports that some person will be at his office who will have authority to receive the money, if the payment is made there,⁶ and therefore a tender is good although made to the office boy.⁷

§ 326. Tender of money into court.—In order that a tender before suit shall amount to payment, as far as the incidental right to declare a forfeiture and recover possession of premises for default in interest on a land contract is concerned, it is not necessary to bring the money into court.⁸ But where the purchaser did not offer in the pleadings to pay the sum due on the contract, it was not error for the judge to refuse a tender made in open court after the closing of the argument.⁹ There is no prejudice in sustaining a plea of tender which fails to allege that defendant "now brings the money into court," when another plea to the same count is in legal form, and the proof is conclusive that the money was paid into court when the pleas

¹ *Hoyt v. Byrnes*, 11 Maine, 475; *Moffat v. Parsons*, 5 Taunt. 307.

² *Wilmot v. Smith*, 3 C. & P. 453.

³ *Watson v. Hetherington*, 1 C. & K. 36, where the letter demanding payment was to the effect: "Must be paid to me."

⁴ *Watson v. Hetherington*, 1 C. & K. 36.

⁵ *Finch v. Boning*, L. R. 4 C. P. D. 143; 9 Cent. Law Jour. 288.

⁶ *Kirton v. Braithwaite*, 1 M. & W. 310.

⁷ *Kirton v. Braithwaite*, 1 M. & W. 310.

⁸ *Hill v. Carter*, 101 Mich. 158, 59 N. W. Rep. 413. "It was not necessary that the amount of the tender should be brought into court. *Caruthers v. Humphrey*, 12 Mich. 270; *Monyhan v. Moore*, 9 Mich. 9; *Allen v. Atkinson*, 21 Mich. 351; *Stewart v. Brown*, 48 Mich. 383; 12 N. W. Rep. 499.

⁹ *Pell v. Chandos* (Texas App. 1894), 27 S. W. Rep. 48.

were filed.¹ And the fact that with a plea of tender into court there is also pleaded a general denial does not render the tender conditional.²

§ 327. By whom a tender may be made.—A tender may be made by the debtor himself or his duly authorized agent.³ And a creditor can not lawfully refuse a tender by an agent duly authorized, if he has reasonable opportunity to learn his authority.⁴ But, it seems, a creditor may object to a tender on the ground that the agent has no authority to make it.⁵ An agent authorized to tender a sum less than the whole may make the tender good by furnishing the money himself for the balance due.⁶ And a tender by a stranger is good if his act is subsequently ratified by the debtor pleading it.⁷ So, also, a tender of money in behalf of an infant, made by his uncle, the father being dead, but the mother living, is good, although the uncle has not been appointed guardian.⁸ And equally a tender made by an inhabitant of a school district, to one having a claim against it, is valid, although such inhabitant is not regularly authorized by the district.⁹

§ 328. Tender under protest.—Although a conditional tender is not good, a tender under protest, reserving the right of the debtor to dispute the amount due, is a good tender if it does not impose any conditions on the creditor. Thus, a mortgagor tendered to a mortgagee the balance appearing to be for principal, interest and costs, according to an account made out by the mortgagor from documents furnished by the mortgagee, such balance being less than what the mortgagee claimed to be due; the mortgagor stated at the time that he did not admit the correctness of the mortgagee's accounts, and that he intended to take steps to dispute them, and to have the costs taxed; the mortgagee refused to accept the sum tendered; the mortgagor then brought an action to redeem; it

¹ *Christian v. Niagara Ins. Co.*, 101 Ala. 634; 14 So. Rep. 374.

² *Cundiff v. Corley* (Texas App. 1894, 27 S. W. Rep. 167.

³ *Eslow v. Mitchell*, 26 Mich. 500.

⁴ *Eslow v. Mitchell*, 26 Mich. 500.

⁵ *Lampley v. Weed*, 27 Ala. 621.

⁶ *Read v. Goldring*, 2 M. & S. 86.

⁷ *Harding v. Davies*, 2 C. & P. 77.

⁸ *Brown v. Dysinger*, 1 Rawle, 408.

⁹ *Kincaid v. School District*, 11 Maine, 188.

was held, that the tender, as it did not impose any conditions on the mortgagee, was a good tender, and that the mortgagor was entitled to accounts, for the purpose of showing whether it was sufficient in amount, reserving further consideration and costs in case it proved to have been sufficient.¹

§ 329. Place of tender.—When money is to be paid by one party to another and the contract fixes no place for the payment, the rule is that the payment must be to the person at the place where he is, if he be within the same dominion.² Thus, calling at the office of the creditor's attorney prepared to pay does not meet the requirements of the law.³ Nor is a tender at the residence of the creditor, during his absence, good.⁴ But, unless the contract provides otherwise, the debtor is not bound to go to another state to tender money to the creditor.⁵ And where the statute has provided that an offer in writing to pay the money, if not accepted, is equivalent to a tender, if the debtor knows the residence and post-office ad-

¹ *Greenwood v. Sutcliffe* L. R. (1892), 1 Ch. 1, where the court said: "What is the object of a tender? It is not necessarily to put an end to all controversy. It may have that effect, and very often has, but its main object is to throw the risk of further controversy upon the other party." * * * "A man has a right to tender money, reserving all his rights, and such a tender is good, provided he does not seek to impose conditions." *Scott v. Uxbridge R. Co.*, L. R. 1 C. P. 596, where the tender was in this form: "If you insist on being paid the amount demanded before satisfactory explanations have been given, our clerk will hand you a check this morning for the amount, but you must consider the payment as under protest, and our client will seek to recover back what is overpaid afterwards." This tender was held to be sufficient. *Sweny v. Smith*, L. R. 7 Eq. Cas. 324, where money was sent as payment,

together with a letter which read: "I request that you will enter this, my protest, in the records of the company; and further, that this money be held in trust by the directors (each of whom I shall hold responsible for repayment of the same) until the question of the vendors' patent rights has been settled." It was held a good tender.

² *Francis v. Deming*, 59 Conn. 108; *Startup v. Macdonald*, 6 Man. & G. 593, where the court said: "In such a case the party bound must find the other at his peril and within the time limited if he be within the four seas." *Pomeroy v. Ainsworth*, 22 Barb. 118; *King v. Finch*, 60 Ind. 420; *Littell v. Nichols*, Hardin, 66.

³ *Francis v. Deming*, 59 Conn. 108.

⁴ *Smith v. Smith*, 2 Hill (N. Y.), 350.

⁵ *Gill v. Bradley*, 21 Minn. 15; *Allshouse v. Ramsay*, 6 Whart. 331; *Tasker v. Bartlett*, 5 Cush. 359; *Smith v. Smith*, 25 Wend. 405.

dress of the creditor, he may make a legal and proper tender to the creditor, although he is beyond the state.¹ Ignorance of where the creditor can be found does not excuse a tender.² And where rent is not payable on the land, a tender on the land is not good;³ but if the rent is payable on the land a personal tender off the land is also good.⁴

§ 330. Unliquidated damages. — In some jurisdictions a tender is lawful not only in actions brought for the recovery of a sum certain, but also in cases of damages for a casual or involuntary personal injury. Statutes upon that behalf, or decisions of the courts, provide for the tender of such a sum of money as the defendant conceives to be sufficient to make amends for the injury. This tender is subject to the same rules as ordinary tenders. When the money is brought into court it becomes the plaintiff's, and it is immaterial, as to the question of its ownership, what the result of the trial is. The plaintiff runs the risk, in proceeding after a tender or deposit, of paying defendant's costs, if the recovery falls short of the amount tendered; while the defendant in such a case runs the risk of losing that amount in the event of his success upon the ensuing trial.⁵ An action to recover damages for a conversion of personal property is not one for "damages for a casual or involuntary injury to property," within the meaning of the section of the New York Code of Civil Procedure, warranting a tender.⁶ In Illinois a tender may be made in all cases of unliquidated damages.⁷ One who seeks to restrain by injunction any act for the collection of money must first determine

¹ *Crawford v. Paine*, 19 Iowa, 172.

² *Sage v. Ranney*, 2 Wend. 532, where the purchaser was ignorant of the place where the vendor could be found, and hence did not tender him the purchase-money.

³ *Haldane v. Johnson*, 20 Eng. Law & Eq. 498.

⁴ *Hunter v. Le Conte*, 6 Cow. 728. See, also, *Slingerland v. Morse*, 8 John. 474; *Poole v. Turnbridge*, 2 M. & W. 223.

⁵ *Taylor v. Brooklyn R. Co.*, 119

N. Y. 561, where the defendant paid \$200 into court to liquidate damages for negligence, but upon the trial the defendant had a verdict. It was held that the deposit belonged to the plaintiff, notwithstanding the verdict.

⁶ *Clement v. N. Y. Central R. Co.*, 9 N. Y. Supl. 601, construing N. Y. Code of Civ. Proc., § 731.

⁷ *Dunbar v. Deboer*, 44 Ill. App. 615, where a tender of damages for cattle damage *feasant* was held good.

and make an approximate tender of the amount due.¹ Where the claims are severable, one being for liquidated and the other for unliquidated damages, the debtor may tender the liquidated damages.²

§ 331. Effect of tender.—A tender of money in payment of a debt due does not discharge the debt. The only effect of the tender is to relieve the debtor from the payment of interest subsequently accruing, and costs incurred in the collection of the debt.³ A plea of tender is always an admission that the amount tendered is due.⁴ And if the amount of the tender is paid into court it belongs to the plaintiff,⁵ no matter what the result of the action, or what the verdict is.⁶ Accordingly where a tender was paid into court, and defendant's counsel, before offering any evidence, announced the withdrawal of the tender, it was held that the court could not consent to the withdrawal of the tender without plaintiff's consent.⁷ Whenever under a tender money is paid into court, while it passes into the custody of the law, it is always subject alone to the demand of the plaintiff.⁸ If the plaintiff withdraws money from court paid in to make a plea of tender good, this absolutely extinguishes and discharges all his claim.⁹ Where the

¹ *McDaniel v. Springfield, etc., Co.*, 48 Mo. App. 273, where the consumer of water was allowed to tender an approximate amount due as water rent, and then was given an injunction against the company from shutting off water. See also, *Overall v. Ruenzi*, 67 Mo. 203.

² *East Tennessee R. Co. v. Wright*, 76 Geo. 532. See also, *Nelson v. Robson*, 17 Minn. 285; *Oakland Bank v. Applegarth*, 67 Cal. 86.

³ *Gracy v. Potts*, 4 Baxter, 395; *Cornell v. Green*, 10 S. & R. 14; *Suffolk Bank v. Worcester Bank*, 5 Pick. 106.

⁴ *Phoenix Ins. Co. v. Readinger*, 28 Neb. 587; 44 N. W. Rep. 864.

⁵ *Slack v. Brown*, 13 Wend. 390; *Dakin v. Dunning*, 7 Hill, 30; *Becker v. Boon*, 61 N. Y. 317; *Wilson v.*

Doran, 110 N. Y. 101; *Wilson v. Doran*, 39 Hun, 88.

⁶ *Taylor v. Brooklyn, etc., R. Co.*, 119 N. Y. 561; *Rhodes v. Andrews* (Ark.), 13 S. W. Rep. 422, where there was a verdict for the defendant.

⁷ *Kansas Transfer Co. v. Neiswander*, 27 Mo. App. 356.

⁸ *Voss v. McGuire*, 26 Mo. App. 452.

⁹ *Hanson v. Todd*, 95 Ala. 328; 10 So. Rep. 354, where the court said: "A plea of tender, if in proper form, contains substantially the averment that the sum tendered and brought into court is the entire amount due plaintiff. -The plea is in bar of—and if proved defeats—any recovery. Bringing the money into court on such a plea has all the effect of a tender, on condition that the plaintiff receive the amount in full satisfaction of his

defendant pleaded a tender of the amount due, which he paid into court, and also pleaded a recoupment, the court held that the plaintiff having accepted the money discharged his claim, although the defendant admitted the whole claim of plaintiff's to be due, and simply paid into court the difference between his recoupment and plaintiff's claims.¹

§ 332. The same subject continued.—Tender of the amount due upon a promissory note secured by a chattel mortgage extinguishes and discharges the lien of the mortgage.² In such a case it is not necessary to keep the tender good by bringing the money into court in case an action is thereafter brought by the mortgagee to obtain possession of the chattels;³ nor need the tender be made when the note matures. Any time before foreclosure is sufficient.⁴ So, also, a tender of the money due upon a real estate mortgage, at any time before foreclosure, discharges the lien, although made after the law day, and not kept good.⁵ And where a mortgagor, or his assigns, claims that the lien of a mortgage is discharged on account of a tender of the amount due, the evidence must clearly establish an unconditional tender, sufficient in amount.⁶

claim. It is disembarrassed of the principle that a tender can not be made on condition that a reception of the money satisfies the creditor's demand. * * * * Where the plaintiff voluntarily accepts the money paid into court, without contesting the sufficiency or truth of the plea, it thereby becomes his property, but its acceptance is upon the terms of the plea,—that is, in full satisfaction and extinguishment of his claim. * * * He can not afterward say that it was accepted only as a payment *pro tanto*." *Gardner v. Black*, 98 Ala. 638; 12 So. Rep. 813; *Frank v. Pickens*, 69 Ala. 369.

¹ *Gardner v. Black*, 98 Ala. 638; 12 So. Rep. 813.

² *Moore v. Norman*, 43 Minn. 428.

³ *Moore v. Norman*, 43 Minn. 428.

⁴ *Moore v. Norman*, 43 Minn. 428.

⁵ *Kortright v. Cady*, 21 N. Y. 343; *Reisan v. Mott*, 42 Minn. 49; *Norton v. Baxter*, 41 Minn. 146; *Ferguson v. Hogan*, 25 Minn. 135; *Coffin v. Reynolds*, 21 Minn. 456; *Flanders v. Chamberlain*, 24 Mich. 305; *Bartel v. Lope*, 6 Ore. 321. In *Noyes v. Wyckoff*, 30 Hun, 466, a distinction is taken between the effect of a tender in cases of chattel and real estate mortgages: it is there held that a tender of the amount due does not discharge the lien of a chattel mortgage, because the legal title has passed to the mortgagee, which does not happen in a real estate mortgage. *Noyes v. Wyckoff*, 114 N. Y. 204.

⁶ *Benson v. Hove*, 45 Minn. 40; *Tuthill v. Morris*, 81 N. Y. 94; *Moore v. Norman*, 43 Minn. 428, where the court said: "But in view of the serious consequences which might pos-

But while a tender discharges the lien of a mortgage, a court of equity will not decree affirmative relief, such as the release or satisfaction of a mortgage, or deed of trust, or other lien, without payment of the amount due at the date of the tender. This is upon the principle of "he who seeks equity must do equity."

§ 333. **Further illustrations.**—Plaintiff gave his note to an irrigation company in payment for water rights, secured by a trust deed of the land to which these rights were to attach, and had, under a transfer from the company, undisturbed use of the rights for seven years; but at the time of the transfer the company was in the hands of a trustee, and, this trustee having failed to complete the conveyance by executing a release of the rights, plaintiff sued to cancel the note and the trust deed; it was held that defendant having, in his answer, tendered a sufficient deed of the water rights, plaintiff was bound to accept it, and there could be no cancellation of the note.² And in the action to cancel such note on the ground of defendant's non-compliance with the contract of sale, tender of a deed of the property by defendant admits a cause of action for specific performance. But if it appears that plaintiff has had undisturbed use of the water rights from the time the contract was made, a period of seven years, the complaint, to entitle him to a decree of cancellation of the note and the trust deed,

sibly result from a refusal to accept such a tender, the proof should be clear that it was fairly made, deliberately and intentionally refused by the mortgagee, that sufficient opportunity was afforded to ascertain the amount due, and that a sum sufficient to cover the whole amount due was absolutely and unconditionally tendered." See also, *Storey v. Krewson*, 55 Ind. 397; *Wilder v. Seelye*, 8 Barb. 408; *Ocean Nat. Bank v. Fant*, 50 N. Y. 474; *Nelson v. Robson*, 17 Minn. 284.

¹ *Landis v. Saxton*, 89 Mo. 375, 383; *Tuthill v. Morris*, 81 N. Y. 94; *Cowles v. Marble*, 37 Mich. 158; *Nelson v. Wilson*, 75 Iowa, 710.

² *Travelers' Ins. Co. v. Redfield*

(Colo. App. 1895), 40. Pac. Rep. 195, per Thomson, J.: "The policy of the law is to sustain contracts, not to destroy them; and, if the withholding of the title resulted in no injury to the plaintiff in the intermediate time, the execution to him of a sufficient deed before final decree, giving him all that he purchased, placed him in the exact situation contemplated when the contract was made, and disentitled him to the relief prayed. *Davidson v. Moss*, 5 How. (Miss.) 673; *Wickliffe v. Lee*, 6 B. Mon. 543; *Hunt v. McConnell*, 1 T. B. Mon. 219; *Evans v. Bolling*, 5 Ala. 550; *Boyce's Ex'rs v. Grundy*, 3 Pet. 210; *Ayres v. Mitchell*, 3 Smedes & M. 683."

must contain an offer to account or pay for the use he has had of the water rights.¹ A vendor's right to declare a forfeiture and recover possession, on a default in payment of interest on a land contract, is lost by a tender of the interest, although he refuse it.² So, also, an offer to pay and a refusal by the creditor to accept will release sureties, although the tender is not kept good. Thus, where a tenant tenders his rent, this releases his sureties, although he subsequently declines to pay.³

§ 334. Vendee's tender and demand of performance.—The mere fact of the existence, at the time fixed for the concurrent mutual performance of an executory contract for the conveyance of real estate, of a lien or incumbrance on the property which it is in the power of the vendor to remove, does not relieve the vendee from the necessity of making a tender and demand of performance, as a condition precedent to the maintenance of an action to recover money paid on the contract, or for damages as for a breach of the contract on the part of the vendor.⁴

¹ *Travelers' Ins. Co. v. Redfield* (Colo. 1895), 40 Pac. Rep. 195.

² *Hill v. Carter*, 101 Mich. 158; 59 N. W. Rep. 413, per McGrath, C. J.: "The creditor, by refusing to accept, does not forfeit his right to the thing tendered, but he does lose all collateral benefits or securities. *Kortright v. Cady*, 21 N. Y. 343; *Tiffany v. St. John*, 65 N. Y. 314; *Frost v. Yonkers, etc., Bank*, 70 N. Y. 553; *Caruthers v. Humphrey*, 12 Mich. 270; *Van Husan v. Kanouse*, 13 Mich. 302."

³ *Randal v. Tatum*, 98 Cal. 390; 33 Pac. Rep. 433.

⁴ *Ziehen v. Smith* (1896), 42 N. E. Rep. 1080; 148 N. Y. 558, O'Brien, J.: "The decisions on the point involved do not seem to be entirely harmonious. In some of them it is said that the existence, at the date fixed for performance, of liens or incumbrances upon the property is sufficient to sustain an action by the vendee to recover the part of the purchase-money paid upon

the contract. *Morange v. Morris*, 3 Keyes, 48; *Ingalls v. Hahn*, 47 Hun, 104. The general rule, however, to be deduced from an examination of the leading authorities seems to be that in cases where by the terms of the contract the acts of the parties are to be concurrent, it is the duty of him who seeks to maintain an action for a breach of the contract, either by way of damages for the non-performance, or for the recovery of money paid thereon, not only to be ready and willing to perform on his part, but he must demand performance from the other party. The qualifications to this rule are to be found in cases where the necessity of a formal tender or demand is obviated by the acts of the party sought to be charged as by his express refusal in advance to comply with the terms of the contract in that respect, or where it appears that he has placed himself in a position in which performance is impossible. If

§ 335. **In cases of pledge and mortgage.**—A pledge is extinguished by a tender of the amount due before a valid sale of the pledged property, although the tender is made after maturity of the debt.¹ In some of the states, a tender of the amount due on a mortgage, made after the law day, extinguishes the lien the same as a tender at common law, made on the law day. The property is thereby discharged from the lien, and the mortgagee is left to his remedy against the mortgagor the same as though no mortgage had existed. To have this effect, it would seem not even necessary to bring the money into court, or to show that the tender has since been kept good.²

the vendor of real estate, under an executory contract, is unable to perform on his part, at the time provided by the contract, a formal tender or demand on the part of the vendee is not necessary in order to enable him to maintain an action to recover the money paid on the contract, or for damages. *Hudson v. Swift*, 20 Johns. 24; *Fuller v. Hubbard*, 6 Cow. 13; *Green v. Green*, 9 Cow. 47; *Hartley v. James*, 50 N. Y. 38; *Bigler v. Morgan*, 77 N. Y. 312; *Burwell v. Jackson*, 9 N. Y. 535; *Bogardus v. N. Y. Life Ins. Co.*, 101 N. Y. 328; *Tamsen v. Schaefer*, 108 N. Y. 604.”

¹ *Hyams v. Bamberger*, 10 Utah, 3; 36 Pac. Rep. 202, *Bartch, J.*: “*Jones*, in his *Treatise on the Law of Pledges* (§ 543), says: ‘A creditor, by refusing a tender properly made of the amount of a debt secured by a pledge, converts it to his own use. He makes it his own so far as to run the chance of any depreciation that may afterwards occur.’ And again, in the same section, he says: ‘Upon the pledgee’s refusal of a tender of the whole amount of the debt secured, the debtor may maintain trover for the property, and he is entitled to damages to the full value of the property, without any abatement for the amount for which the property was pledged. The creditor must resort to an action

to recover the debt. The refusal of the tender discharges the lien upon the property and places the parties, in relation to the property, in the same position as if the debt had been paid and no pledge had ever existed.’ *Schouler on Bailment*, § 254; *Sutherland on Damages*, § 277; *Van Husan v. Kanouse*, 13 Mich. 303; *Ball v. Stanley*, 5 Yerg. 199; *Mitchell v. Roberts*, 17 Fed. Rep. 776; *Norton v. Baxter*, 41 Minn. 146; 42 N. W. Rep. 865; 1 *Bacon’s Abridgment*, tit. ‘Bailment’ (b), p. 610; *Ratcliff v. Davis*, *Yelv.* 178; *Loughborough v. McNevin*, 74 Cal. 250; 14 Pac. Rep. 369 and 15 Pac. Rep. 773; *Jones v. Hart*, 2 Salk. 441; *Coggs v. Bernard*, 2 Salk. 523, note; *Ratcliff v. Davies*, *Cro. Jac.* 244.”

² *Hyams v. Bamberger*, 10 Utah, 3; 36 Pac. Rep. 202, per *Bartch, J.*: “This appears to be the rule in New York and Michigan. 1 *Jones on Mortgages*, § 893; *Kortright v. Cady*, 21 N. Y. 343; *Jackson v. Crafts*, 18 Johns. 110; *Moynahan v. Moore*, 9 Mich. 9; *Potts v. Plaisted*, 30 Mich. 149. The rule laid down by these authorities appears to be founded upon the doctrine that the mortgage is merely a pledge of the property, the ownership of which remains in the mortgagor, and that the tender, after default, produces the same result

§ 336. Tendering back borrowed stock.—A tender implies not only an offer to do the thing proposed, but the power and willingness then and there to do it as offered. In no view is that a tender which the party has not the power or right to perform, in case his offer is accepted. Nevertheless his title to, or method of obtaining the thing tendered, is material only so far as it affects his ability to make an actual and valid transfer, so as to vest the title in the other party, if his offer is accepted. Thus where it is necessary to tender stock, the identical stock contracted for need not be offered, but the one making the tender may borrow stock for that purpose.¹ And stock may always be borrowed for the purpose of making a tender in order to rescind a sale of stock for fraud, where the buyer has parted with the stock bought before discovering the fraud.²

§ 337. Tendering railroad fare.—A passenger traveling on a street-railroad need not tender the exact fare, but he may

as a tender in the case of a pledge of personal property; which is a departure from the common-law doctrine that a mortgage is a conveyance to the mortgagee in fee, subject to be defeated by performance of the condition by the mortgagor. The general rule adopted by the weight of authority, from the time of Lord Coke down to the present, appears to be that at common law a tender of the debt, secured by mortgage, made after the day named for payment, does not operate to discharge the mortgage. This rule is founded on the ground that, upon a breach of the condition of the mortgage, the mortgagee becomes the owner of the property in fee, and thereafter he is not required to accept the tender and reconvey the property to the mortgagor. In equity, however, the mortgagor has a right to redeem at any reasonable time, and a tender of the debt after breach of conditions, while it will not discharge the mortgage, yet it will have

the effect, so long as it is kept good, to protect the mortgagor from cost, and stop interest."

¹ *Mayo v. Knowlton*, 134 N. Y. 250, where the court said: "Undoubtedly, when the purchaser of personal property, capable of identification and description, has sold and parted with the same before the discovery of fraud practiced upon him in the purchase, he will be left to an action for damages. Having parted with the property, he can no longer rescind by tendering back that which he had received. But the stock had no earmark; one share was the same as another, and could not be identified or distinguished therefrom."

² *Mayo v. Knowlton*, 134 N. Y. 250. See, also, *Horton v. Morgan*, 19 N. Y. 170; *Champion v. Joslyn*, 44 N. Y. 653; *Burrall v. Bushwick R. Co.*, 75 N. Y. 211; *Barclay v. Culver*, 30 Hun, 1; *Nourse v. Prime*, 4 Johns. Ch. 490; *Cobb v. Hatfield*, 46 N. Y. 533.

tender a reasonable sum, and the carrier must accept such tender, and must furnish change to a reasonable amount.¹ Thus the tender of a five-dollar gold piece in payment of a five-cent fare, by a street-car passenger, who has no smaller change, is a tender of a reasonable sum.² But a tender of a hundred dollar bill is not a good tender.³ And in the case of a traveler on steam-railroads, a tender of a twenty-dollar gold coin, requiring more than eighteen dollars to be paid back, is not a good tender.⁴ In actions for breach of duty by a railroad company in not conveying a passenger, it is not necessary to allege a strict legal tender of fare. It is sufficient to allege that the passenger was ready and willing and offered to pay such sum as the carrier was legally entitled to charge; and the tender may be made in legal tender notes.⁵ Upon similar grounds a genuine silver coin worn smooth by use, not appreciably diminished in weight, and distinguishable, is a legal tender for car fare; and if ejected for refusal to make other payment, the passenger may have an action for damages.⁶

§ 338. Tender excused.—When before tender made, the party to whom money is due declares he will not receive it, or makes any declaration or demand which is equivalent to a refusal to accept the money if tendered, then actual tender is dispensed with.⁷ But this is the rule only when relief is sought

¹ *Barrett v. Market Street R. Co.*, 81 Cal. 296.

² *Barrett v. Market Street R. Co.*, 81 Cal. 296.

³ *Barrett v. Market Street R. Co.*, 81 Cal. 296.

⁴ *Fulton v. The Grand Trunk R. Co.*, 17 U. C. Q. B. 428, where the court said: "The general practice is for the passengers to pay at the office and get tickets. The officer attending there might reasonably object to an offer of a twenty dollar gold piece in order that one dollar and twenty-five cents might be taken out of it. If any or all of the passengers might put him to the trouble of giving back so much change as that, it

would be impossible that the business could be transacted with the expedition which is necessary, or with proper caution, for there would be people, probably, who would soon take their chance of putting off counterfeit coin or bills, if they found that the officer was obliged to receive them under circumstances which did not admit of his taking time to scrutinize them."

⁵ *Tarbell v. The Central Pacific*, 34 Cal. 616.

⁶ *Jersey City R. Co. v. Morgan*, 52 N. J. Law, 60.

⁷ *Root v. Johnson*, 99 Ala. 90; 10 So. Rep. 293; *Odum v. Rutledge*, 94 Ala. 488.

in equity. For in actions at law it makes no difference that the creditor declares in advance that he will not accept the tender; the creditor can only be put in default by a tender.¹ When a person, entitled to the transfer of a patent right as a condition to the liability sued for, absolutely and unqualifiedly refuses to accept such an assignment, and denies the liability, a formal tender of such assignment is unnecessary, and such liability may be enforced without such tender.² In a suit to annul a tax sale, where the prescription of the tax is relied on, a tender is excused. And also is a tender excused when the amount is indefinite and uncertain.³ A tender is not necessary where a party puts it out of his power to comply.⁴ Where a party asks subrogation a tender is excused until the amount is ascertained by the decree.⁵ And in all bills to redeem a tender is excused until the amount necessary is ascertained by the court.⁶

§ 339. Questions of practice.—Payment of money into court without a rule may be disregarded by the creditor.⁷ And whenever a tender is relied on as a defense it must be pleaded.⁸ In Maine it is the settled law that a tender can only be kept good by payment of the money into court upon the first day of the term.⁹ It is held that an appellate court has no control over money paid into the trial court as a tender, except when the cause is reviewed and determined and remanded for further proceedings, in pursuance of the determination.¹⁰ If the cred-

¹ *Nelson v. Wilson*, 75 Iowa, 710; *Courtright v. Deeds*, 37 Iowa, 503.

² *MacDonald v. Wolff*, 40 Mo. App. 302, where the court said: "The law never requires a person to do a useless thing, and, applying this principle, we are of opinion that the absolute and unqualified refusal of defendant to accept the assignment relieved the plaintiff of the duty of making a formal tender of a written transfer. What good could have resulted from it?"

³ *Breaux v. Negrotto*, 43 La. Ann. 426.

⁴ *Davis v. Van Wyck*, 64 Hun, 186.

⁵ *Koehler v. Farmers' Bank*, 5 N. Y. Supl. 745.

⁶ *Kline v. Vogel*, 90 Mo. 239; *Weeks v. Baker*, 152 Mass. 20; *Soell v. Had-den*, 85 Texas, 182; *Haskell v. Brewer*, 11 Maine, 258.

⁷ *Levan v. Sternfeld*, 55 N. J. L. 41; 25 Atl. Rep. 854.

⁸ *Hughes v. Eschback*, 7 D. C. 66.

⁹ *Gilpatrick v. Ricker*, 82 Maine, 185; *Pillsbury v. Willoughby*, 61 Maine, 274; *Reed v. Woodman*, 17 Maine, 43.

¹⁰ *Mignano v. McAndrews*, 56 Fed. Rep. 300.

itor is absent from the state, the tender may be first made by plea filed, accompanied with the amount claimed to be due, and accrued costs.¹ And in cases where money is paid into court, the findings of the court or master are unimportant so far as the tender is concerned.²

§ 340. Touching costs.—If money is paid into court under a tender, no tender having before been made, and the parties go to trial on an issue other than that of tender, the costs are to be apportioned in the discretion of the trial court.³ But where a property owner seeks to have a tax sale set aside he must tender costs to the buyer.⁴ And every tender after suit has begun must include all accrued costs.⁵ A question of costs can not be raised for the first time on appeal.⁶ But if a party accept money paid in as a tender, after the cause has been remanded from an appellate court, this does not preclude him from recovering costs.⁷

¹ *Gardner v. Black*, 98 Ala. 638; 12 So. Rep. 813; *Spoor v. Phillips*, 27 Ala. 193; *Trimble v. Williamson*, 49 Ala. 525; *Lehman v. Collins*, 69 Ala. 127; *Monahan v. Moore*, 9 Mich. 8; 77 Am. Dec. 468.

² *Anderson v. Moore*, 145 Ill. 61; 33 N. E. 848. See, also, *Phoenix Ins. Co. v. Readinger*, 28 Neb. 587; *Foster v. Mayer*, 20 N. Y. Supl. 487; *McCalley*

v. Otey, 90 Ala. 302; *Bluntzer v. De-wees*, 79 Texas, 272; *Nelson v. Loder*, 132 N. Y. 288.

³ *Redman v. Thomas*, 39 Mo. App. 143.

⁴ *Gage v. Arndt*, 121 Ill. 491.

⁵ *Collier v. White*, 67 Miss. 133.

⁶ *Saum v. Shell*, 45 Kan. 205.

⁷ *Summerson v. Hicks*, 142 Pa. St. 344; 21 Atl. Rep. 875.

CHAPTER IX.

VENDOR AND PURCHASER.

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| <p>§ 341. Contracts for sale of land.</p> <p>342. Title founded on adverse possession.</p> <p>343. Title from a stranger.</p> <p>344. Remedying defects.</p> <p>345. Whether a title is marketable.</p> <p>346. The same subject continued—Illustrations.</p> <p>347. Duties of vendor.</p> <p>348. Burden of proof.</p> <p>349. Illustrations of unmarketable titles.</p> <p>350. Specified land to be conveyed.</p> <p>351. Sales in gross.</p> <p>352. Conflict in description.</p> | <p>§ 353. Compensation for deficiencies.</p> <p>354. <i>Bona fide</i> purchaser—Possession as notice.</p> <p>355. Vendor's lien.</p> <p>356. Vendor's lien—Liability of purchaser from vendee.</p> <p>357. Vendor's lien—Expressly reserved.</p> <p>358. Reserving lien on crops to secure purchase-money.</p> <p>359. Vendor's right to earnest money.</p> <p>360. Equitable mortgage analogous to vendor's lien.</p> |
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§ 341. **Contracts for sale of land.**—A purchaser of real estate is not entitled to demand a title absolutely free from all suspicion or possible defect. He may claim simply a marketable title, that is one which a reasonable purchaser, well informed as to the facts, and their legal bearings, willing and anxious to perform his contract, would in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to and ought to accept.¹ And mere captious objections to the title ought not to prevail, when made by a purchaser who seeks to avoid the performance of his contract. A mere doubt, however honestly entertained by the purchaser, will not justify him in refusing to execute his contract. It is only in cases where the court itself is in doubt

¹Todd v. Union Dime Co., 128 N. Y. 636; Dingley v. Bon, 130 N. Y. 607; Rife v. Lybarger, 49 Ohio St. 422; Atkinson v. Taylor, 34 Mo. App. 442; Hale v. Cravener, 128 Ill. 408; Parmly v. Head, 33 Ill. App. 134; Mead v. Altgeld, 33 Ill. App. 373; Beioley v. Carter, L. R. 4 Ch. 230; Alexander v. Mills, L. R. 6 Ch. 124; Bell v. Holtby, L. R. 15 Eq. 178; Collier v. Walters, L. R. 17 Eq. 252.

as to the title that a specific execution will be refused on the ground that the title is not marketable.¹ Whether a title to land is a good and marketable one is for the determination of the court on the papers and other facts submitted to it. The opinion of a witness, however, competent to determine whether the title be good and marketable or not, can not be received in evidence;² and the opinions of lawyers as experts should not be considered.³ But while a lawyer's opinion is to be rejected, still if such opinion is adverse to the title, the court will look into and examine the title with closer scrutiny, before compelling a purchaser to accept it.⁴

§ 342. Title founded on adverse possession.—If the vendor's title has been acquired by adverse possession for the statutory period, this will enable him to comply with a contract to convey the fee.⁵ The burden of showing that the adverse possession has ripened into ownership is on the vendor.⁶ But a purchaser will not be compelled to complete the purchase where there is some reasonable ground of evidence shown in support of an objection to the title, or where the title depends upon a

¹ *Rife v. Lybarger*, 49 Ohio St. 422, 429, where the court said: "It is said that the vendees bought the land with a view to its subdivision into town lots, and its immediate resale, which purpose was made known to the vendor, and that by reason of this incumbrance they lost a sale at a considerable advance on the price they were to pay. This may be true, but the plaintiff is no more to be affected by the captious objections of possible purchasers of the vendees, than by similar objections on the part of the vendees themselves." *Walsh v. Barton*, 24 Ohio St. 28; *Ludlow v. O'Neil*, 29 Ohio St. 181.

² *Murray v. Ellis*, 112 Pa. St. 485.

³ *Mead v. Altgeld*, 33 Ill. App. 373; *Parmly v. Head*, 33 Ill. App. 134; *Camfield v. Gilbert*, 4 Esp. 221; *Alpass v. Watkins*, 8 T. R. 516.

⁴ *Atkinson v. Taylor*, 34 Mo. App. 442.

⁵ *Ballou v. Sherwood*, 32 Neb. 666; 49 N. W. Rep. 790; *Shriver v. Shriver*, 86 N. Y. 575; *O'Connor v. Huggins*, 1 N. Y. Supl. 377; *Ottinger v. Strasburger*, 33 Hun, 466; *Rife v. Lybarger*, 49 Ohio St. 422; *Hellreigel v. Manning*, 97 N. Y. 56; *Murray v. Harway*, 56 N. Y. 337; *Brown v. Witter*, 10 Ohio, 143; *Thacker v. Booth* (Ky.), 6 S. W. Rep. 460; *Shober v. Dutton*, 6 Phila. 185; *Pratt v. Eby*, 67 Pa. St. 396; *Godden v. Kimmel*, 99 U. S. 201; *Union, etc., R. Co. v. McAlpine*, 129 U. S. 305; *Railroad Co. v. McCarthy*, 96 U. S. 258; *Carson v. German Ins. Co.*, 62 Iowa, 433; *Jennings v. Reeves*, 101 N. C. 447; 7 S. E. Rep. 897; *Garner v. Lasker*, 71 Texas, 431; 9 S. W. Rep. 332.

⁶ *Kneller v. Lang*, 63 Hun, 48.

matter of fact which is not capable of satisfactory proof, or, if capable of that proof, yet is not so proved.¹ While a title depending upon the bar of the statute of limitations is a marketable title, still it must clearly appear that the entry of the real owner is barred;² and the time prescribed by statute must be proven not to have been prolonged by some act of the parties which has operated to prevent the running of the statute. Thus, where a mortgage appeared of record it was held necessary for the vendor to show that there had been no incident, such as infancy, coverture or lunacy, to extend the time, although it appeared that without such an event the mortgage was barred.³ But such a rule, it seems, would not obtain in case of promissory notes; all the vendor has to show in such case is that they are barred, without proving the non-existence of incidents extending the time.⁴ In California the courts do not follow the rule that a title depending on the bar of the statute of limitations may be marketable, and it is accordingly there held that a purchaser is entitled, in the absence of an express agreement to the contrary, to a good paper title, sufficient in law.⁵

§ 343. Title from a stranger.—A purchaser is not required to accept a conveyance from a third party, but only from the vendor.⁶ But if the vendee accepts a deed from a third party who makes it at the vendor's request, the vendee must pay the purchase price to the vendor.⁷ And it is not necessary for the vendor to own the land at the date of the contract to sell. Provided that he is able to convey when the time for performance arrives, this is all that is required.⁸

¹ *Shriver v. Shriver*, 86 N. Y. 575, where the absence of a party in Australia was held should have been accounted for by the vendor.

² *Pratt v. Eby*, 67 Pa. St. 396; *Townsend v. Goodfellow*, 40 Minn. 312.

³ *Austin v. Barnum*, 52 Minn. 136; 53 N. W. Rep. 1132.

⁴ *Rife v. Lybarger*, 49 Ohio St. 422.

⁵ *McCroskey v. Ladd* (Cal.), 28

Pac. Rep. 216; *Benson v. Shotwell*, 87 Cal. 49. See, also, *Sheehy v. Miles*, 93 Cal. 288.

⁶ *George v. Conhaim*, 38 Minn. 338; 37 N. W. Rep. 791.

⁷ *Hamilton v. Hulett*, 57 Minn. 208; 53 N. W. Rep. 364.

⁸ *Handley v. Tibbetts* (Ky.), 16 S. W. Rep. 131.

§ 344. Remedying defects.—Inasmuch as a vendor may always, if possible, perfect his title, the vendee must point out to the vendor wherein the title is defective;¹ and then the vendor has a reasonable time to perfect the title.² And the vendor may perfect the title at any time up to the actual trial of an action for the recovery of the purchase-money.³ In an ordinary sale of land there is an implied condition that, if the title be defective, the vendee may decline to take it and may recover the deposit-money if he have paid any; but there is no such legal obligation on the part of the vendor to perfect the title as will give the vendee the right to recover damages for the failure to do so.⁴ If the title becomes perfect by the lapse of time, barring the defects noted by the vendee, this relieves the vendor from the necessity of perfecting.⁵

§ 345. Whether a title is marketable.—As a general rule a title which is open to judicial doubt is not a marketable title. But what is a sufficient ground for judicial doubt is not to be conclusively reduced to fixed and determinate principles, because it depends, in some degree, upon the discretion of the court.⁶ First, however, it must be remembered that contracts for the conveyance of a “perfect title” do not contemplate a perfect title in the strict sense of the word perfect, because, roughly speaking, there are no such titles. It means a title that is perfect and safe to a moral certainty, a title, which does not disclose a patent defect, suggesting the possibility of a law suit to defend it; a title, such as a well-informed and prudent man, paying full value for the property, would be willing to take.⁷ And a perfect title does not mean a perfect record title, because if it did, then the term contemplates a case which, under the American system of conveyancing and registry, is

¹ *Anderson v. Strassburger*, 92 Cal. 38.

² *Andrew v. Babcock*, 63 Conn. 109; 26 Atl. Rep. 715.

³ *Mitchell v. Allen*, 69 Texas, 70; 6 S. W. Rep. 745.

⁴ *Presbrey v. Kline*, 20 D. C. 513.

⁵ *Williams v. Porter* (Ky.), 21 S. W. Rep. 643. *Contra*, *Noyes v. Johnson*, 139 Mass. 436.

⁶ *Shriver v. Shriver*, 86 N. Y. 575, 584.

⁷ *Birge v. Bock*, 44 Mo. App. 69; *Todd v. Union Dime Co.*, 128 N. Y. 636; *Dingley v. Bon*, 130 N. Y. 607; *Rife v. Lybarger*, 49 Ohio St. 422; *Atkinson v. Taylor*, 34 Mo. App. 442; *Hale v. Cravener*, 128 Ill. 408; *Parmly v. Head*, 33 Ill. App. 134; *Mead v. Altgeld*, 33 Ill. App. 373.

next to impossible. The grantor in a deed in the chain of title may convey by implication as of full age, while in fact he is a minor; female grantors may be married and their deeds void for misjoinder of their husbands, or male grantors may convey as single, while in fact they are married, and convey property incumbered with a dower interest. Where there are many persons of a common name, one may attempt to convey property which in fact belongs to another. A perfect title never can be shown by the record alone, but always depends for its existence upon the record as well as upon facts outside of the record.¹

§ 346. The same subject continued—Illustrations.—While the title tendered need not in fact be bad to justify a rejection thereof by the vendee, it must be either defective in fact or so clouded by apparent defects, either appearing in the record or by proof outside, that prudent men, knowing the fact, would hesitate to take it. A suspicion or conjecture merely, without any facts to support it, does not raise a reasonable doubt as to the validity of a title good upon the record. If the defect or doubt is disclosed on the face of the record title the vendee need go no further, but if it depends upon some extrinsic fact not discovered by the record, he must prove this fact to justify a refusal to accept the title.²

¹ *Birge v. Bock*, 44 Mo. App. 69.

² *Greenblatt v. Hermann* (1894), 144 N. Y. 13, per Andrews, C. J.: "The point that at least the title was doubtful, and, therefore, unmarketable, rests upon the possible existence of heirs on the mother's side, not brought into the proceedings. If their existence had been shown, or evidence given rendering it probable that such heirs were in being, the plaintiff would have been entitled to relief. It has been often said that the purchaser is entitled to a marketable title. The title tendered need not in fact be bad in order to relieve him from his purchase, but it must either be defective in fact, or so

clouded by apparent defects, either in the record or by proof outside of the record, that prudent men, knowing the facts, would hesitate to take it. *Fleming v. Burnham*, 100 N. Y. 1; *Moore v. Williams*, 115 N. Y. 586. In the present case there is no presumption in the absence of proof that the mother of the decedent had brothers or sisters or descendants of either. The title is not doubtful by reason of any fact shown or by reason of any inference from any such fact. It is a possibility merely that such heirs may exist. But the plaintiff has not seen fit to give any proof on the subject, and has left it to conjecture merely, and a suspicion or conjecture, without

§ 347. Duties of vendor.—If the burden of showing title rests with the vendor, and he exhibits a complete chain of title by record, which is apparently regular on its face, he has done all that the law requires of him in the first instance; and, if the vendee then challenges the title thus exhibited, the burden is upon him to show that there are imperfections in the title *dehors* the record.¹ But this rule can apply to cases only where there is no necessary break in the record title, by death, marriage or other causes. Where there is no will, for instance, and especially where there is no administration, the devolution of title does not take place by matter of record; but upon the death of an ancestor, the title vests immediately in his heirs by descent. Marriage changes the name of the female, and the deed seldom discloses her former name. In all such classes of cases it is sufficient for the vendor to show in the first instance, by the recitals of the record itself, if the record so recites, that certain grantors were all the children of A., or that B., married to C., was formerly E., giving her name as a maid or widow. If the record does not so recite, then the least that can be required of the vendor is that he adduce some other *prima facie* evidence of that fact, before he can put the vendee in the wrong for refusing to accept the title.²

§ 348. Burden of proof.—The burden of proof, no matter what the action may be, is on the vendor to show that his title is marketable, and not on the vendee to show that the title is unmarketable.³ And when it is the duty of the vendor, by the terms of the contract, to exhibit his title to the vendee, he must exhibit it within a reasonable time.⁴ If he have *prima*

any facts to support it, does not raise a reasonable doubt as to the validity of a title good upon the record."

¹ Birge v. Bock, 44 Mo. App. 69, 76, 77.

² Birge v. Bock, 44 Mo. App. 69.

³ Birge v. Bock, 24 Mo. App. 330; Dwight v. Cutler, 3 Mich. 566; Burwell v. Jackson, 15 N. Y. 536; Delevan v. Duncan, 49 N. Y. 485; Swayne v. Lyon, 67 Pa. St. 436; Phillips v. Breck, 79 Ky. 465; Little v. Paddle-

ford, 13 N. H. 167. "In fact, we know of no exception to the rule, certainly none established by decided cases, that an executory agreement to convey a title to land means the conveyance of a good title, and that the showing of such a title by the vendor is a condition precedent to his recovery." Rombauer, J., in Birge v. Bock, 24 Mo. App. 330, 334.

⁴ Birge v. Bock, 44 Mo. App. 69, 47.

facie a perfect title of record, it may be assumed that he discharges his undertaking by exhibiting to the vendee the certificate of a competent title examiner, affixed to what purports to be an abstract of all the conveyances affecting the property, such abstract showing a complete chain of title and disclosing no flaws. But if the abstract shows a break in the title, the vendor must look up the evidence *in pais*, which is necessary to supply the gap and to show that the title is good; and this evidence must be communicated to the vendee.¹ In suits between vendor and vendee a doubtful title can not be made marketable by an opinion of a court on a case stated between them.²

§ 349. Illustrations of unmarketable titles.—Where the owners of certain land have bound themselves to build only in a certain manner, and this covenant runs with the land, this renders the title unmarketable.³ A title is not marketable which depends for its validity upon information which is not fully presented to the court, and upon the doubtful construction of the limitations of a deed and the terms of a statute, each of which is inartificially drawn.⁴ Inasmuch as a deed absolute in form, but intended as a mortgage, is a mortgage, a title under such a deed is not marketable.⁵ And a title depending on a deed of recent date, without further proof of title, is not marketable.⁶ The pendency of proceedings to condemn real property for public use is, as between vendor and purchaser, such a defect in the title that the purchaser, under a contract to convey to him good title, is not obliged to take the title so affected.⁷ And it seems that any recitals in a record, which are not binding on third persons, and which if

¹ Birge v. Bock, 44 Mo. App. 69, 78.

² Pratt v. Eby, 67 Pa. St. 396.

³ Kountze v. Helmuth, 67 Hun, 343.

⁴ Paulmier v. Howland, 49 N. J. Eq. 364; 24 Atl. Rep. 268.

⁵ Adair v. Adair, 22 Ore. 115; Smith v. Smith, 80 Cal. 323; Hall v. Arnott, 80 Cal. 348; Booth v. Hoskins, 75 Cal. 271; Raynor v. Drew, 72 Cal. 307; Healy v. O'Brien, 66 Cal. 517;

Taylor v. McLain, 64 Cal. 513; Murdock v. Clarke, 90 Cal. 427; Lane v. Shears, 1 Wend. 433; Peugh v. Davis, 96 U. S. 332; Odell v. Montross, 68 N. Y. 499; Brinkman v. Jones, 44 Wis. 498; Howe v. Carpenter, 49 Wis. 697.

⁶ Walsh v. Barton, 24 Ohio St. 28.

⁷ Cavanaugh v. McLaughlin, 38 Minn. 83; 35 N. W. Rep. 576.

false will give title to such third persons, have a tendency, at least, to make the title unmarketable.¹

§ 350. Specified land to be conveyed.—"The vendor must convey property answering in all respects to that contracted for, and can not compel the purchaser to accept a conveyance of property differing from the contract in any material particular; whether in estate, or tenure, quantity, identity, or condition."² Thus a contract for the conveyance of a specified tract of land is not satisfied by the conveyance of a part of such tract.³ Accordingly if the vendor pulls down any building after the contract of sale, the purchaser is not bound to complete the purchase.⁴ "But any subsequent deterioration or improvement in the property from accidental or natural causes accrues to the loss or profit of the purchaser, as being the beneficial owner by virtue of the contract."⁵ Where a leasehold property described as a term of twenty-three years was sold, and it appeared that a yard, part of the premises, was only held by the vendor from year to year, it was held that the defect avoided the sale.⁶ And if a house is described as a certain number on a street, this is a material description and the vendor does not fulfill his contract by tendering a house next to the designated one.⁷ A contract to convey a wharf with a jetty is not performed unless the jetty is conveyed as well as the wharf.⁸

¹ *Sheehy v. Miles*, 93 Cal. 288, where the record recited that a homestead was declared upon community property, it being held that the title was unmarketable because if the recitals were false and the property not community, the land would descend to other parties than the grantor.

² *Leake on Contracts*, 831.

³ *Cavanaugh v. Casselman*, 88 Cal. 543, where the court said: "That obligation could not be satisfied by the conveyance of a part of the tract, any more than would the payment of a money obligation be satisfied by the payment of a part thereof. Whether the conveyance of a part was made

with or without controversy between the parties is immaterial. Unless it was accepted in satisfaction of the agreement, the unexecuted part of the original agreement remained in full force."

⁴ *Granger v. Worms*, 4 Camp. 83.

⁵ *Leake on Contracts*, 833, citing *White v. Nutt*, 1 P. Wms. 61; *Spurrer v. Hancock*, 4 Vesey, 667; *Paine v. Meller*, 6 Vesey, 349.

⁶ *Dobell v. Hutchinson*, 3 A. & E. 355.

⁷ *Stanton v. Tattersall*, 1 Sm. & G. 529.

⁸ *Peers v. Lambert*, 7 Beav. 546.

§ 351. **Sales in gross.**—When land is sold in bulk for a gross sum, and not by the foot or the acre, and there is no fraud or willful misrepresentations or concealment amounting to fraud, and the description is definite—as by metes and bounds, governmental subdivisions or other certain description—and there is no special covenant or averment as to quantity, then a call for quantity in the conveyance, whether qualified by the words “more or less” or other equivalent words or not, is merely descriptive; and if it does not correspond with the quantity within the boundaries given such call yields to the description, and the grantee takes all within the boundaries, be the same more or less than the quantity stated, and can have no relief on account of a deficit, either on the covenants by way of recoupment nor directly for damages.¹ Thus in a purchase of a farm, said to contain two hundred and sixty-one acres, by certain boundaries, the sale is binding although there is a deficiency of seventeen acres.² And relief was even denied where the language used was “there being in the lot one hundred and thirty-five acres strict measure.”³ Where the deed stated without qualifying words that the quantity conveyed was two and three-fourths acres, and the actual quantity was one acre and one hundred and forty-eight perches, it was held to be a sale in gross and the purchaser was remediless.⁴ In such cases, if the vendee visits the prop-

¹ *Wood v. Murphy*, 47 Mo. App. 539. The statement in the text is taken from the brief of counsel for the respondent in this case, a statement which can not be improved on for accuracy and clearness. See also, *Mann v. Pearson*, 2 John. 37; *Smith v. Evans*, 6 Bing. 102; *Phillips v. Porter*, 3 Ark. 18; *Powell v. Clark*, 5 Mass. 355; *Jackson v. Moore*, 6 Cowen, 706; *Allison v. Allison*, 1 Yerg. 16; *Beach v. Stearns*, 1 Aik. 325; *Roat v. Puff*, 3 Barb. 353.

² *Wood v. Murphy*, 47 Mo. App. 539.

³ *Roat v. Puff*, 3 Barb. 353.

⁴ *Large v. Penn*, 6 S. & R. 488. See also, *Harrell v. Hill*, 19 Ark. 102; 68

Am. Dec. 202; *Stebbins v. Eddy*, 4 Mass. 414; *Weaver v. Carter*, 10 Leigh, 37; *Eubank v. Hampton*, 1 Dana, 343; *Brown v. Parish*, 2 Dana, 6; *Jackson v. McConnell*, 19 Wend. 175; *Noble v. Googins*, 99 Mass. 231, holding that in a written contract for the purchase of land for a gross sum, a description of the land by its boundaries, or the insertion of the words “more or less,” or of equivalent words, will control a statement of the quantity of land, or of the length of one of the boundary lines, so that neither party will be entitled to relief on account of a deficiency or surplus. *McEvoy v. Loyd*, 31 Wis. 142, *Ufford v. Wilkins*, 33 Iowa,

erty itself prior to the sale, and makes a personal examination of it touching quantity, he will be presumed to rely on his own judgment in making the purchase, and not upon any representations of the vendor.¹

§ 352. Conflict in description.—If there be a conflict in the boundaries between the monuments and the courses and distances, the latter must yield to the former, because they are more certain, and reference will be had to them to determine the intention of the parties to the conveyance.² Thus where, after the description of the lands conveyed in the deed, by metes and bounds, were the words “containing one hundred and eighty acres, strict measure,” it was held that as the subject-matter of the conveyance was a farm with natural boundaries, which were used in the deed, the natural boundaries governed and controlled, although the quantity specified was nine acres too much.³ And when the land is specifically and definitely described in the instrument by which it is conveyed, a recital, in the same clause with the description, that the tract conveyed contains a specific quantity, is mere description, and will not operate as an implied warranty that the tract conveyed contains the number of acres or quantity specified.⁴

§ 353. Compensation for deficiencies.—In a case where the vendor is unable from any cause not involving *mala fides* on his part, to convey each and every parcel of the land contracted to be sold, or where the deficiency in regard to quantity, identity, or condition, is slight in substance, there the vendor may insist on performance with compensation to the purchaser, or a proportionate abatement from the agreed price if that has not been paid. “It is much too late to contend, that every

110; *Campbell v. Johnson*, 44 Mo. 247; *Ketchum v. Stout*, 20 Ohio, 453.

¹ *Farrar v. Churchill*, 135 U. S. 609.

² *Andrews v. Rue*, 34 N. J. Law, 402; *Opdyke v. Stephens*, 28 N. J. Law, 83; *Powell v. Clark*, 5 Mass. 355; *Roat v. Puff*, 3 Barb. 353; *Jackson v. Moore*, 6 Cowen, 706; *Weart v. Rose*, 1 C. E. Green, 290.

³ *Andrews v. Rue*, 34 N. J. Law, 402.

⁴ *Fuller v. Carr*, 33 N. J. Law, 157; *Smith v. Negbauer*, 42 N. J. Law, 305; *Elliott v. Weed*, 44 Conn. 19; *Armstrong v. Brownfield*, 32 Kan. 116; *Powell v. Clark*, 5 Mass. 355; *Jackson v. Barringer*, 15 John. 472.

variance from the description will enable a man to resist the performance. The principle is that if he gets substantially that for which he bargains, he must take a compensation for a deficiency in the value."¹ The practice among English conveyancers is to insert an express condition in contracts of sale to the effect that any misdescription, mistake or error shall not avoid the sale, but shall be matter of compensation.²

§ 354. Bona fide purchasers—Possession as notice.—If a contract of sale be registered it is conclusive of notice of the contract to any subsequent purchaser notwithstanding the purchaser lived in another state, and did not, in fact, search the register's books.³ Actual, notorious, and exclusive possession of land takes the place of the recording of the instrument of title; and a subsequent purchaser of land in possession of one who is not his vendor is affected with notice of whatever claim or interest the person in possession has, and which an inquiry into the possession would have revealed. He is not permitted to dispute such right or interest unless he has made the inquiry which equity and good conscience impose on him, and such inquiry, duly prosecuted, has failed to reveal any right or interest in the tenant in possession.⁴ Actual possession of real es-

¹ *Dyer v. Hargrave*, 10 Vesey, Jr., 506, per Sir William Grant, Master of the Rolls, 506; *Foley v. Crow*, 37 Md. 51; *Poole v. Shergold*, 2 Bro. C. C. 118; *Stoddart v. Smith*, 5 Bin. (Pa.) 355.

² *Dart on Vendors*, 86.

³ 1 Story's Equity Jurisprudence, § 403.

⁴ *Chapman v. Chapman* (Va. 1895), 21 S. E. Rep. 813, Riely, J.. "In the case of *Holmes v. Powell*, 8 De Gex, M. & G. 572, that eminent jurist, Lord Justice Knight Bruce, said: 'I apprehend that by the law of England, when a man is of right and *de facto* in the possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any

interest in the property conflicting or inconsistent with the title or alleged title under which he is in possession, or which he has a right to connect with his possession of the property. It is equally a part of the law of the country, as I understand it, that a man who knows, or can not be heard to deny that he knows, another to be in possession of a certain property, can not for any civil purpose, as against him at least, be heard to deny having thereby notice of the title or alleged title under which or in respect of which the former is or claims to be in that possession.' The same general rule is said by Mr. Pomeroy to be established in the United States by a very great preponderance of authority. 2 Pomeroy on Equity

tate is sufficient notice to a person proposing to take a mortgage on the property, and to all the world, of the existence of any right which the person in possession is able to establish.¹ The Virginia rule is that trustees under a conveyance by a debtor in trust for the benefit of his creditors are purchasers for value without notice, although the general rule is otherwise;² but notice of adverse title to one of such trustees is notice to all of them, and none of them are *bona fide* purchasers.³

§ 355. Vendor's lien.—The vendor's lien is based upon the theory that a vendee ought not to hold the land of another, and not pay for it; and the rule that equity looks to substance and not to form is applicable to the enforcement of vendor's

Jurisprudence, § 614, and the cases cited in the note thereto in support of the text. The doctrine has recently been upheld by the court of appeals of New York to its fullest extent in the case of *Phelan v. Brady*, 119 N. Y. 587; 23 N. E. Rep. 1109."

¹ It was argued in *Edwards v. Thompson*, 71 N. C. 177, where the purchaser was a resident of South Carolina, and bought land in North Carolina, that the question of notice of an equity in derogation of the vendor's right to sell was exclusively one of fact, and that, in order to be fixed upon the purchaser, it must be shown either that he had notice in fact, or else willfully or imprudently omitted to inquire when the means of inquiry were in his reach. "We do not think," said the court, "this is the true principle. On policy, the law avoids such minute and uncertain inquiries. It says that open, notorious and exclusive possession in a person other than his vendor is a fact of which a purchaser must inform himself, and he is conclusively presumed to have done so."

² *Chapman v. Chapman* (Va. 1895), 21 S. E. Rep. 813, Riely, J.: "They

are unquestionably, under many decisions of this court, purchasers for value. *Evans v. Greenhow*, 15 Gratt. 153; *Wickham v. Martin*, 13 Gratt. 427; *Exchange Bank v. Knox*, 19 Gratt. 739; *Shurtz v. Johnson*, 28 Gratt. 657, 667; *Cammack v. Soran*, 30 Gratt. 292; *Williams v. Lord*, 75 Va. 390; *Witz v. Osburn*, 83 Va. 227; 2 S. E. Rep. 33."

³ *Chapman v. Chapman* (Va. 1895), 21 S. E. Rep. 813, Riely, J.: "The conveyance was to them jointly. The particular estate they took was joint and inseverable; the title joint and indivisible. To be *bona fide* purchasers without notice, they must be wholly so. There can be no such thing as a purchase partly *bona fide*. If tainted in part, the whole is infected. Consequently, notice to one of two or more trustees is notice to all. *Le Neve v. Le Neve*, 2 White & T. Lead. Cas. Eq., pt. 1, p. 109; *Smith v. Smith*, 2 Crompt. & M. 230; *Meux v. Bell*, 1 Hare, 73; *Willes v. Greenhill*, 4 De Gex, F. & J. 147, 150; *Bank v. Davis*, 2 Hill, 451, 464; *Myers v. Ross*, 3 Head, 59; 2 Pomeroy on Equity Jurisprudence, § 667; *Lewin on Trusts*, 609-612."

liens.¹ Generally speaking, the lien of the vendor exists; and the burden of proof is on the purchaser to establish that, in the particular case, it has been intentionally displaced or waived by the consent of the parties.² It has been held that where there is an exchange of lands, a covenant by one of the parties to pay off the liens on the lands transferred by him, as part of the consideration of the land deeded to him, is as much an agreement to pay a part of the purchase-money as though there had been an agreement to pay that amount directly to the vendor to enable him to pay off the liens. If the agreement is not kept, so much of the consideration fails, and a vendor's lien exists for the amount paid to clear off the liens.³ Where a note does not show that it was given for the price of land, but declares that it is secured by rent on other property, and the deed conveying the land recites a cash consideration and reserves no lien, in an action to foreclose his lien, the burden is on the vendor to show that a lien on the land was reserved.⁴

§ 356. Vendor's lien—Liability of purchaser from vendee.—

If a purchaser of land knows that his vendor is still owing a part of the purchase-money for which no security has been given, he will take the land subject to the implied lien of the

¹ *Beal v. Harrington*, 116 Ill. 113; 4 N. E. Rep. 664; 2 *Warvelle on Vendors*, 707.

² 2 *Story on Equity and Jurisprudence*, § 1224.

³ *Elliott v. Plattor*, 43 Ohio St. 198; 1 N. E. Rep. 222; *Pratt v. Eaton*, 65 Mo. 157; *Bennett v. Shipley*, 82 Mo. 448; *Dayton, etc., Railroad Co. v. Lewton*, 20 Ohio St. 401; 2 *Warvelle on Vendors*, 707. In *Mackreth v. Symmons*, 15 Ves. 329, Lord Eldon decided in favor of the lien as to the debt assumed by the purchaser, but which he failed to pay, while he refused to extend it to the annuities. See *Sugden on Vendors*, p. 679, § 19.

⁴ *Weeks v. Barton* (Texas App. 1895), 31 S. W. Rep. 1071, *Stephens, J.*: "Appellee sued appellant on a promis-

sory note, and sought to foreclose the vendor's lien on the tract of land for which he alleged the note had been given. The deed conveying the land to appellant recited a cash consideration and reserved no lien. The note did not even disclose on its face that it had been given for unpaid purchase-money of the land, but, on the contrary, contained this recital: 'This note is secured by rent on the Barton farm for 1891.' In this state of case, where a lien is expressly reserved upon other property, the implied lien on the land will not be presumed, but the burden rests on the vendor to show that it, too, was retained. *Parker County v. Sewell*, 24 Texas, 238; *Faver v. Robinson*, 46 Texas, 204; *Cresap v. Manor*, 63 Texas, 485."

original vendor.¹ But land is not chargeable with a vendor's lien which has been conveyed to a subsequent purchaser for value without notice of the existence of the lien.² Where part of the consideration for a deed is the vendee's assumption of certain debts of the vendor, amounting to a sum certain, and the vendee settles such debts by compromise for less than their face, he is liable to the vendor for the rebate on such debts since he acts in the matter as the vendor's agent. The vendor has a lien for the amount of such rebate, and a vendor's lien may be enforced after the vendee has sold the land to one who buys with notice of the lien.³

¹ *Harsbarger v. Foreman*, 81 Ill. 364; *Moshier v. Meek*, 80 Ill. 79; 2 *Warvelle on Vendors*, pp. 699, 700.

² *Bang v. Brett* (Minn. 1895), 63 N. W. Rep. 1067.

³ *Koch v. Roth*, 150 Ill. 212; 37 N. E. Rep. 317, per Magruder, J.; "Did a vendor's lien exist in favor of appellee for the difference between the amount of indebtedness agreed to be paid and the amount actually paid? Counsel for appellants refer to a statement in *Devlin on Deeds* (Vol. 2, § 1256), in support of the proposition that, if the obligation of the vendee of land be for the discharge of a liability to a third party, no lien is retained by the vendor when the conveyance is absolute; and that, in order to create a vendor's lien, there must not only be a debt for unpaid purchase-money to a fixed amount, but that such debt must be due directly to the vendor. The cases relied on in support of the proposition are *Patterson v. Edwards*, 29 Miss. 67; *Chapman v. Beardsley*, 31 Conn. 115; *Hiscock v. Norton*, 42 Mich. 320; 3 N. W. Rep. 868; *Sears v. Smith*, 2 Mich. 243; *Vandoren v. Todd*, 3 N. J. Eq. 397. In the Mississippi case the deed recited a consideration of \$10,000, paid in cash, and 'in consideration of said Edwards (the vendee) assuming to well and truly pay and satisfy the

principal and interest, due upon 'two certain notes due to the Planters' Bank, and payable February 26, 1840. The deed, upon its face, left the precise amount of the consideration unstated, and to be determined by reference to an outside matter. In the Connecticut case, also, the amount of the consideration was indefinite, it appearing that the vendee, to whom the conveyance was made, assumed the payment of 'other claims, together with the mortgage debt to the bank.' In neither of the other cases referred to did the facts show an assumption of the debts of the vendor by the vendee. In *Sears v. Smith*, *supra*, the lien was held to have been waived, because the vendor accepted the note of a third person, either as security or in absolute payment for the land. In *Vandoren v. Todd*, *supra*, it was held that the lien was not waived, although the period of payment was dependent upon the life of another person, etc. In *Hiscock v. Norton*, *supra*, the vendee agreed to build a house for the vendor, and other elements of an indefinite character entered into the consideration; and there was held to be no lien, because the sale was not for a specific sum, and it could not be ascertained with any certainty what the amount in money was for which the lien was

§ 357. Vendor's lien—Expressly reserved.—Where the deed expressly reserves a vendor's lien, the superior title to the land conveyed remains in the vendor, on the death of the ven-

sought to be enforced. Other cases are referred to by counsel where the vendee agreed to support the vendor during his life, and where the consideration was for personal services of an indefinite character, such as *Arlin v. Brown*, 44 N. H. 102; *Brawley v. Catron*, 8 Leigh, 522; *McCandlish v. Keen*, 13 Gratt. 615; *McKillip v. McKillip*, 8 Barb. 552. The rule extracted from all these cases by Pomeroy, in his work on Equity Jurisprudence, is thus stated by him (Vol. 3, § 1251): 'The grantor's lien, wherever recognized, is only permitted as a security for the unpaid purchase price, and not for any other indebtedness or liability. There must be a certain, ascertained, absolute debt owing for the purchase price; the lien does not exist in behalf of any uncertain, contingent, or unliquidated demand.' In the case at bar, the amount of indebtedness to be paid by the vendee was fixed at a specified sum, which went to make up the amount of the consideration named in the deed. Hence there was no violation of the rule laid down by the author above referred to in the following words: 'The vendor can not claim a lien as security for an uncertain demand.' 2 Devlin on Deeds, § 1256. Of course, where the obligation of the vendor to discharge a definite amount of indebtedness owing by the vendor appears to be substituted for the purchase-money, or to be taken instead of the purchase-money, or as a direct security for it, the lien is lost. But we see nothing in the facts of the present case to indicate that such was designed to be the object of the agreement to pay the vendor's debts. Upon principle, there can be no good reason why there should not be a lien

for unpaid purchase-money due the vendor, whether such money is to be paid into the hands of the vendor himself or into the hands of a creditor for his benefit. The obligation to pay the debts in such case is that of the vendee himself, and not the obligation of a third person, and, therefore, can not be regarded as the taking of such outside security as will waive the lien. 2 Warvelle on Vendors, p. 714; *Boynton v. Champlin*, 42 Ill. 57; *Sears v. Smith*, *supra*; *Lehndorf v. Cope*, 122 Ill. 317; 13 N. E. Rep. 505. In *Phelps v. Reeder*, 39 Ill. 172, where one of two tenants in common of land purchased his cotenant's interest therein, and there were mechanics' liens upon the premises, which were to be paid off by the purchasing tenant by allowing a sale to take place under the anticipated decree, and having him become the purchaser, and he was to be allowed, as a credit on the purchase-money, one-half of the full amount of those debts; it was held that this agreement constituted the purchaser the agent of his vendor in respect to the payment of these liens; that, as such agent, he could not speculate in regard to the discharge of the liens at the expense of his principal; that, whatever abatement of the liens the agent may have procured, he would be required to allow it to his principal. In *Hitchcock v. Watson*, 18 Ill. 289, we held that an agent or trustee for another can not speculate in the execution of his fiduciary duties or employment; and, if he by compromise or otherwise liquidates or pays off a debt of his principal or *cestui que trust* at less than he has received for that purpose, he is accountable for the residue."

dee, and the vendor's lien on the proceeds of the land, sold by the vendee's administrator, is superior to the claim of the vendee's family for the yearly allowance, and claims for funeral expenses or the general administration expenses. The facts that a renewal note is given in place of purchase-price notes, which were secured by a vendor's lien, the renewal note expressly continuing the lien, and that the vendee also executes a deed of trust to secure such note, does not impair the original vendor's lien.¹

¹ *Jackson v. Ivory* (Texas App. 1895), 30 S. W. Rep. 716, per Collard, J.: "The contract was executory, and no title passed to Cox, and could not pass, until the purchase-money notes were paid. *Foster v. Powers*, 64 Texas, 247; *McKelvain v. Allen*, 58 Texas, 383; *Lundy v. Pierson*, 67 Texas, 233; 2 S. W. Rep. 737. The transfer of these notes by Faubion to Francis Smith & Co., with his title to the land, vested in the assignee all the rights held by Faubion, both in the lien and the title to the land. Cox consented to this, and executed a new note as a renewal of all other notes, expressly continuing and preserving the lien, and declaring that the new note was for the original purchase-money. This gave the renewal note the same character and the same binding effect as the original notes. *Johnson v. Townsend*, 77 Texas, 639; 14 S. W. Rep. 233. The execution of the deed of trust by Cox and wife to secure the note by express lien upon the land did not waive or impair the original lien. It was a confirmation of it. *Irvin v. Garner*, 50 Texas, 48; *De Bruhl v. Maas*, 54 Texas, 464; *Dibrell v. Smith*, 40 Texas, 447. All the rights of the original vendor were transferred to appellee, and he occupied the same relation to the property, and could enforce the same rights, as the original vendor. He held and owned the lien, and also the superior title to the land. The estate of Cox had no title

to the land as against the vendor so long as the purchase-money remained unpaid, and it could not become subject to administration as ordinary assets. The vendor's rights and the right of his assignee were not affected by the death of Cox. His death did not create a title different from that possessed by him, and his heirs could not, upon his death, become vested with rights in the land superior to his, as against the superior title and right of the vendor's assignee. The title to the land was not in the estate, and the surviving constituents of the family would have no more right to a homestead, or to a year's allowance preferred to the vendor's rights, than they could have to other lands belonging to strangers. In this respect, the vendor's lien is different from ordinary mortgages and liens created by contract of the deceased mortgagor. The latter are subordinate to administration and statutory rules of priority declared and enjoyed therein. *Robertson v. Paul*, 16 Texas, 472; *Giddings v. Crosby*, 24 Texas, 295; *McLane v. Paschal*, 47 Texas, 365; *Mabry v. Ward*, 50 Texas, 404; *Jenkins v. Cain*, 72 Texas, 88; 10 S. W. Rep. 391; *Clements v. Neal*, 1 Posey Unrep. Cas. (Tex.) 41. In the very nature of the vendor's rights in the land and his lien, which, under circumstances of failure of the vendee to pay, will entitle the former to a recovery of the land itself or a rescission of the sale, there can be no

§ 358. Reserving lien on crops to secure purchase-money.—

A reservation in a deed of a lien on crops to be thereafter planted on the land, to secure the purchase-money, is valid, and entitled to precedence over the lien of a subsequent mortgagee, who had actual notice thereof.¹

right in the vendee, or his heirs after his death, that can defeat it.”

¹ *Martin v. Schichtl*, 60 Ark. 595; 31 S.W. Rep. 458, where the court said: “In *Apperson v. Moore*, 30 Ark. 56, which was a suit in equity on the mortgage of a future crop, it was held the lien of a mortgage on an unplanted crop attaches, in equity, as soon as the subject of the mortgage comes into existence; and can be enforced, in a proceeding to foreclose, against the mortgagor, and those holding under him with record notice. This power was recognized and confirmed by an act of the general assembly, approved February 11, 1875, which made mortgages on crops to be planted valid. It has been frequently held that a reservation in a lease of a farm of a lien on crops not *in esse*, which are to be grown on the land, as security for the payment of a stipulated rent, is sufficient to hold the crops so soon as they come into existence. *Baxter v. Bush*, 29 Vt. 465. The reservation of the lien on crops in this case was an equitable mortgage. If a mortgage on a crop before it is planted, to secure an ordinary debt, and the lien of the lessor reserved in the lease, attach to the crop so soon as it is planted, the lien reserved by Mrs. Rice certainly attached and held the crops as a security for the payment of the purchase-money. The fact that the reservation is inconsistent with and repugnant to the grant in the deed does not defeat the lien. Reservations of easements, like a right of way in conveyances of land, and in leases of ‘grass, herbage, feeding and pasturage,’ have been upheld, and yet they are inconsistent

with the grant. *Rose v. Bunn*, 21 N. Y. 275. The case of *Darling v. Robbins*, 60 Vt. 347; 15 Atl. Rep. 177, sustains our view. In that case it was held that a ‘reservation in a warranty deed of land of the crops that might be produced thereon, to secure the interest on the purchase-money, is a valid lien, and may be foreclosed.’ The difference between this and that case is, the lien reserved on the crops in the former is to secure the payment of the notes given for the purchase-money, instead of the interest alone, as in the latter case. But the rule is the same, and sustains the lien in both cases. In *Walters v. Meyer*, 39 Ark. 560; *Watson v. Pugh*, 51 Ark. 218; 10 S. W. Rep. 493, and *Quertermous v. Hatfield*, 54 Ark. 16; 14 S. W. Rep. 1096, cited by appellants, no lien on crops was reserved or created by contract, and the law gave none. They were cases in which land was sold, and the vendee executed his note for the purchase-money, and promised to pay it as rent. The court held that ‘calling the purchase-money rent would not make it such, nor create a lien on the crops for its payment.’ In *Walters v. Meyer*, while so holding, Chief Justice English, who delivered the opinion of the court, said: ‘No doubt a vendor may, by contract, reserve a lien upon lands and crops, its fruits, to secure the payment of purchase-money.’ The calling the lien reserved on the crops a ‘landlord’s lien’ does not defeat the manifest intent of the parties to create it. The misnomer can not defeat the intention of the parties. Equity requires no particular words to be used in creating

§ 359. Vendor's right to earnest money.—While courts of equity, not less than courts of law, recognize the rights of parties to a contract to stipulate for penalties and forfeitures, and while, on a proper showing, courts of equity will always relieve against forfeitures, it is a rule of universal application that they will never enforce either a penalty or a forfeiture.¹ But where a vendee has deposited part of the price as earnest money, to be forfeited as liquidated damages in case he fails to fulfill his contract, and he does fail to fulfill it, a court of equity will enforce a vendor's title to the earnest money, since it is not a penalty, but compensation for the breach of contract.²

§ 360. Equitable mortgage analogous to vendor's lien.—There is no doubt upon the authorities that where one party advances money to another upon the faith of a verbal agreement by the latter to secure its payment by a mortgage upon certain lands, but which is never executed, or which, if executed, is so defective or informal as to fail in effectuating the purpose of its execution, equity will impress upon the land intended to be mortgaged a lien in favor of the creditor who advanced the money for the security and satisfaction of his debt. This lien attaches upon the payment of the money and, unless there is a waiver of it, express or implied, remains and may be enforced so long as the debt itself may be enforced, and no waiver can be implied from the act of the creditor in receiving a mortgage which by reason of fraud, inadvertence or mistake

a lien. It looks through the form to the substance of an agreement; and if from the instrument evidencing the agreement 'the intent appear to give or to charge or to pledge property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified, the lien follows.' In the case of *Flagg v. Mann*, 2 Sumn. 486; Fed. Cas. No. 4,847, Judge Story said: 'If the transaction resolve itself into a security, whatever may be its form, and whatever name the parties may

choose to give it, it is in equity a mortgage.' *Bell v. Pelt*, 51 Ark. 433; 11 S. W. Rep. 684; 3 Pomeroy on Equity Jurisprudence, § 1237; 2 Devlin on Deeds, § 1237."

¹ 2 Story on Equity Jurisprudence, § 1319; *Livingston v. Tompkins*, 4 Johns. Ch. 415; *Marshall v. Vicksburg*, 15 Wall. 146; *Vail v. Drexel*, 9 Ill. App. 439; *Horsburg v. Baker*, 1 Pet. 232; *Smith v. Jewett*, 40 N. H. 530.

² *Bucklen v. Hasterlik*, 155 Ill. 423; 40 N. E. Rep. 561.

is not effectual to secure a specific lien on the lands or any part of them, nor is this lien merged in any such instrument subsequently executed.¹ Some of the cases hold that the lien of the party who has advanced money under such circumstances is analogous to that of the vendor of real estate for the unpaid purchase-money. The vendor's lien rests solely upon the doctrine of equity that it would be inequitable for the vendee who has received the legal title without payment of the purchase-money to hold the estate discharged from the claim of the seller for its price, and it is certainly difficult to see any just distinction between the two cases. In one case a party receives the title to real property without paying for it, with or without an agreement that his vendor shall be secured in the payment of the purchase price by a lien upon it by way of mortgage or otherwise. In the other case the party advances money under an agreement that its payment shall be secured by mortgage upon specific real estate, but which agreement has never been perfected. The right of the vendor and that of the person who has advanced the money are not essentially different, and each would seem to commend itself with equal force to the conscience of a court of equity. The doctrine of equitable mortgages is not limited to written instruments intended as mortgages, but which by reason of formal defects can not have such operation without the aid of the court, but applies also to a very great variety of transactions to which equity attaches that character.² It is not necessary that such transactions or agreements as to lands should be in writing in order to take them out of the operation of the statute of frauds for two reasons, first, because they are completely executed by at least one of the parties and are no longer executory, and, secondly, because the statute by its own terms does not affect the

¹ *Sprague v. Cochran* (1894), 144 N. Y. 104; *De Peyster v. Hasbrouck*, 11 N. Y. 582; *Payne v. Wilson*, 74 N. Y. 348; *Coman v. Lakey*, 80 N. Y. 345; *Husted v. Ingraham*, 75 N. Y. 251; *Perry v. Board of Missions*, 102 N. Y. 99; *Chase v. Peck*, 21 N. Y. 581; *Haverly v. Becker*, 4 N. Y. 169; *Glacken v. Brown*, 39 Hun, 294; *Lanning v. Tompkins*, 45 Barb. 308; *Matter of Howe*, 1 Paige, 125; *Smith v. Smith*, 125 N. Y. 224; *Hoag v. Town of Greenwich*, 133 N. Y. 152.

² *Sprague v. Cochran* (1894), 144 N. Y. 104.

power which courts of equity have always exercised to compel specific performance of such agreements.¹

¹ *Smith v. Smith*, 125 N. Y. 224; 2 R. S. (N. Y.), § 10.
Beardsley v. Duntley, 69 N. Y. 577;

CHAPTER X.

PAYMENT.

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| § 361. Payment defined. | § 381. Taxes paid under compulsion. |
| 362. Conditional payment. | 382. The same subject continued. |
| 363. Voluntary payments—Illustrations. | 383. Receipts. |
| 364. Payment under protest. | 384. Receipts in full. |
| 365. Compulsory payments—Recovery back. | 385. The same subject continued. |
| 366. Payment by a stranger. | 386. Receipt under seal. |
| 367. Medium of payment—Illustration. | 387. Effect of a receipt. |
| 368. Payment to creditor's creditor or to agent after principal's death. | 388. Application of payments. |
| 369. Paying creditor's debt—West Virginia doctrine. | 389. Payments on open account. |
| 370. Payment by order. | 390. Application by the creditor. |
| 371. Payment by check. | 391. Debts barred by statute of limitations. |
| 372. The same subject continued—Illustration. | 392. Rights of third parties. |
| 373. Certified checks. | 393. Time of appropriation. |
| 374. Further illustration. | 394. Appropriation by law. |
| 375. Payment by bill or note. | 395. Partial payments. |
| 376. The same subject continued. | 396. Further illustrations. |
| 377. Further illustration. | 397. Exception to the rules as to application of payments. |
| 378. Evidence of intention to merge the debt. | 398. The same subject continued. |
| 379. The same subject continued. | 399. Payments made under mistake of fact. |
| 380. Repayment of taxes illegally collected. | 400. Payments made under mistake of law. |
| | 401. Presumption of payment—Time of payment. |
| | 402. Executor's duty to pay debts. |

§ 361. **Payment defined.**—Originally payment was the performance of a promise to pay money, at the time and in the manner required by the terms of the contract; but it has been extended to include the delivery of money in satisfaction of a debt, after a default has been made in payment according to the terms of the contract. But the delivery of anything else than money is not a payment, and can not be pleaded as such.

Thus, if wood is delivered and received as a payment of money due on a note it is only by virtue of a subsequent and independent agreement to that effect, and these facts can not be shown under a plea of payment.¹ Payment, in a restricted sense, is a discharge in money of a sum due. As usually understood, it means the transfer of money from one person, who is the payor, to another, who is the payee, in satisfaction of a debt. In such sense, it would not include an exchange or compromise, or an accord and satisfaction, but would mean the full satisfaction of a debt in money. But, in its general sense, payment is the performance of an agreement, or the fulfillment of a promise or obligation, whether it consists in giving or doing. The discharge of a contract or obligation in money or its equivalent, with the assent of the parties, would constitute payment. It may be made in something else than money; in fact, anything that the creditor will accept as payment. It is a mode of extinguishing obligations. To constitute payment, therefore, money, or some other valuable thing, must be delivered by the debtor to the creditor for the purpose of extinguishing the debt, and the creditor must receive it for the same purpose.² Accordingly where a vendor of land gave the agent making the sale a note for his commissions, payable when the purchase-money notes were paid, the discharge of the notes with the consent of the parties, although money did not pass, constituted payment.³ Upon similar grounds it is held that

¹ *Ulsch v. Muller*, 143 Mass. 379; *Grinnell v. Spink*, 128 Mass. 25; *Wheaton v. Nelson*, 11 Gray, 15.

² *Bush v. Abraham*, 25 Ore. 336; 35 Pac. Rep. 1066.

³ *Bush v. Abraham*, 25 Ore. 336; 35 Pac. Rep. 1066, Lord, C. J.: "As payment is but a mode of extinguishing a debt, it lies with the creditor whether he will accept something different from that which was owing as payment of his debt. So that, if the defendant chose to enter into an agreement with the company to accept something else than money, though of less value, in satisfaction and discharge of the company's notes, when

consummated it would be a substituted payment, and as effectually extinguish such notes as though payment had been made in money. Such being the case, any agreement to that effect carried into execution by the parties would operate as payment of the note in question within the purview of the condition to which the notes sued on are subject. We hold, therefore, that the payment contemplated by the condition need not necessarily be made in money, but any mode which operated as payment by which such note was satisfied and extinguished, to which the defendant agreed."

there is no variance between the proof and the allegations of a defense denominated a defense of payment, when all the facts constituting such payment are set out in such defense, although such defense appears more properly to constitute an accord and satisfaction. The nature of the defense is to be determined from the facts pleaded, and not from the name given to it by the pleader.¹

§ 362. Conditional payment.—Generally, a payment may be made conditionally. Thus, if the debtor transmit money to his creditor as a payment in full of the demand, the creditor may not receive and retain the money as a credit upon a larger sum claimed by him, without discharging the debtor as to the whole.² But a party can not impose conditions upon the payment of a liquidated demand admitted to be due; and even if the debtor transmits the money to the creditor with a condition attached, the creditor may keep the money and apply it to his claim and disregard the condition.³ Conditions, attached to payments, must be clear and expressly stated. No conditions are to be implied.⁴

¹ *Green v. Hughitt Township* (S. Dak. 1894), 59 N. W. Rep. 224, Corson, P. J.: "Whether technically a payment, or an accord and satisfaction, is not very material, as the facts are fully stated. By section 3456, Compiled Laws, a payment is defined as the 'performance of an obligation for the delivery of money,' and an accord is defined as 'an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled' (§ 3483, Compiled Laws). Whether, therefore, the facts, as claimed by the respondents to have been proven, show a payment or an accord and satisfaction, is not easily determined, and, in our view, is not necessary to be determined in this case. That they did constitute payment or an accord and satisfaction can not be doubted. Courts are governed, under our system of practice,

by the facts stated in the party's pleadings."

² *Washington Gas Co. v. Johnson*, 123 Pa. St. 576; *Berdell v. Bissell*, 6 Colo. 162; *McDaniels v. Bank*, 29 Vt. 230; *Preston v. Grant*, 34 Vt. 201; *Bull v. Bull*, 43 Conn. 455; *Potter v. Douglass*, 44 Conn. 541; *Elton v. Johnson*, 16 Conn. 253; *Lyman v. Rasmussen*, 27 Minn. 384; 7 N. W. Rep. 687; *Detroit, etc., Railroad Co. v. Smith*, 50 Mich. 112; *McAfee v. Fisher*, 64 Cal. 246; *Libby v. Hopkins*, 104 U. S. 303.

³ *Hamill v. German Nat. Bank*, 13 Colo. 203. Where a draft was transmitted to pay a note, upon which suit had been brought, with an express condition to dismiss the suit, it was held the creditor might keep the draft, apply it as far as it went, and continue his suit.

⁴ *Ziegler v. McFarland*, 147 Pa. St. 607. See also, *Castner v. Fisher*, 104 N. C. 392.

§ 363. Voluntary payments—Illustrations.—A justice of the peace, who accepts a judgment debtor's check payable to himself personally in payment of the judgment rendered by him, and then satisfies the judgment on his record, and pays to the successful party the amount due him, can not, on dishonor of the check, recover of the party the money voluntarily paid him; and whether the judgment debtor had money in the bank to pay the check between the times it was made and presented is immaterial.¹ Voluntary payments of pension money, made to the Soldiers' and Sailors' Home by an inmate thereof, in pursuance of an agreement under which his admission to the home was obtained, can not be recovered.² But where the plaintiff is in the employ of defendants, who are advancing him money from time to time on his wages, an overpayment by them to him under such circumstances can not be considered as a voluntary payment in the sense that they can not require him to account for it.³

§ 364. Payment under protest.—Where a party, with full knowledge of the facts, pays a demand that is unjustly made against him, and to which he has a valid defense, and where no special damage or irreparable loss would be incurred by making such defense, and where there is no claim of fraud upon the part of the party making such claim, and the payment is not necessary to obtain the possession of the property wrongfully withheld, or the release of his person, such payment is voluntary, and can not be recovered. Nor will the fact that such payment was accompanied by a protest make that involuntary which otherwise would be voluntary. A protest is of no avail unless there be duress or coercion of some

¹ *Garretson v. Joseph*, 100 Ala. 279; 13 So. Rep. 948.

² *Bryson v. Home for Soldiers, etc.* 168 Pa. St. 352; 31 Atl. Rep. 1008.

³ *Farrell v. Burbank*, 57 Minn. 395; 59 N. W. Rep. 485, per Cauty, J.: "The finding that this over-payment was 'voluntary' amounts to nothing. This is not the kind of a payment or

the kind of a case where the doctrine can be invoked that a voluntary payment can not be recovered back. This is a case of a current running account, where there are advances on the one side and continuous earning of the same on the other, and the law implies an agreement to repay any over-payments."

character, and then its only office is to show that the payment is the consequence of such duress or coercion.¹

§ 365. Compulsory payments—Recovery back.—A payment by a person to free his goods from an attachment levied for the purpose of extorting money, by one who knows that he has no cause of action, is a payment under duress, and the money paid can be recovered back.² And so a trader who pays money he does not owe under the threat that his stock in trade will be attached if he does not pay it may recover back the amount as paid under compulsion.³

¹ *Wessel v. Johnson Land Co.*, 3 N. Dak. 160; 54 N. W. Rep. 922; *Benson v. Monroe*, 7 Cush. 125; *Commissioners v. Walker*, 8 Kan. 431; *Emmons v. Scudder*, 115 Mass. 367; *Lester v. Mayor*, 29 Md. 415; *Potomac Coal Co. v. Cumberland Co.*, 38 Md. 226; *Gerecke v. Campbell*, 24 Neb. 306; *Mariposa Co. v. Bowman*, Deady, 228; *Lamborn v. County Commissioners*, 97 U. S. 181; *Powell v. Board*, 46 Wis. 210; *People v. Wilmerding*, 136 N. Y. 363; *Ashley v. Ryan*, 6 Ohio Cir. Ct. 208; *Copas v. Anglo-Am. Provision Co.*, 73 Mich. 541; *McCabe v. Shaver*, 69 Mich. 25.

² *Chandler v. Sanger*, 114 Mass. 364.

³ *Weber v. Kirkendall* (1894), 39 Neb. 193, per Ragan, C.: "It is undoubtedly a general rule that money paid voluntarily, without fraud, and with a full knowledge of all the facts, can not be recovered back by the party who has so paid it. There are, however, many exceptions to this rule, or rather instances in which the payments, having been made under a pressure of an enforced emergency, are not considered voluntary, but compulsory, in law. *Cobb v. Charter*, 32 Conn. 358. In that case the defendant had possession of a chest of tools belonging to the plaintiff, who was a mechanic, and refused to give up the chest unless plaintiff would pay a bill

for board which defendant had against the plaintiff's son, and for which the plaintiff was in no manner liable. To get possession of his chest of tools, Cobb paid the board bill, and the court held that it was not voluntarily paid, and that it might be recovered back. In *Vyne v. Glenn*, 41 Mich. 112; 1 N. W. 997, the defendant compelled plaintiff to make a settlement with him, and to forgive certain moneys which the defendant lawfully owed the plaintiff, by informing the plaintiff that he had stopped payments of certain moneys due the plaintiff from third persons, knowing at the time that if plaintiff failed to get these moneys owing him he would be financially embarrassed, or perhaps ruined. It was held that the settlement made was obtained by duress, and would be set aside, and the defendant compelled to pay the moneys to plaintiff which the plaintiff had forgiven him in the settlement made. In *Spaids v. Barrett*, 57 Ill. 289, goods were wrongfully taken from the owner thereof by means of a writ of attachment fraudulently obtained, and the party in possession refused to surrender the goods on payment of the sum actually due, but demanded more than twice that amount as a condition of his releasing the attachment and surrendering possession of the goods. The owner paid

§ 366. **Payment by a stranger.**—A payment by a stranger does not ordinarily inure to the benefit of a debtor. Thus, in an action on a covenant to pay money, it was held to be no defense that the creditor had accepted a full satisfaction from a third person.¹ So, where a creditor's bill founded on a judgment was instituted, a plea that the judgment had been paid by the municipal corporation as a gratuity to the complainant, a police officer, who had obtained the judgment for costs in an

the sum demanded, and the court held that it was not voluntarily paid, and might be recovered back. In *Adams v. Schiffer*, 11 Colo. 15; 17 Pac. Rep. 21, Adams agreed to convey to Schiffer an interest in certain mining property by a deed passing a good title. In pursuance of this agreement he gave Schiffer a quitclaim deed, which he accepted. A third party made an unfounded claim to the property, which Schiffer bought up. At the time, Adams was a depositor in Schiffer's bank, and Schiffer compelled him, by refusing to pay his checks, to settle for a part of the sum paid by Schiffer to such third party. The court held that such a payment was involuntary. This money which appellees have extorted from appellant may not have been obtained by duress of property, technically speaking, but it was obtained from appellant involuntarily. It was obtained by a specie of intimidation, fraud and compulsion, and no court of equity will permit them to retain it. If this had been a debt which appellant owed the appellees, then, had appellant paid it under the fear that if he did not his goods would have been attached, the case would be entirely different. But the controlling facts in this case are that it was not the appellant's debt, and that it was not voluntarily paid." In *Weber v. Kirkendall*, 44 Neb. 766; 63 N. W. Rep. 35, after a rehearing of the case last recited, the court said: "It has been frequently held, and

may be accepted as sound law, that payments or concessions exacted from the owner of property unlawfully withheld, in order to obtain possession thereof, where the detention is accompanied by immediate hardship or irreparable injury, may be avoided on the ground of compulsion, although not amounting to technical duress. See *Fitzgerald v. Fitzgerald*, etc., *Construction Co.*, 44 Neb. 463; 62 N. W. Rep. 899, and authorities cited. But the mere apprehension of legal proceedings, unaccompanied by any act of hardship or oppression, has never been held sufficient ground for the avoiding of a contract. The books, on the other hand, abound in cases holding that, where the parties are on terms of equality towards each other, one threatened with civil process is required to make his defense in the first instance to the merits of the claims, and can not postpone litigation by paying the demand and afterwards maintain an action therefor. No court would be warranted in going further in protecting parties against unconscionable demands than did we in the opinion heretofore filed in this case. And yet the ground of our conclusion therein was not alone the threatened attachment, but also the detention of the plaintiff, amounting to physical restraint, and the alleged fraudulent representations with regard to his liability for the indebtedness claimed."

¹ *Clow v. Borst*, 6 John. 37.

action against him for false imprisonment, was held to be bad.¹ These cases proceed upon the principle that satisfaction from a stranger amounts to nothing.² But if the payment by a stranger operates as a purchase of the claim, then of course, this may be pleaded by the debtor.³ And, if a creditor accept money from a stranger, in extinguishment of a claim, and then sue and recover from his debtor, he would be liable to repay the stranger what he had paid.⁴ It seems that if a stranger pay an over-due note, and take it away with him, but decline having it canceled, this will be deemed a payment, and not a sale.⁵

§ 367. Medium of payment—Illustration.—Where the purchaser of a printing establishment contracts to pay a certain amount in printing, the seller can not enforce the collection of such amount in cash, as a profit presumably attaches to the printing.⁶ And where one person is obligated to pay money

¹ *Bleakley v. White*, 4 Paige, 654.

² *Muller v. Eno*, 14 N. Y. 597.

³ *Bleakley v. White*, 4 Paige, 654; *Cason v. Heath*, 86 Geo. 438; *Wright v. Mix*, 76 Cal. 465.

⁴ *Bleakley v. White*, 4 Paige, 654, 656. See, also, *Edgcumbe v. Rod*, 1 Smith's Rep. (Eng. K. B.) 515; *Clow v. Borst*, 6 John. 37; *King v. Barnes*, 109 N. Y. 267, 289.

⁵ *Burr v. Smith*, 21 Barb. 262.

⁶ *Allen v. Wall* (1893), 7 Wash. 316; 35 Pac. Rep. 65, per Dunbar, C. J.: "To enforce the collection of this amount in cash would be equivalent, or at least might be equivalent, to compelling the appellant to pay more than he contracted to pay for the plant. The parties must be bound by the contracts which they make." In *Sheehy v. Chalmers* (Cal. 1894), 36 Pac. Rep. 514, the court said: "The code provides that: 'In an action on a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff,

iff, whether it be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein.' Code Civil Procedure, § 667. This action was on a contract in writing for the direct payment of money, made payable in 'U. S. gold coin.' There was no error, therefore in making the judgment payable in the kind of money specified in the contract. *Carpentier v. Atherton*, 25 Cal. 564." In *Butler v. Merchant* (Texas App. 1894), 27 S. W. Rep. 193, in an action on a contract to pay a certain sum in Mexican dollars, the evidence showed that a Mexican dollar, between the time the money became due and the institution of the suit, was worth from 69 to 92 cents. *Held*, that it was not error to allow the value of the Mexican money at the rate of 80 cents on the dollar, although at the time of the trial it was worth only 66 cents, as plaintiff should not suffer from defendant's failure to pay.

for the use of another, a payment made in any mode, either property or negotiable paper or sureties, if such payment is received as full satisfaction of the demand, is equivalent to, and will be treated as, a payment in cash. Where payment is received as a complete satisfaction, and the debt or obligation is extinguished, it is a matter of no moment to the person to whose use the payment is made whether it is made in money, property, or obligations. The benefit to him is the same, and the obligation to refund should be the same.¹

§ 368. Payment to creditor's creditor or to agent after principal's death.—The fact that a debtor has voluntarily paid, without the assent of his creditor, a debt due by the latter to a third person, is no defense in an action against the debtor by the creditor.² And in an action for a decree satisfying a judgment, in which a set-off is claimed of fee bills owed by the judgment creditor, and included in the judgment for costs, a complaint simply stating that the fee bills were paid by complainant is demurrable, because no one can volunteer to pay another's debts, and then claim repayment.³ Ordinarily

¹ Brandt on Suretyship, § 285. The rule laid down by this author is adopted in *Smith v. Mason*, 44 Neb. 610; 63 N. W. Rep. 41, and the following cases are cited: *Witherby v. Mann*, 11 Johns. 518; *Stone v. Porter*, 4 Dana, 207; *Robertson v. Maxcey*, 6 Dana, 101; *Cornwall v. Gould*, 4 Pick. 444; *Stubbins v. Mitchell*, 82 Ky. 535; *Atkinson v. Stewart*, 2 B. Mon. 348; *Ralston v. Wood*, 15 Ill. 159; *Brisendine v. Martin*, 1 Ired. 286; *Pinkston v. Taliaferro*, 9 Ala. 547; *Anthony v. Percifull*, 8 Ark. 494; *White v. Carlton*, 52 Ind. 371; *Keller v. Boatman*, 49 Ind. 104. The case of *Bell v. Boyd*, 76 Texas, 133; 13 S. W. Rep. 232, does not conflict with the rule above stated. In that case a principal and one of several sureties executed their note, which was accepted by the creditor, in payment of the former note. While it was held in that case that

the surety upon the new note was not entitled to contribution from the sureties upon the original note, the court recognizes the doctrine that, where one of several sureties discharges the original obligation by his individual note, he is in a position to recover contribution from his cosureties.

² *Harrison v. Moran*, 163 Mass. 495; 40 N. E. Rep. 850, per Field, C. J.: "It is no defense for a debtor that he has voluntarily paid to a creditor of the plaintiff what he owed the plaintiff, unless such payment is authorized or assented to by the plaintiff. Credits sometimes can be attached and taken on execution, but, without legal process, a debtor can not compel the person to whom he is indebted to assent to the payment of the debt to a creditor of that person."

³ *Keifer v. Summers*, 137 Ind. 106; 35 N. E. Rep. 1103.

payment to an agent after the principal's death does not discharge the obligation, even if made in actual ignorance of the death. But long-continued silence on the part of a principal when a payment has been ignorantly made to his agent after revocation of his authority raises a presumption, in favor of the payor, that the agent has accounted for the money.¹ And where notes for the purchase-money of land are made payable to the vendor's agent or "bearer," payment to the agent, who still holds the notes, after his principal's death, is valid, and entitles the vendee to a deed.²

§ 369. Paying creditor's debt—West Virginia doctrine.—

A stranger paying the debt of another without request can not sustain an action at law against such other unless he has in some way ratified such payment. But such payment by a stranger, if accepted as such by the creditor, discharges the debt, so far as the creditor is concerned, and also as to the debtor, if he satisfy it; and a stranger who pays a debt without request by the debtor, when his payment is not ratified by the debtor, may bring a suit in equity praying relief in the alternative, that is, that if the debtor do not ratify such payment the debt may be enforced in his favor, as its equitable assignee, or, if so ratified, that he be decreed repayment of the amount paid for the use of the debtor.³

¹ *Long v. Thayer* (1893), 150 U. S. 520; 14 Sup. Ct. Rep. 189, per Brown, J.. "Western's death undoubtedly operated as a revocation of Kinney's authority to act for him or his estate. The payments made to Kinney as his agent would not be sufficient to discharge Thayer's obligation to his estate, even if such payments were made by him in actual ignorance of Western's death. *Michigan Insurance Co. v. Leavenworth*, 30 Vt. 11; *Davis v. Windsor, etc., Bank*, 46 Vt. 728; *Jenkins v. Atkins*, 1 Humph. 294; *Clayton v. Merrett*, 52 Miss. 353; *Lewis v. Kerr*, 17 Iowa, 73. Indeed, it was said by this court in *Galt v. Gallo-way*, 4 Pet. 332, 344, that 'no princi-

ple is better settled than that the powers of an agent cease on the death of his principal. If an act of agency be done subsequent to the decease of the principal, though his death be unknown to the agent, the act is void.'"

² *Long v. Thayer* (1893), 150 U. S. 520; 14 Sup. Ct. Rep. 189.

³ *Crumlish v. Central Imp. Co.* (1893), 38 W. Va. 390; 18 S. E. Rep. 456, per Brannon, J. "If his payment is not ratified, he may go into equity, praying that if the debtor ratify it he may be decreed to repay him, or, if he do not ratify the payment, that the debt be treated as unpaid, as between him and the debtor, and that

§ 370. Payment by order.—The mere acceptance by a creditor from his debtor of an order on a third person, without

it be enforced in his favor, as an equitable assignee. *Neely v. Jones*, 16 W. Va. 625; *Moore v. Ligon*, 22 W. Va. 292; *Beard v. Arbuckle*, 19 W. Va. 135. But how as to the creditor? When a stranger pays him the debt of a third party, without request of such third party, as in this case, can the creditor say the debt is yet unsolved, and enforce it against the debtor, as is attempted to be done by *Jamison & Co.*? Can he accept such payment, and say, because it was made by a stranger, it is no payment? Is his acceptance not an estoppel by conduct *in pais*, as to him? There has been a difference of opinion in this matter. The old English case of *Grymes v. Blofield*, Cro. Eliz. 541 (decided in Elizabeth's reign), is the parent of the cases holding that even the creditor accepting payment from a stranger may repudiate and still enforce his demand as unpaid. That case is said to have decided that a plea of accord and satisfaction by a stranger is not good, while *Rolle's Abridgment*, 471 (condition F.), says it was decided just the other way. *Denman*, C. J., questioned its authority in *Thurman v. Wild*, 39 E. C. L. 252; 11 A. & E. 453. Opposite holding has been made in England in *Hawkshaw v. Rawlings*, 1 Strange, 23. Its authority is questioned at the close of the opinion by *Creswell*, J., in *Jones v. Broadhurst*, 67 E. C. L. 173, as contrary to an ancient decision in 36 Henry VI, and against reason and justice. *Parke*, B., seemed to think it law in *Simpson v. Eggington*, 10 Exch. 845. It was followed in *Edgcombe v. Rodd*, 5 East, 294, and *Stark v. Thompson*, 3 T. B. Mon. 296. Lord Coke held the satisfaction good. Coke on Littleton, 206b, 207a. See 5 Rob. Pr. (New), 884; 7 Rob. Pr. (New) 548. The cases of *Goodwin v. Cremer*, 83 E. C. L. 757, and *Kemp v. Balls*, 28 Eng. Law & Eq. 498, seem to hold that payment must be made by a third person as agent for and on account of debtor, with his assent or ratification. In New York, old cases held this doctrine. *Clow v. Borst*, 6 Johns. 37; *Bleakley v. White*, 4 Paige, 654. But later, in *Wellington v. Kelly*, 84 N. Y. 543, *Andrews*, J., said that the old cases were doubtful, but had not been overruled, but it was not necessary in that case to say whether it should longer be regarded as law, and the syllabus makes a *quære* on the point. It was held in *Harrison v. Hicks*, 1 Port. (Ala.) 423, that 'payment of a debt, though made by one not a party to the contract, and although the assent of the debtor to the payment does not appear, is still the extinguishment of the demand.' The opinion says that as between the person paying and him for whose benefit it was paid, a question might arise whether it was voluntary, which would depend on circumstances of previous request, or subsequent, express or implied. This doctrine is sustained by *Martin v. Quinn*, 37 Cal. 55; *Gray v. Herman*, 75 Wis. 453; 44 N. W. Rep. 248; *Cain v. Bryant*, 12 Heisk. 45; *Leavitt v. Morrow*, 6 Ohio St. 71; *Webster v. Wyser*, 1 Stew. (Ala.) 184; *Harvey v. Tama Co.*, 53 Iowa, 228; 5 N. W. Rep. 130. *Bishop on Contracts*, § 211, holds that, if payment 'be accepted by creditor in discharge of debt, it has that effect.' See 2 *Wharton on Contracts*, § 1008. It seems utterly unjust, and repugnant to reason, that a creditor accepting payment from a stranger, of the third person's debt, should be allowed to maintain an action against the debtor pleading and thereby ratifying such payment, on the technical theory that he is a stranger to the

more, will not be regarded as more than a conditional payment. It requires proof to the effect that the parties understood and agreed that the order should be received as absolute payment, and that it was so accepted. The question whether the order was received in payment of the debt is one of fact for the jury.¹ And an order is only conditional payment, even though the creditor accept an order from a third person.² But Vermont³ and Wisconsin⁴ have adopted the rule, that the taking of an order drawn upon a third person for the amount of a previous indebtedness of the drawer is *prima facie* a payment of the debt.⁵ Where an attorney at law having a note

contract. He has himself, for this purpose, allowed him to make himself a *quasi* party. He consents to treat him so, so far as payment is concerned. To regard the debt paid, so far as he is concerned, is but to hold him to the result of his own act. Shall he collect the debt again? Then, can the stranger recover back? What matters it to the creditor who pays? As the supreme courts of Wisconsin and Ohio, in cases above cited, said, this doctrine is against common sense and justice. It does not at all infringe the rule that one can not at law make another his debtor, without request to allow such payment to satisfy the debt as to the creditor; and this court, while recognizing the rule that one can not officiously pay the debt of another, and sue him at law, unless he has ratified it, by allowing the stranger to go into equity and get repayment, makes the payment, in the eyes of a court of equity, operate to satisfy the debtor, and render the stranger a creditor of the debtor. *Neely v. Jones*, *supra*. I know that in *Neely v. Jones*, 16 W. Va. 625, it is held that, 'if a payment by a stranger is neither ratified nor authorized by the debtor it will not be held to be a discharge of the debt;' but although this point is general, that was a case of the stranger seeking to make the

debtor repay, and the case and opinion intended to lay down the rule at law only as between the stranger paying and the debtor, not as between the creditor and debtor."

¹ *Williams v. Costello*, 95 Ala. 592; 11 So. Rep. 9; *Bond v. McMahon*, 94 Mich. 557; *Mead v. Stevens*, 22 Ill. App. 298; *Lupton v. Freeman*, 82 Mich. 638; *Born v. First Nat. Bank*, 123 Ind. 78; *Holmes v. Briggs*, 131 Pa. St. 233; *First Nat. Bank v. Buchanan*, 87 Tenn. 32; 9 S. W. Rep. 202; *Caldwell v. Hall*, 49 Ark. 508; *Lowrey v. Murrell*, 2 Port. (Ala.) 280; *Carriere v. Ticknor*, 26 Ala. 575; *Lee v. Fontaine*, 10 Ala. 755; *Pearson v. Thomson*, 15 Ala. 700.

² *Williams v. Costello*, 95 Ala. 592; 11 So. Rep. 9, where A., being indebted to B., gave an order on a tailor to make B. a coat, which order the tailor accepted. When the coat was made, the tailor refused to deliver it unless the order was paid. It was held the tailor did not have to deliver the coat, although B. had, in addition to the order, given the tailor some cash.

³ *Holmes v. Laraway*, 64 Vt. 175.

⁴ *Schierl v. Baumel*, 75 Wis. 69.

⁵ See, also, *Mehlberg v. Tisher*, 24 Wis. 607; *Corbett v. Clark*, 45 Wis. 403; *Allan v. Eldred*, 50 Wis. 132.

for collection gave up the note to the maker and took his order on a third person for the amount, it was held that this constituted a payment of the note.¹

§ 371. Payment by check.—The giving of a check for an antecedent debt is not an absolute payment and extinguishment of the debt in the absence of an agreement to that effect. Ordinarily it is only a means of payment, and the debt will not be extinguished unless and until the check is paid, or unless loss be sustained by the drawer in consequence of the laches of the holder, in which case the debt will be discharged in proportion to the loss sustained. If the check be not paid, and the payee is without fault, his right of action against the drawer for the debt, which has been merely suspended by the giving of the check, revives, and he may have recourse to the drawer, either upon the debt or upon the check, at his option.² Checks may, however, as of course, be received as absolute payment, and whether so received is a question for the jury, under all the circumstances.³ A debt is not, however, the subject of garnishment after delivery of a check in payment.⁴ A written receipt in full does not establish a positive agreement for absolute payment when the payment is by check.⁵ A check, as between the holder

¹ *Rice v. Dudley*, 34 Mo. App. 383.

² *Comptoir D'Escompte De Paris v. Dresbach*, 78 Cal. 15; *Brewster v. Bours*, 8 Cal. 501; *Griffith v. Grogan*, 12 Cal. 317; *Higgins v. Wortell*, 18 Cal. 330; *Crary v. Bowers*, 20 Cal. 85; *Smith v. Owens*, 21 Cal. 11; *Brown v. Cronise*, 21 Cal. 386; *Welch v. Allington*, 23 Cal. 322; *Mitchell v. Hockett*, 25 Cal. 538; *Brown v. Olmstead*, 50 Cal. 162; *Crawford v. Roberts*, 50 Cal. 235; *Blair v. Wilson*, 28 Gratt. 165; *Currie v. Misa*, L. R. 10 Exch. 153; *People v. Baker*, 20 Wend. 602; *Small v. Franklin Mining Co.*, 99 Mass. 277; *Holmes v. Briggs*, 131 Pa. St. 233; 18 Atl. Rep. 928; *Good v. Singleton*, 39 Minn. 340; 40 N. W. Rep. 359; *Owen v. Hall*, 70 Md. 97; 16 Atl. Rep. 376; *Williams v. Chisholm*, 128 Ill. 115; 21 N. E. Rep. 215; *Hall v. Stevens*, 116 N. Y. 201; 22 N. E. Rep. 374.

³ *Holmes v. Briggs*, 131 Pa. St. 233; 18 Atl. Rep. 928; *Blair v. Wilson*, 28 Gratt. 165; *National Bank v. Levy*, 17 R. I. 746; 19 Lawers' Rep. Ann. 475.

⁴ *National Bank v. Levy*, 17 R. I. 746; 19 Lawyers' Rep. Ann. 475; *Den- nie v. Hart*, 2 Pick. 204; *Barnard v. Graves*, 16 Pick. 41; *Getchell v. Chase*, 124 Mass. 366; *Hemphill v. Yerkes*, 132 Pa. St. 545; *Cohen v. Gale*, L. R. 3 Q. B. D. 371.

⁵ *Comptoir D'Escompte De Paris v. Dresbach*, 78 Cal. 15; *Carroll v. Sweet*, 5 N. Y. Supl. 572; *Greer v. Laws*, 56 Ark. 37. See also, *Tobey v. Barber*, 5 Johns. 68; *Murray v. Gouverneur*, 2 Johns. Cas. 438; *McMurray v. Taylor*, 30 Mo. 263; *Glenn v. Smith*, 2 Gill & J. 493; *Muldon v. Whitlock*, 1 Cow. 290; *Putnam v. Lewis*, 8 Johns. 389. *Contra*, a written receipt in full is con-

and the drawer, may be presented at any time, and delay in presentment does not discharge the liability of the drawer, either on the check or on the debt for which it was given, unless loss has resulted.¹ "When checks deposited with a bank, and credited in the depositor's pass-book, are taken, in the absence of any special agreement, they are deemed to be taken for collection, and not as cash. They may be afterward returned and the credit annulled if there are no funds to meet them; and this is so whether the check is drawn on the same bank or another."²

§ 372. The same subject continued—Illustrations.—Where a debtor on account of his debt gave his creditor the check of a third person, and the creditor receipted the debt and gave up the debtor's notes for the debt, it was held that the check was accepted as payment of the debt.³ And on an issue whether a legacy was paid during testator's life-time, where it appeared that the bequest was made as compensation for services, and that the legatee had expressed her intention of getting the

clusive evidence of absolute payment. *Bailey v. Parbridge*, 134 Ill. 188; *La Fayette County Corp. v. Magoon*, 73 Wis. 627.

¹ *Carroll v. Sweet*, 128 N. Y. 19.

² *Daniel on Negotiable Instruments*, § 1623, citing, *National Gold Bank v. McDonald*, 51 Cal. 64; *Morse on Banks*, 320, 321.

³ *Kirkpatrick v. Puryear*, 93 Tenn. 409; 24 S. W. Rep., per Snodgrass, J.: "It will be remembered that this is not the case of Puryear giving his own check for his own account, and the law relating to that condition of facts need not be discussed. It is the case of the indorsement of a check of another to a creditor in settlement of the account, whether it be payment absolute or conditional, and to be governed by the law as to such transfer. It is well settled that the taking of the creditor's check on account is not payment unless it was so intended, *Springfield v. Green*, 7 Baxt. 301,

and it is true that the taking of a check of another by a creditor on account is not necessarily payment, but must have effect according to the intention of the parties. In the absence of proof of a special agreement, the giving up or retention of the original security will, in general, be a decisive circumstance in determining that question, for if the creditor means, in any contingency, to resort to the original indebtedness, he will scarcely be willing to surrender all evidence of that indebtedness to his debtor without fortifying himself with some evidence of the real nature of the transaction. *Morris v. Harveys*, 75 Va. 726; *Fidelity, etc., Deposit Co. v. Shenandoah Valley R. Co.*, 86 Va. 1; 9 S. E. Rep. 759. Upon the facts of this transaction, as given by the son and not denied by the complainant, we are of the opinion that the check was accepted in payment."

money at once, and that while the bulk of testator's estate was in litigation, and when his bank account was very low, he gave the legatee a check for an amount covering the bequest, which check was paid, it was proper to find that the legacy was satisfied by the check.¹ But where plaintiff sent for collection a demand draft on defendant, to a bank with which defendant had an account, and when drafts on defendant were sent to such bank for collection he was accustomed to write his acceptance thereon, and to pass them back to the bank, where they were treated by defendant and bank as checks, and the defendant, according to such custom, wrote his acceptance on the draft in suit, passed it back to the bank, and charged himself with it in his pass-book, but the bank failed, and never paid plaintiff, it was held that the transaction between defendant and the bank did not constitute payment.²

¹ Whitney's Appeal, 167 Pa. St. 609; 31 Atl. Rep. 867.

² State Bank v. Byrne, 97 Mich. 178; 56 N. W. Rep. 355, per Hooker, C. J.. "It is elementary doctrine that 'an agent authorized merely to collect a demand or to receive payment of a debt can not bind his principal by any arrangement short of an actual collection and receipt of the money.' Ward v. Evans, 2 Ld. Raym. 928; Ward v. Smith, 7 Wall. 447; Pitkin v. Harris, 69 Mich. 133; 37 N. W. Rep. 61; Hurley v. Watson, 68 Mich. 531; 36 N. W. Rep. 726. The most that can be claimed for this transaction is that the defendant, by accepting and delivering the demand draft, directed the Milford bank to pay this note, and charge the amount to his account, and that the bank promised to do so. As between them it was perhaps understood that defendant had paid this note, but it was in law no more than an attempted substitution of the bank for himself, as debtor. Had the acceptance been a check, and the check drawn upon another bank or private person, the effect would have been in law the same. The law re-

quires payment in money, and, as already shown, nothing else answers the purpose, except by agreement with the creditor, or his agent duly authorized, to accept something else. As between defendant and his bank it was clearly the latter's duty to honor his check (or acceptance, which under their custom was practically a check) by payment of the note, but the creditor was no party to that transaction. The bank was plaintiff's agent to collect the money, not to make an arrangement by which it should assume the debt. A debtor who seeks to pay a debt through his debtor, thereby securing his own claim, acts at his peril, and is not exonerated from his obligation until his debtor performs his part by satisfying the creditor. There are a few authorities which at first blush might be supposed to justify a different conclusion. Morse on Banking (section 247) is authority for the following: 'By custom, banks receive their own certificates of deposit as payment, and such custom will be judicially noticed by the courts, and will justify a collecting bank in receiving its own

§ 373. Certified check.—A certified check is subject to the same rules as ordinary checks with regard to operating as absolute or conditional payment. In the absence of an express agreement to the contrary, a certified check is only a conditional payment; it does not of its own force operate as a payment.¹

certificate of deposit in payment of paper that it holds for collection; and the debtor is discharged, even if the bank fails before remitting. And especially will this be so where the owner of the paper directed the bank to remit by draft, for he is presumed to have intended a draft of the collecting bank.' The case of *British, etc., Mortgage Co. v. Tibballs*, 63 Iowa, 468; 19 N.W. Rep. 319, is the authority cited for this. It bases the decision upon the usage of banks, which it says courts will take judicial notice of. This was a certificate of deposit. If there is any usage by which certificates of deposit are so used, it is plain that such certificates are but the promise of the bank to pay; and, were it the certificate of deposit or certified check of another bank, it would be the mere substitution of one obligation for another, and it is difficult to see any difference between such a case and one where the certificate of deposit or certified check is that of the collecting bank. This holding is not supported by citations. Mr. Justice Reed dissents in an able opinion, adhering to the common-law rule. Another case—that of *Welge v. Batty*, 11 Ill. App. 461—is relied upon. Here the debtor drew a check on the collecting bank, having at the time a deposit sufficiently large to cover it. The check was received, and note delivered, and the amount was charged against the debtor on his bank account. A draft was sent by the collecting bank, but, before it got around, the bank failed. This was held to be a payment, the court saying that it

would have been an idle ceremony for the debtor to draw his money out of the bank and pay it back again to the bank. Here, again, the court cites no authority to support its decision. The great weight of authority is against these cases. The payment by check, certificate, or what not is not for the convenience of the creditor, and he has no concern with the fact that it is the custom of the bank to take checks in payment. The fact that a debtor has a credit at a bank is not conclusive evidence that the bank has money with which to honor his checks. As in this case, the bank may be insolvent when it receives the check, and there is no good reason apparent for permitting the depositor of an insolvent bank to pay his debt with worthless paper, thereby making his creditor a loser. No custom should be allowed to justify such a transaction, unless it be in a case where the creditor is connected with and a party to the custom. Many cases can be found where checks are received and operate as payment, but they are usually in suits between the creditor and the collecting bank, where a different question is involved."

¹ *Born v. First National Bank*, 123 Ind. 78, where the court said: "It is, and long has been, settled law that an ordinary check does not constitute payment. This doctrine is so well settled that it is unnecessary to refer to the authorities. Accepting, as we must, this rule as obligatory, we can not conclude that a certified check constitutes payment,

§ 374. **Further illustrations.**—As a check is only conditional payment, the bank can not offset amount due by holder to it, against the check.¹ “Vast amounts of property are sold by agents, brokers, and commission men for their principals, and it would be unreasonable and unjust when they received a check, as the means of procuring the money for their principals, to permit the bank to set off an amount due by them individually.”² But no governmental officer can receive a check in payment of taxes or fees due by law; if checks are taken they are mere conditional payments, although there is an express agreement to the contrary.³ When a debtor pays money to his creditor, in the absence of anything to the contrary, the presumption is that it was a payment on the existing debt; and so if the payment is made by the delivery of a check, which is afterwards converted into cash.⁴ Where a principal provides his agent with funds to pay a debt, if the creditor take the agent's own check in conditional payment, this releases the principal entirely, even though the agent deceived the creditor as to the fact of his having funds of the principal to pay with.⁵ If a check be indorsed and transferred in conditional payment of a debt, the indorser will be discharged unless the check is presented within a reasonable time, and due notice given.⁶ But an acceptance by a creditor of a

unless we assume that the certification makes it the equivalent of money as a medium of payment. But neither in principle nor authority is there to be found warrant for the assumption, for, as we have seen, the nature of a check is not changed by certification, except in the one particular already indicated. As there is no other change, it is logically impossible that the effect of that change can make the check the equivalent of money. From whatever point of view the question is examined it appears clear that there is no release of the drawer of the check unless there is either an express or an implied agreement to that effect.” *Bickford v. First National*

Bank, 42 Ill. 238; *Rounds v. Smith*, 42 Ill. 245; *Brown v. Leckie*, 43 Ill. 497; *Mutual National Bank v. Rotge*, 28 La. Ann. 933; *Andrews v. German National Bank*, 9 Heisk. 211; *Larsen v. Breene*, 12 Colo. 480.

¹ *Brown v. Leckie*, 43 Ill. 501.

² *Daniel on Negotiable Instruments*, § 1628.

³ *Houghton v. City of Boston*, 159 Mass. 138; 34 N. E. Rep. 93.

⁴ *Tiddy v. Harris*, 101 N. C. 589.

⁵ *Cleveland v. Pearl*, 63 Vt. 127.

⁶ *Carroll v. Sweet*, 128 N. Y. 19; *Daniel on Negotiable Instruments*, § 1587, citing *Merchants' Bank v. Spicer*, 6 Wend. 443; *Little v. Phenix Bank*, 2 Hill (N. Y.), 425; *Murray v.*

check from his debtor which imports a full payment of the amount due him is not conclusive evidence of that fact, and does not estop him from recovering a balance due unless there was an agreement that it should be in full satisfaction.¹

§ 375. Payment by bill or note.—Senator Daniel discusses in detail conditional and absolute payment by bill or note, and the effect of taking a bill or note for a debt. The following is a summary of the results at which he arrives: When the debtor gives his own bill or note for a precedent debt it is *prima facie* evidence of an agreement to suspend the remedy until the instrument is due. If it be not paid when due the original debt is revived. The taking by the creditor of his debtor's note or bill in such a case does not merge or extinguish the indebtedness; the note is simply evidence of the debt, and its operation is only to extend the time of payment.²

Judah, 6 Cow. 484; Humphries v. Bicknell, 2 Litt. 296; Daniels v. Kyle, 1 Kelly, 304; Harbeck v. Craft, 4 Duer, 122.

¹ Greer v. Laws, 56 Ark. 37; Springfield Co. v. Allen, 46 Ark. 217; Burke v. Snell, 42 Ark. 57; 1 Greenleaf on Evidence, § 211. See, also, Independent Bldg. Assn. v. Real Est. Title Co., 156 Pa. St. 181; Bibb v. Snodgrass, 97 Ala. 457; 11 So. Rep. 880; Holmes v. Briggs, 131 Pa. St. 233.

² Daniel on Negotiable Instruments, § 1260, 4th ed., citing, The Kimball, 3 Wall. 37; Bank v. Daniel, 12 Pet. 32; Peter v. Beverley, 10 Pet. 532; Downey v. Hicks, 14 How. 240; Clark v. Young, 1 Cranch, 181; Sheehy v. Mandeville, 6 Cranch, 253; Lewis v. Davison, 29 Gratt. 216; McCluney v. Jackson, 6 Gratt. 96; McGuire v. Gadsby, 3 Call, 334; Armistead v. Ward, 2 Pat. & H. 512; Middlesex v. Thomas, 5 C. E. Green, 39; Glenn v. Smith, 2 Gill & J. 493; Clopper v. Union Bank, 7 Har. & J. 92; Walton v. Bemiss, 16 La. 140; McLaren v. Hall, 26 Iowa, 297; Steamboat v. Hammond, 9 Mo. 64; Yarnell v. Anderson,

14 Mo. 619; Doebling v. Loos, 45 Mo. 150; Archibald v. Argall, 53 Ill. 307; and see, also, to the same effect: The Jagger Iron Co. v. Walker, 76 N. Y. 521; Whitley v. Dumham Co., 89 Ala. 493; Hadley v. Bordo, 62 Vt. 285; Stewart, etc., Co. v. Rau, 92 Ga. 511; 17 S. E. Rep. 748; Price v. Barnes, 9 Ind. App. 1; 31 N. E. Rep. 809, which seems to overrule Nixon v. Beard, 111 Ind. 137, in the latter it being held that the note operated as a payment, and discharge; Bank of Monroe v. Gifford, 79 Iowa, 300; 44 N. W. Rep. 558; Graham v. Negus, 8 N. Y. Supl. 679, holding that the note does not even operate to extend the time for payment of the original debt, or suspend the right of action on the same until the maturity of the note; Fuller v. Negus, 8 N. Y. Supl. 681; Craddock v. Dwight, 85 Mich. 581; 48 N. W. Rep. 644; Sheldon Axle Company v. Scofield, 85 Mich. 577, holding that a provision in a contract for the sale of goods to be delivered from time to time during the year, to the effect that settlements were to be made monthly "by note or cash," did not bind the ven-

§ 376. **The same subject continued.**—An agreement between the maker and payee of a note, entered into after the delivery thereof, that the payee shall purchase stock of the maker, and that the note shall be taken as payment *pro tanto* therefor, is no defense to an action on the note, as it is not a satisfaction of the note, nor a new contract substituted therefor.¹ Where a

dor to accept any note or notes in payment of the account. *Cradock v. Dwight*, 85 Mich. 587; *Edwards v. Harvey*, 2 Colo. App. 169; 29 Pac. Rep. 1024; *Baker v. Baker*, 2 S. Dak. 261; 49 N. W. Rep. 1064, holding that the mere fact that a chattel mortgage, given to secure a note given in payment of an antecedent debt, has been foreclosed, nothing appearing as to the value of the property mortgaged, does not raise the presumption that the property sold for enough to pay the debt, and that by reason thereof it extinguished it. *Combination Steel Co. v. St. Paul Co.*, 47 Minn. 207, holding that a mere recital in a receipt or other writing, to the effect that the note was given "for" or "on account of" or in "payment of" the debt, is not sufficient to make the note an absolute payment. *Miller v. McCarty*, 47 Minn. 321; *Bausman v. Credit Co.*, 47 Minn. 377; *Hanson v. Tarbox*, 47 Minn. 433; *Davis v. Parsons*, 157 Mass. 584; 32 N. E. Rep. 1117, holding that if a note is not taken in absolute payment, it does not become so by the creditor negotiating it, provided the creditor takes it up again and offers it at the trial. *Zook v. Odle*, 3 Colo. App. 87; 32 Pac. Rep. 82. Massachusetts, Maine and Vermont courts hold that a note given for a precedent debt is, in the absence of an express agreement, a discharge of the debt. *O'Connor v. Hurley*, 147 Mass. 145; *Ely v. James*, 123 Mass. 36; *Varner v. Nobleborough*, 2 Greenl. 121; *Daniel on Notes and Bills*, § 1260; *Hadley v. Bordo*, 62 Vt. 285; 19 Atl. Rep. 476.

¹*Hayes v. Allen* (1894), 160 Mass. 286; 35 N. E. Rep. 352, where the court said: "The note in question was made for a valid consideration. The defense is that, subsequent to the making and delivery of it, an oral agreement was made between the parties that the defendant would sell, and the plaintiff would buy, on the first of January next ensuing, 3,000 shares of the capital stock of the Antique Marble Company at one dollar per share, and that the note should be taken as payment *pro tanto* for said shares. The stock was seasonably tendered by the defendant, and the note and the balance of the purchase-money demanded, but the plaintiff refused to give up the note and perform the contract. It is evident that the agreement in regard to the stock was an independent agreement. It was to be performed at a different time from that contained in the note, and the measure of damages for a failure to perform it would be different from that in case of failure to pay the note. It was not itself a satisfaction of the note, nor a new contract substituted for the note, and entitling the defendant to it. Independent contracts, of the nature of that set up in defense in this suit, do not come within the principle which allows parties, in order to prevent circuity of action, to avail themselves, by way of defense in certain cases, of matters which might be the subject of a suit. *Waterhouse v. Kendall*, 11 Cush. 128; *Traver v. Stevens*, 11 Cush. 167; *Stanton v. Maynard*, 7 Allen, 335; *Gibson v. Gibson*, 15 Mass. 106; *Bart-*

creditor accepts from his debtor the notes of a third person, it is not necessary to show an express agreement that they were taken in absolute payment, but an understanding to this effect is sufficient.¹ And the fact that a note was received in payment of a debt may be proved from the circumstances surrounding the transaction, although there may have been no express agreement to that effect.² Where the surety on a note transferred as collateral security to the payee thereof a mortgage given him by the maker as indemnity against loss as such surety, it was held, that the acceptance of this transfer did not operate as a payment of the note.³ If a note which is void for something *aliunde*, *e. g.*, because made and delivered on Sunday, be given for a debt, it does not operate as payment of the debt nor discharge the maker's liability to pay the debt.⁴

§ 377. Further illustrations.—Where the debt is contracted at the time the note or bill is executed, Senator Daniel seems to

lett *v.* Farrington, 120 Mass. 284; Hunt *v.* Brown, 146 Mass. 253; 15 N. E. Rep. 587. The defendant does not claim that he can avail himself of the agreement by way of set-off. The case is not like that of First Nat. Bank *v.* Watkins, 154 Mass. 385; 28 N. E. Rep. 275, where the court held that the agreement operated at once, and in effect discharged the defendant from liability on the note."

¹ Ralston *v.* Aultman (Texas App. 1894), 26 S. W. Rep. 746, per Head, J. "If a creditor accepts from his debtor the note of a third party, with the understanding that it shall be in satisfaction of the latter debt, we see nothing to prevent this from being a legal contract, whether this be expressly stipulated or not. Swearingen *v.* Buckley, 1 Texas Unrep. Cas. 421."

² Macomber *v.* Macomber (R. I. 1894), 31 Atl. Rep. 753, where the court said: "The ground on which they were disallowed as payment by the master was that by the law of this state a note does not operate as payment unless received as such under an ex-

press contract to that effect. We presume this opinion of the master rested on a remark of Chief Justice Ames in Wheeler *v.* Schroeder, 4 R. I. 383. We do not think that an express contract is necessary in order that a note shall operate as payment, and that the fact that it was so received may be proved by the circumstances attending the transaction, even if there may have been no express agreement to that effect. Wilbur *v.* Jernegan, 11 R. I. 113; Nightingale *v.* Chafee, 11 R. I. 609."

³ Barkwell *v.* Swan (1892), 69 Miss. 907; 13 So. Rep. 809.

⁴ Hartshorn *v.* Hartshorn (N. H. 1892), 29 Atl. Rep. 406, per Carpenter, J. "Giving a void note (Allen *v.* Deming, 14 N. H. 133) did not pay the debt for which it was given, nor discharge the defendant from his liability. Shaw *v.* Spooner, 9 N. H. 197; Burnham *v.* Spooner, 10 N. H. 165; Walker *v.* Lovell, 28 N. H. 138; Carleton *v.* Woods, 28 N. H. 290; Pecker *v.* Kennison, 46 N. H. 488."

be of the opinion that this should be regarded as absolute payment; but he states that the weight of authority is to the effect that this is only conditional payment.¹ Where the note or draft of a third party is received by a creditor from his debtor for a pre-existing debt, the presumption is that it is received as a conditional payment, unless there is an agreement that it is to be an absolute payment, and the burden of proving such an agreement is upon the debtor.² If the creditor take the note of a third person from his debtor at the time the debt is contracted, whether such note will operate as a conditional or absolute payment depends upon whether the debtor indorses it. If he does not indorse it then it operates as absolute pay-

¹ Daniel on Negotiable Instruments, § 1261, 4th ed., quoting the following from Parsons on Notes and Bills, 157: "It seems to be substantially selling a note by barter, or exchanging it for goods. * * * We can hardly conceive a bill being taken at the time of the sale, unless it be the understanding of the parties to regard it as payment. The remedy on the note or bill, which is more convenient to the creditor, is all that should be allowed him, for there is no sufficient reason for allowing resort to be had to the original."

² *Shepherd v. Busch*, 154 Pa. St. 149; *Holmes v. Briggs*, 131 Pa. St. 233, where the court said: "Nothing is better settled than in the absence of any special agreement to the contrary the mere acceptance by a creditor from his debtor of the note or check of a third person, to the creditor's order, for a pre-existing indebtedness, is not absolute, but merely conditional payment, defeasible on the dishonor or non-payment of the note or check, and in that event the debtor remains liable for his original debt." *League v. Waring*, 85 Pa. St. 244; *Cheltenham Stone Co. v. Gates Iron Works*, 23 Ill. App. 635, holding, that the

credit of the note to the debtor's account, and the subsequent rendering of monthly statements showing such credit, is not evidence from which a positive inference can be drawn of an intention that the acceptance of the note should operate as an absolute satisfaction and discharge of the debt. In the opinion the court said: "The rule universally recognized is, that the mere acceptance from a debtor of his own note or the note of a third person, in case of an antecedent indebtedness, is not a payment of such indebtedness. In the absence of a special agreement, it is considered as a conditional payment or as a collateral security." *Tobey v. Barber*, 5 Johns. 68; *Whitbeck v. VanNess*, 11 Johns. 409; *Breed v. Cook*, 15 Johns. 241; *Noel v. Murray*, 1 Duer, 388; *Camidge v. Allenby*, 6 B. & C. 373; *Gibson v. Toby*, 53 Barb. 191; *Hunter v. Moul*, 98 Pa. St. 13; *Johnson v. Weed*, 9 Johns. 310; *James v. Hackley*, 16 Johns. 273; *Peter v. Beverly*, 10 Pet. 532; *Griffith v. Grogan*, 12 Cal. 317; *Brown v. Olmsted*, 50 Cal. 162; *Akin v. Peters*, 45 Ark. 313; *Jaffrey v. Cornish*, 10 N. H. 505; *League v. Waring*, 85 Pa. St. 244; *McIntyre v. Kennedy*, 29 Pa. St. 448.

ment—a barter of the note,¹ but if he indorses it then the contrary rule obtains—it is only conditional payment.²

§ 378. Evidence of intention to merge the debt.—The question whether a note or bill is taken in absolute or conditional payment is a pure question of fact dependent upon the intention of the parties, which intention must be evidenced by an actual agreement, if the presumptions stated in the two preceding sections are to be overcome. The following are some instances where it was held that the evidence established an agreement touching the matter: Where a note is taken for an antecedent debt and a receipt in full is given, the presumption that the debt was not paid unless the notes were paid is opposed by the presumption of payment raised by giving the receipt, and the jury must decide.³ Ordinarily a receipt, if intended to be proof of an agreement to receive the paper as absolute payment, should say so, and if the receipt does not contain recitals to this effect it is very feeble proof.⁴ A draft was held to be taken in absolute payment of a mortgage, where it appeared that the amount of the draft was credited on the back of the mortgage.⁵ Where the vendor agreed to accept “cash at the end of thirty days trial, or note, with interest, due in ninety days,” and the vendee elected to give his note, this was held to be absolute payment and a merger of the debt

¹ Daniel on Negotiable Instruments, § 1264, citing the following cases: *Bank of England v. Newman*, 1 Ld. Raym. 442; *Ex parte Blackburne*, 10 Ves. 204; *Fyde v. Clark*, 1 Esp. 447.

² Daniel on Negotiable Instruments, § 1265, 4th ed., citing *Monroe v. Hoff*, 5 Den. 360; *Boyd v. Hitchcock*, 20 Johns. 76; *Soffe v. Gallagher*, 3 E. D. Smith, 507; *Shriner v. Keller*, 25 Pa. St. 61. See also, *Sebastian Co. v. Codd*, 77 Md. 293; 26 Atl. Rep. 316; *Tiffany v. Glasgow*, 82 Mich. 266; *O'Bryan v. Jones*, 38 Mo. App. 90; *White Star Line, etc., Co. v. Morange*, 91 Ala. 610; 8 So. Rep. 867; *Houston v. Evans*, — Texas, —; 17 S. W. Rep. 925;

Daniel on Negotiable Instruments, § 1262, 4th ed., citing *McLughan v. Bovard*, 4 Watts, 308; *League v. Wasing*, 85 Pa. St. 244; *Gordon v. Price*, 10 Ired. Law, 385; *Downey v. Hicks*, 14 How. 240; *Gibson v. Toby*, 53 Barb. 191; *Crane v. McDonald*, 45 Barb. 354; *Noel v. Murray*, 13 N. Y. 167; *Glenn v. Burrows*, 37 Hun, 602; *Malpas v. Lowenstine*, 46 Ark. 552; *Hunt v. Higman*, 70 Iowa, 406; *Hopkins v. Detwiler*, 25 W. Va. 734; *Gallagher v. Roberts*, 2 Wash. C. C. 191.

³ *Walker v. Tupper*, 152 Pa. St. 1.

⁴ *Shepherd v. Busch*, 154 Pa. St. 149.

⁵ *Whitley v. Dunham Lumber Co.*, 89 Ala. 493; 7 So. Rep. 810.

in the note.¹ If the creditor make any composition with the parties liable on the paper, this will operate as a full payment although, when taken, there was an understanding that the paper was only conditional payment.² Bank drafts have come to be an important medium in the transaction of business, especially where large payments are made. They are regarded as safe and convenient. Under the improved systems of banking that now prevail, the confidence reposed in such drafts is very great. The presumption, therefore, that a bank draft is received in absolute payment, is stronger than in the case of a note, check or draft of a private individual.³

§ 379. The same subject continued.—While the giving of a note for an existing debt is *prima facie* payment of it,⁴ this presumption is rebutted when the creditor holds security, as the mere taking of a debtor's note shows the want of sufficient motive by the creditor to forego his security. He can not be presumed to have intended an action so prejudicial to his interest.⁵ "When a bill is given in renewal of a former bill, and the holder retains such former bill, the renewal, in the absence of special agreement, operates merely as a conditional payment thereof. If the renewed bill be paid in due course, or otherwise discharged, the original bill is likewise discharged."⁶ When a note is discounted by a bank to take up a prior note held by the bank against the party procuring the discount, and the avails are credited to him, the

¹ *Challoner v. Boyington*, 83 Wis. 399; but in Wisconsin the Massachusetts rule obtains that in all cases where a bill or note is received, the note will be deemed to have been taken by the creditor in satisfaction, unless the contrary be expressly proved. *Ford v. Mitchell*, 15 Wis. 304; *Hoefinger v. Wells*, 47 Wis. 628; *Allis v. Meadow Springs Co.*, 67 Wis. 16.

² *Loth v. Mothner*, 53 Ark. 116.

³ *Hall v. Stevens*, 116 N. Y. 201. See also, *McCord v. Durant*, 134 Pa. St. 184; *Case Mfg. Co. v. Soxman*, 138 U. S. 431.

⁴ *Bunker v. Barron*, 79 Maine, 62; *O'Conner v. Hurley*, 147 Mass. 145; *Schierl v. Baumel*, 75 Wis. 69; *Farr v. Stevens*, 26 Vt. 299.

⁵ *Titcomb v. McAllister*, 81 Maine, 399.

⁶ Benjamin's *Chalmer's Bills, Notes and Checks*, art. 251. See also, *Woods v. Woods*, 127 Mass. 141; *Ex parte Barclay*, 7 Ves. 597; *Waydell v. Luer*, 5 Hill, 448; *Moses v. Trice*, 21 Gratt. 556; *Godfrey v. Crisler*, 121 Ind. 203; *East River Bank v. Butterworth*, 45 Barb. 476; *Chisholm v. Williams*, 128 Ill. 115.

transaction is to be regarded as an extinguishment of the prior note, although it may not have been actually surrendered.¹ And whether a note is delivered up or not, upon its renewal, it may always be sued on, if the debtor fails to keep his promise to give security for the new note.²

§ 380. Repayment of taxes illegally collected.—Under certain circumstances taxes illegally collected can be recovered back. But this is not always so. “If the town, city or other strictly public corporation could be held liable to repay all taxes irregularly collected, even if paid voluntarily, it is evident that great public inconvenience would ensue. Such a condition of things would afford unlimited opportunity to demagogues to appeal to the natural avarice of mankind. Actions would be brought to recover taxes, necessary and legal in their essentials, but collected irregularly or by virtue of legislation in which some technical defect could be found. The administration of government would be seriously impeded, and the just and equitable principle of the common law would be distorted into an instrument of injustice.”³ Therefore, in the absence of a statute there are three prerequisites to the right of recovery for money paid by reason of illegal taxation, viz.: (1) The assessment must be absolutely void. (2) The money sued for must have been received by the corporation for its own use. (3) The payment must have been upon compulsion and not

¹ *Phoenix Ins. Co. v. Church*, 81 N.Y. 218; *Slaymaker v. Gundacker*, 10 S. & R. 75; *Bank of U. S. v. Daniel*, 12 Pet. 34; *Cumber v. Wane*, 1 Str. 426; 1 *Smith's Lead. Cas.* (357) 633.

² *Wright v. Buck*, 62 N. H. 656; *Jaffrey v. Cornish*, 10 N. H. 505; *Johnson v. Cleaves*, 15 N. H. 332; *Clark v. Draper*, 19 N. H. 419; *Smith v. Smith*, 27 N. H. 244; *Foster v. Hill*, 36 N. H. 526.

³ *Beach on Public Corporations*, § 231. It seems that the liability of the corporation for the repayment of taxes illegally collected exists at common law independent of statute. *National*

Bank v. Elmira, 53 N. Y. 49; *Bank of Commonwealth v. Mayor of New York*, 43 N. Y. 189; *City of Grand Rapids v. Blakely*, 40 Mich. 367; *Tuttle v. Everett*, 51 Miss. 27; *Town of Douglasville v. Johns*, 62 Geo. 423; *Lamborn v. County Commissioners*, 97 U. S. 181; *Railroad Co. v. Commissioners*, 98 U. S. 541; *Phelps v. Mayor*, 112 N. Y. 216; *Ege v. Koontz*, 3 Pa. St. 109; *Princeton v. Vierling*, 40 Ind. 340; *Mayor of Jersey City v. Riker*, 38 N. J. Law, 225; *Haines v. School District*, 41 Maine, 246; *Cook v. Boston*, 9 Allen, 393.

voluntary.¹ The following are illustrations of the first rule: Where property exempt by law from taxation is illegally taxed, the assessment is void and the money may be recovered.² Where an assessment is levied for street improvements and the assessment is void, the sum paid can be recovered;³ and an assessment may be recovered as void when the corporation fails to carry out the improvement for which the assessment was levied.⁴ The burden is upon the party attacking the validity of a tax. There is no presumption that municipal authorities have acted illegally or that conditions precedent have not been performed.⁵ The following are illustrations of the second rule: A tax was paid to a collector who paid it into the town treasury, and the treasurer of the town paid it over to a building committee of a school district. The tax being void it was held that a tax-payer might recover his share from the school district, but had no cause of action against the town.⁶ But so long as the corporation actually has the money in its custody or under its control, it is liable to be sued, although the money is not to be used for its own purposes.⁷

§ 381. Taxes paid under compulsion.—The third rule is to the effect that the tax must be paid under compulsion. By compulsion is meant payment only when the tax-payer can save himself and his property in no other way than by paying the illegal demand.⁸ It seems that some overt act towards

¹ *Richardson v. City of Denver*, 17 Colo. 398; *Beach on Public Corporations*, § 231.

² *City of Indianapolis v. McAvoy*, 86 Ind. 587.

³ *Taylor v. People*, 66 Ill. 322; *Bradford v. Chicago*, 25 Ill. 411; *Diefenthaler v. Mayor, etc.*, New York, 111 N. Y. 331; *Peyser v. Mayor, etc.*, New York, 70 N. Y. 497; *Mayor, etc., Jersey City v. O'Callaghan*, 41 N. J. Law, 349; *Phelps v. Mayor*, 112 N. Y. 216, where it is held that when the assessment is made under an ordinance void on its face, the payment of the assessment, being a mere mistake of law, can not be recovered.

⁴ *Bradford v. Chicago*, 25 Ill. 411;

Valentine v. St. Paul, 34 Minn. 446; *Beach on Public Corporations*, § 232.

⁵ *Vaughn v. The Village of Port Chester*, 135 N. Y. 460; *Tingue v. The Village of Port Chester*, 101 N. Y. 294; *Town of Douglasville v. Johns*, 62 Geo. 423.

⁶ *Joyner v. Third School District*, 3 Cush. 567.

⁷ *City of Grand Rapids v. Blakely*, 40 Mich. 367.

⁸ *Railroad Co. v. Commissioners*, 98 U. S. 541; *Preston v. Boston*, 12 Pick. 14; *Lamborn v. County Commissioners*, 97 U. S. 181; *Beach on Public Corporations*, § 234, citing the following cases, *Galveston City Co. v. Galveston*, 56 Texas, 486; *Town of Princeton v. Vier-*

collecting the tax must have been taken before the tax can be considered to have been paid under such compulsion as the law requires. Thus where land was assessed for taxation and the taxes remaining unpaid, the tax-lists, with warrants thereto attached, were issued, authorizing the county treasurer, upon default in the payment of the taxes, to enforce the collection of them by the seizure and sale of the personal property of the owner. The owner paid the taxes, but protested in writing that the taxes were illegally assessed. This was held to be no compulsion; that the owner was not coerced and therefore could not recover the tax;¹ and a mere protest against payment is not enough.² But a protest is enough to make a payment involuntary where the law under which the levy is made is constitutional, and the illegality of the tax is claimed because of irregularities or defects in the statutory proceedings.³

ling, 40 Ind. 340; Board of Commissioners v. National Land Co., 23 Kan. 196; Kansas Pacific R. Co. v. Commissioners, 16 Kan. 587; City of Detroit v. Martin, 34 Mich. 170; Bank of N. O. v. New Orleans, 12 La. Ann. 421; Robinson v. Charleston, 2 Rich. L. (S. C.) 317; Leonard v. Canton, 35 Miss. 189; Raiser v. Athens, 66 Ala. 194; Clarke v. Dutcher, 9 Cow. 674; City of Muscatine v. Keokuk, etc., Co., 45 Iowa, 185; Falls v. Cairo, 58 Ill. 403; Harrison v. Milwaukee, 49 Wis. 247; Mayor of Richmond v. Judah, 5 Leigh (Va.), 305; Phelps v. Mayor of New York, 112 N. Y. 216; Diefenthaler v. Mayor, etc., of New York, 111 N. Y. 331; Bank of Com. v. Mayor, etc., of New York, 43 N. Y. 184; Bucknall v. Story, 46 Cal. 589; Emery v. Lowell, 127 Mass. 138; Benson v. Monroe, 7 Cush. 125; Churchman v. Indianapolis, 110 Ind. 259; McCreikart v. Pittsburgh, 88 Pa. St. 133; Taylor v. Board of Health, 31 Pa. St. 73.

¹ Railroad Co. v. Commissioners, 98 U. S. 541.

² Newcomb v. City of Davenport, 86 Iowa, 291; 53 N. W. Rep. 232; City of Detroit v. Martin, 34 Mich. 170; Buck-

nall v. Story, 46 Cal. 595; De Baker v. Carillo, 52 Cal. 473; Rutledge v. Price Co., 66 Wis. 35.

³ Whitney v. City of Port Huron, 88 Mich. 268. See further on this subject, Beach on Public Corporations, §§ 235-238, where many cases are collected. Payments made through ignorance of law, and not by mistake of fact, can not be recovered; Painter v. Polk County, 81 Iowa, 242; Badeau v. United States, 130 U. S. 439; Kraft v. City of Keokuk, 14 Iowa, 86; Falls v. Cairo, 58 Ill. 403. *Contra*, City of Louisville v. Henning, 1 Bush, 381. In Iowa it is held that a tax paid without protest may be recovered back if the tax is imposed by a city ordinance. Robinson v. Burlington, 50 Iowa, 240. See also, Rushton v. Burke, 6 Dakota, 478; 43 N. W. Rep. 815, holding that a county treasurer may be sued personally for money paid to him in his official capacity for illegal taxes, where it is paid under protest with notice that suit will be brought to recover it. Gerecke v. Campbell, 24 Neb. 306, not a tax case, but an analogous one, where an execution was issued on a dormant judgment, and money

§ 382. **The same subject continued.**—Taxes under a special assessment, paid before the penalty for non-payment became due, under protest and with an expressed intention to sue to recover them back, there being no actual seizure or immediate danger of actual seizure of the property, can not be recovered back in an action of assumpsit, on the ground that the payment was compulsory. And one who pays taxes, under protest, under a special assessment for sewers, where the assessment was not set aside, and the sewers were built, and the general power of the city to make such assessment under valid ordinances was not disputed, can not recover them back.¹ The common-law rule

was paid under protest, held to be a voluntary payment. *Lyman v. Landerbaugh*, 75 Iowa, 481; *Barney & Smith Co. v. County Com'rs*, 29 Weekly Law. Bul. (Cin.) 366; *McFarlan v. Township*, 93 Mich. 558, holding a mere protest enough; *Scharffbillig v. Scharfbillig*, 51 Minn. 349; 53 N. W. Rep. 713; *Doolittle v. Luzerne Co.*, 6 Kulp. 495; *Baker v. City of Fairbury*, 33 Neb. 674; *Painter v. Polk Co.*, 81 Iowa, 242; *Atchison R. Co. v. Atchison*, 47 Kan. 712, 722, holding that where a protest in writing was filed which stated that the payment was made solely to avoid the issue of process, and gave notice that an action would be brought to recover the payment, that this constituted an involuntary payment; *Powell v. Board, etc.*, St. Croix Co., 46 Wis. 210; *Pooley v. Buffalo*, 4 N. Y. Supl. 450, holding that a payment without protest and voluntary can be recovered when paid under ignorance of fact. The council of a city failed to comply with the statute authorizing it to assess for street paving, of which fact the tax-payer was ignorant. *Tripler v. City of N. Y.*, 17 N. Y. Supl. 750; 63 Hun, 630; *Lored v. Lorry* (Texas App.), 20 S. W. Rep. 89, a case going the full length that the case of *Railroad Co. v. Commissioners*, 98 U. S. 541, went. A most rigid doctrine. *Vaughn v. Village of Port Chester*, 60 Hun, 401; *De Graff v.*

County of Ramsey, 46 Minn. 319; *Lathrope v. McBride*, 31 Neb. 289; *Longnecker v. Shields*, 1 Colo. App. 264; 28 Pac. Rep. 659; *Vanderbeck v. City of Rochester*, 46 Hun, 87.

¹ *Hopkins v. City of Butte*, 40 Pac. Rep. 171, per Hunt, J.: "It can not be successfully argued that Mrs. Hopkins paid the tax which she now seeks to recover for the purpose of immediate relief. Indeed, the contrary appears, for she herself stated that she wanted to go away from Butte, and, while she thought the tax was unjust and illegal, of her own free will she paid the amount of it, merely stating, in effect, that it was paid under protest, and that she intended to sue to recover it back. The assessment does not appear to have ever been set aside by any legal proceedings, and it is admitted that the improvements for which the levy was made were built in front of the property assessed. She knew, presumably, that the city treasurer could not sell her property, and could not even do as much as assess the penalty in case the tax was not paid. All these facts clearly show, at law, and unwilling, but none the less voluntary, payment, as contradistinguished from a compulsory payment. Such a payment does not entitle her to the relief she asks. *Cooley on Taxation*, § 811; *First Nat. Bank v. Mayor, etc.*, 68 Ga. 119;

which, in the absence of statute, must govern all demands similar to that made by a municipality for taxes, from one of its inhabitants whose property has been assessed, is that where a party pays an illegal demand, with a full knowledge of all the facts which rendered such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent the immediate seizure of his person or property, such payment must be deemed voluntary, and can not be recovered back; and the fact that

Rogers v. Inhabitants of Greenbush, 58 Me. 90; *Conkling v. City of Springfield*, 132 Ill. 420; 24 N. E. Rep. 67; *Bowman v. Boyd*, 21 Nev. 281; 30 Pac. Rep. 823; *Richardson v. City of Denver*, 17 Colo. 398; 30 Pac. Rep. 333; *Swift v. City of Poughkeepsie*, 37 N. Y. 511. The constitutionality of the law under which the assessments were levied was not assailed. It is merely claimed that the city of Butte, by reason of a failure to pass an ordinance dividing the city into sewer districts, had not taken the steps necessary to authorize it to levy any special sewer assessments. There was a resolution and ordinance passed, however, in which sewer districts were created. The ordinances may have been defective, and the assessments even irregularly made, but the general power of the city to make sewer assessments under valid ordinances is not disputed. The case, therefore, is not one where authority to levy the tax was wholly wanting, and must be distinguished from decisions which uphold the right to recover back taxes where the levy of the tax is on its face invalid, and where protest on the ground of illegality was made at the time of payment. *Shoup v. Willis*, 2 Idaho, 108; 6 Pac. Rep. 124; *Gillette v. Hartford*, 31 Conn. 351; *Newman v. Board of Supervisors*, 45 N. Y. 676. It is also to be distinguished from the opinion of Chief Justice Chase in *Erskine v. Van Arsdale*, 15 Wall. 75, in

that payment was made in that case to release property from detention, and the protest against payment (as in other cases involving the payment of revenues to release property) saved the rights which grew out of that fact, while in the case at bar there was no levy at all, and no right to make a levy was conferred upon the treasurer of the city, to whom payment was made. Nor can *Whitney v. City of Port Huron*, 88 Mich. 268; 50 N. W. Rep. 316, control under the conditions of fact here existing. In that case the plaintiff sued to recover taxes paid by her, under protest, on a special paving assessment. Payment was made under protest, and to protect the property from being sold, and on account of the taxes being illegal. The city treasurer had advertised the plaintiff's property for sale, and she had the right to presume that he would proceed with the sale. The case was thereby brought within the rule of immediate and urgent necessity of paying the tax to prevent seizure. And it was held that a payment made under such a threat was an involuntary one. Under the great weight of authority and reason, the law looks with disfavor upon suits to recover back taxes where dissatisfaction and unwillingness to pay, rather than compulsion, to prevent the immediate execution of a levy or seizure, are the causes which prompt the protest. The judgment is affirmed."

the party, at the time of making the payment, files a written protest does not make the payment involuntary.¹

§ 383. Receipts.—A receipt is the written acknowledgment of the delivery of money or other thing of value, without containing any affirmative obligation upon either party to it—a mere admission of a fact, in writing.² Therefore a receipt is only *prima facie* evidence of the admissions which it contains, and where it does not embody a contract it is open to explanation, and the party admitting payment in full may show it to be untrue.³ But if by means of the receipt a person has been induced to alter his position, then it is conclusive.⁴ A receipt on a bill of exchange stating that the bill was paid may be contradicted, and the payment shown to be a purchase instead of an extinguishment of the bill.⁵ But the burden is always on the person attacking a receipt, and in the absence of evidence contradicting a receipt it becomes conclusive.⁶ All questions touching the giving of a receipt are triable at law and a bill in equity does not lie to set aside a receipt.⁷ And even in a case where the receipt is obtained by fraud this may be shown on a plea of payment.⁸ Where a debtor has the money ready to pay, the giving him a receipt for the same with the intention

¹ *Railroad Co. v. Commissioners*, 98 U. S. 541; *Little v. Bowers*, 134 U. S. 547; 10 Sup. Ct. Rep. 620. And the test of whether or not money paid for the payment of taxes was a payment under duress, so as to make it an involuntary payment, "must, in general, consist of some actual or threatened exercise of power possessed, or believed to be possessed, by the party accepting or receiving the payment, over the person or property of another, from which the latter has no other means, or reasonable means, of immediate relief, except by making payment." 2 *Dillon on Municipal Corporations*, § 943.

² *Krutz v. Craig*, 53 Ind. 561.

³ *St. Louis R. Co. v. Davis*, 35 Kan.

464; *Clark v. Marbourg*, 33 Kan. 471; *American Bridge Co. v. Murphy*, 13 Kan. 35; *Stout v. Hyatt*, 13 Kan. 232.

⁴ *Graves v. Key*, 3 B. & Ad. 318; *Straton v. Rastall*, 2 T. R. 366; *Wyatt v. Marquis of Hertford*, 3 East, 147; *Heane v. Rogers*, 9 B. & C. 586.

⁵ *Graves v. Key*, 3 B. & Ad. 313.

⁶ *Nielsen v. United States, etc., Co.*, 37 Ill. App. 283; *Peaslee v. Glass*, 61 Ill. 94.

⁷ *Lee v. Lancashire R. Co.*, L. R. 6 Ch. App. 527.

⁸ *Lee v. Lancashire R. Co.*, L. R. 6 Ch. App. 527, 538. See, *Stewart v. Great Western R. Co.*, 2 D. J. & S. 319, to the effect that there is no necessity to go into chancery.

of making him a present of the money is the legal equivalent of payment, although no money in fact passes.¹

§ 384. **Receipts in full.**—The payment of a portion of an ascertained, overdue and undisputed debt, although accepted in full satisfaction, and a receipt in full is given, is not a satisfaction of the balance; and will not, where there is no new consideration, estop the creditor from recovering the remainder of such debt.² But a receipt in full is always *prima facie* a satisfaction of all claims,³ also that the accounts on both sides are settled and adjusted.⁴ A receipt in full, given upon the settlement of a disputed claim, is restricted to the subject-matter of it; and will not include a note not yet due.⁵ So, also, a receipt “in full for my last year’s wages” is not broad enough to operate to cut off an existing claim, under a special contract for extra services.⁶ But a receipt by a servant who had been discharged, “in full of all demands of every name and nature, which I have against” the employer was held to constitute a satisfaction of any claim for wrongful dismissal.⁷ And a receipt by a physician of a certain sum in full satisfaction of professional services is a bar to a subsequent action for the value of such services.⁸ Where an attorney sent his client a draft stating on its face that it was in full for his share of the recovery, and the client indorsed the draft and collected it, the question whether the draft and indorsement were equivalent to a receipt in full was left to the jury.⁹ And where a contractor, on receiving payment under his contract, gave a certificate to the effect that it was in full, he was held precluded from bringing an action for damages for being improperly delayed in the performance of his contract.¹⁰

¹ *Maber v. Maber*, L. R. 2 Exch. 153, and it was here held to take the debt out of the statute of limitation.

² *St. Louis R. Co. v. Davis*, 35 Kan. 464; *Danziger v. Hoyt*, 120 N. Y. 190, 194.

³ *Patterson v. Ackerson*, 2 Edw. Ch. 427; *Welch v. Lynch*, 5 N. Y. Leg. Obs. 20; *Danziger v. Hoyt*, 120 N. Y. 190.

⁴ *Alvord v. Baker*, 9 Wend. 323; *Lambert v. Seely*, 2 Hilt. 429.

⁵ *Joslyn v. Capron*, 64 Barb. 598.

⁶ *Fredenburg v. Biddlecome*, 17 Weekly Dig. 25 (N. Y.).

⁷ *People v. Board of Managers*, 96 N. Y. 640.

⁸ *Danziger v. Hoyt*, 120 N. Y. 190.

⁹ *Serat v. Smith*, 40 N. Y. St. Rep. 45.

¹⁰ *Coulter v. Board*, 63 N. Y. 365.

§ 385. **The same subject continued.**—A receipt in full, given in settlement of a disputed claim, is conclusive.¹ And at least in Connecticut² and Vermont³ the courts have adopted the rule that a receipt in full, given upon the part payment of a debt, in the absence of any impeachment of it for fraud or mistake, is valid and a discharge of the entire debt.⁴

§ 386. **Receipt under seal.**—An acknowledgment of payment in the consideration clause of a deed does not conclude the grantor. In an action to recover the purchase price, he may show the actual consideration; that it was not paid, or the time when and the manner in which it was to be paid. The consideration clause is open to explanation, and may be varied by parol proof.⁵ But the acknowledgment in a deed of the

¹ *Green v. Rochester, etc., Co.*, 1 T. and C. 5 (N. Y.); *Cleere v. Cleere*, 82 Ala. 581, by virtue of statute; *Freeman v. Tucker*, 20 Geo. 6; *Vedder v. Vedder*, 1 Denio, 257; *Henderson v. Stokes*, 42 N. J. Eq. 586, refusing to reform a receipt in full; *O'Neil v. Lake, etc., Co.*, 63 Mich. 690, holding that the signing of such a receipt by a man's wife, whom he had sent for the money, did not bind him.

² *Elting v. Sturtevant*, 41 Conn. 176; *Bull v. Bull*, 43 Conn. 455; *Aborn v. Rathbone*, 54 Conn. 444.

³ *Ashley v. Hendee*, 56 Vt. 209; *Holbrook v. Blodget*, 5 Vt. 520; *Guyette v. Town of Bolton*, 46 Vt. 228.

⁴ See *Aborn v. Rathbone*, 54 Conn. 444, where the receipt was of a certain sum "in full to date." This was held to discharge a larger liquidated debt which was undisputed. See also, further on receipts in full: *Ensign v. Webster*, 1 Johns. Cas. 145; *Tobey v. Barber*, 5 Johns. 68; *Bogart v. Van Velsor*, 4 Edw. Ch. 718; *Higby v. New York R. Co.*, 3 Bos. 497; *Ryan v. Ward*, 48 N. Y. 204; *Redfield v. Holland, etc., Co.*, 56 N. Y. 354; *Boardman v. Gaillard*, 1 Hun, 217; *Wilcox v. McCarthy*, 3 Brad. (N. Y.) 284; *Worth v.*

Mumford, 1 Hilt. 1 (N. Y.); *Thomas v. McDaniel*, 14 Johns. 185; *Hammond v. Slocum*, 50 How. Pr. 415; *Miller v. Coates*, 66 N. Y. 609; *Churchill v. Bradley*, 11 J. & S. 170; *Riley v. White*, 6 N. Y. Leg. Obs. 272, holding that a receipt in full, though under seal, if given without consideration, is not a void release. *Downey v. McGinn*, 1 City Ct. (N. Y.) 478; *Greer v. People's Co.*, 18 J. & S. 110; *Peck v. Peck*, 20 Weekly Digest, 83; 99 N. Y. 608; *Brewer v. Union Pac. R. Co.*, 31 Hun, 545; *Matter of Jones*, 10 St. Rep. (N. Y.) 176; *Matter of Dunkell*, 5 Dem. (N. Y.) 188; *Guldager v. Rockwell*, 14 Colo. Rep. 459; *Sutton v. The Albatross*, 2 Wall. Jr. 327, holding slight evidence sufficient to vary and contradict a receipt in full; *Illinois R. Co. v. Welch*, 52 Ill. 183; *Ruby v. Railroad Co.*, 8 W. Va. 269.

⁵ *Hebbard v. Haughian*, 70 N. Y. 54; *Purmort v. McCrea*, 5 Paige, 620; *Shephard v. Little*, 14 Johnson, 210; *Bowen v. Bell*, 20 Johnson, 338; *Bingham v. Weiderwax*, 1 N. Y. 509; *Battle v. Rochester City Bank*, 3 N. Y. 88; *Bridges v. Russell*, 30 Mo. App. 258; *Agnew v. McGill*, 96 Ala. 496; 11 So. Rep. 537.

payment of the consideration money is *prima facie* evidence of payment.¹ The consideration clause in a deed, while it estops the grantor from alleging that it was executed without any consideration whatsoever, is always open to explanation for any other purpose.² And a receipt indorsed upon a deed is like any other simple receipt; merely *prima facie* evidence of the statements it contains.³ But if a party has purchased an estate, relying on the statements contained in an indorsed receipt, then the receipt becomes conclusive.⁴

§ 387. Effect of a receipt.—In a suit to enforce a vendor's lien, the acknowledgment of payment contained in the deed is only *prima facie* evidence of payment;⁵ and as against

¹ *Agnew v. McGill*, 96 Ala. 496; 11 So. Rep. 537; *Wood v. Chapin*, 13 N. Y. 509; *Thallhimer v. Brinckerhoff*, 6 Cow. 90; *Jackson v. McChesney*, 7 Cow. 360; *Carpenter v. Freeland, Lator* (N. Y.) 37; *Amsden v. Manchester*, 40 Barb. 158.

² *Whitbeck v. Whitbeck*, 9 Cow. 266; *Baker v. Connell*, 1 Daly (N. Y.), 469; *Stackpole v. Robbins*, 47 Barb. 12; *Taylor v. Hoey*, 4 J. & S. 402; *Mains v. Haight*, 14 Barb. 76; *Dooper v. Noelke*, 5 Daly, 413; *Lacus-trine Fertilizer Co. v. Lake Guano, etc., Co.*, 82 N. Y. 476.

³ *Lampon v. Corke*, 5 B. & Ald. 606.

⁴ *Hunter v. Walters*, L. R. 7 Ch. App. 75: "I apprehend that if a man executes a solemn instrument by which he conveys an interest, and if he signs on the back a receipt for money * * * he can not affect not to know what he was doing, and it was not enough for him afterwards to say that he thought it was only a form." Per *Hatherley*, L. C., 82. See also, *Kennedy v. Green*, 3 M. & K. 699; *Salazar v. Taylor*, 18 Colo. 588; 33 Pac. Rep. 369; *Maddox v. Bramlett*, 84 Geo. 84; *Shepherd v. Busch*, 154 Pa. St. 149; *Watson v. Miller*, 82 Texas, 279; *McCloskey v. McCormick*, 37 Ill. 66; *Neilsen v. United States, etc., Co.*, 37 Ill. App. 283; *Zook v. Odle*, 3 Colo. App. 87; *Crow v. Gleason*, 20 N. Y. Supl. 590;

65 Hun, 625; *Hunt v. Gleason*, 22 N. Y. Supl. 366; 67 Hun, 649. *Leake* lays down the rule, that the absence of an indorsed receipt on a deed is constructive notice that the consideration money is not paid. *Leake on Contracts*, 905.

⁵ *Koch v. Roth*, 150 Ill. 212; 37 N. E. Rep. 317, per *Magruder, J.*: "It is well settled that the recital of the consideration in a deed or bill of sale is not conclusive upon either party, and that it may be shown by parol what was the true amount of the consideration, and how it is to be paid. *Booth v. Hynes*, 54 Ill. 363; *Primm v. Legg*, 67 Ill. 500; *Drury v. Holden*, 121 Ill. 130; 13 N. E. Rep. 547; *Fort v. Richey*, 128 Ill. 502; 21 N. E. Rep. 498. The formal clause in a deed reciting the consideration is always open to explanation; and such a recital does not waive or destroy the vendor's lien, but is only *prima facie* evidence of payment. The fact of the non-payment of all the purchase-money may be shown, and, when such fact appears, a lien may be declared, notwithstanding the formal receipt for the consideration. 2 *Warvelle on Vendors*, 705. It is shown here that the appellee received no money upon the delivery of the deed and bill of sale."

strangers thereto, a receipt is incompetent evidence of the payment thereby acknowledged; because, as against such strangers, such receipt is but the hearsay declaration of the party who signed it, made without opportunity for his cross-examination, and independently of the sanction of his oath.¹ Where an administrator sued a life insurance company to recover the premium alleged to have been paid by his intestate upon an application for insurance, which was not granted by the company; and he put in evidence the latter's receipt for such premium, which provided for repayment if the application was denied, and the testimony of defendant's agent, who conducted the transaction, showed that the intestate had given a sight-draft for the premium, but had paid no cash; that the draft was protested, and had never since been paid; and that

¹Ellison v. Albright 41 Neb. 93; 59 N. W. Rep. 703, per Ryan, C.: "There is, therefore, now presented the competency of this receipt as against Ellison, who was not a party to the action in which the judgment was rendered, of which satisfaction and payment are attempted to be shown by the receipt. In Davidson v. Berthoud, 1 A. K. Marsh. 353, the case was for money laid out and expended by the defendants in error to the use of the plaintiff, and for work, labor, etc. The language used in discussing the effect and nature of a receipt was as follows: 'The only question material to be decided is whether the circuit court erred in admitting as evidence a receipt signed by A. Woolford for \$222.11, alleged to be advanced by the defendant in error to the plaintiff's use. It is explicitly laid down by Peake, in his treatise on Evidence (page 254), that, to prove the payment of money, in such a case, the person who made it, or he by whom it was received, should be called as a witness, for the receipt or acknowledgment of a person will be no evidence against the defendant. And of the correctness of this doc-

trine, on principle, there can be but little reason to doubt, for proof of the acknowledgment of a person who received the money would only be hearsay evidence, and the receipt of such person is nothing more than written evidence of his acknowledgment; and, whether in writing or by parol, hearsay evidence is equally inadmissible. Phillipps on Evidence, 174.' In Lloyd v. Lynch, 28 Pa. St. 419, there was under consideration the effect to be given a receipt on a deed, as against one not a party to the deed. Having premised that such receipt was competent evidence against the grantor, and all who derived title from him, and was such evidence as to pass the grantor's title, the opinion continued in the following language: 'But it is no evidence whatever of the fact of payment against a stranger, or even against one who derived title from Thomas Farrell [the grantor] previously to the date of the conveyance to Lloyd. Against them, it is nothing but hearsay. It is a mere *ex parte* declaration, not under oath, taken without any opportunity to cross-examine.' "

it was partly on this ground that the application had been refused, and there was no conflicting evidence sufficient to raise a doubt, it was held that it was proper to direct a verdict for defendant.¹ While an indorsement of the payment of interest on a note is *prima facie* evidence that such payment was made by the maker, such presumption is rebutted by the testimony of the maker to the contrary;² and where a note was delivered by the payee to the maker at the time when payment was demanded, and was retained by the maker, although the full amount due was not paid, the maker having claimed a credit which the payee refused to allow, it was held that the maker, by marking the note "paid," could not destroy its character as evidence of the indebtedness.³ The payment of a sum less than the amount actually due will not operate as a satisfaction of the entire debt, even though a receipt in full be given, unless there is a positive agreement to receive the amount paid in full discharge of the debt.⁴ Thus, a receipt in full for fees is not a complete defense to an action for attorney's fees, rent, and use of law library, in the absence of an agreement that the amount for which it was given was in full discharge of the debt.⁵

§ 388. Application of payments.—A person indebted on separate and distinct accounts is entitled to have his payments applied on such account or accounts as he shall direct.⁶ And if the party to whom the money is offered does not agree to apply it according to the expressed will of the party offering it, he must refuse it, and stand upon the rights which the law gives

¹ *Whiting v. Equitable Life Assur. Soc.* (1893), 60 Fed. Rep. 197.

² *Bell v. Campbell*, 123 Mo. 1; 25 S. W. Rep. 359.

³ *Liesemer v. Burg* (Mich. 1895), 63 N. W. Rep. 999.

⁴ *Markel v. Spitler*, 28 Ind. 488; *Ogborn v. Hoffman*, 52 Ind. 439; *Board of Com'rs v. State*, 109 Ind. 596; 10 N. E. Rep. 625.

⁵ *Kepler v. Jessupp*, 11 Ind. App. 241; 37 N. E. Rep. 655.

⁶ *Perot v. Cooper*, 17 Colo. 80; *Conduitt v. Ryan*, 3 Ind. App. 1; *Moore v. Norman*, 52 Minn. 83; 18 Lawyers' Rep. Ann. 359; *Boyd v. Jones*, 96 Ala. 305; 11 So. Rep. 405; *Vaughan v. Powell*, 65 Miss. 401; *Atkinson v. Cox*, 54 Ark. 444; *Hanson v. Cordano*, 96 Cal. 441; *Hinkle v. Higgins*, 83 Texas, 615; *Ellis v. Mason*, 32 S. C. 277; 10 S. E. Rep. 1069; *Clayton's Case*, 1 Mer. 572; *Simson v. Ingham*, 2 B. & C. 65; *Mills v. Fowkes*, 5 Bing. (N. C.) 455.

him.¹ It is not necessary that the debtor should give an express direction as to the application of the payment; if, from the circumstances of the case, his intention as to its application may be clearly implied, the creditor is bound to regard it.² Thus, where a creditor claims that his debtor owes him upon two separate demands, one of which is admitted and the other disputed, if the debtor, under such circumstances, makes a payment to his creditor, it will be presumed that the payment is made upon the demand admitted, rather than upon the one disputed.³ Payment will be referred to an interest-bearing debt, rather than to one not bearing interest.⁴ A payment equaling the exact amount of a debt is an appropriation.⁵ Where it appears that, at the time payments were made by a debtor to his creditor, the debtor intended them to be applied upon a specific obligation, and the creditor "well knew" that the debtor so intended, this is a sufficient appropriation.⁶ If the debtor pay with one intention, and the creditor receive with another, the intent of the debtor must govern.⁷ If a payment is made from the proceeds of the sale of mortgaged property, it must be applied to the discharge of the mortgage debt.⁸

§ 389. Payments on open accounts.—Where a payment is made upon general account, with no direction as to its application, the law applies it to the oldest items; that is, the first debits are to be charged against the first credits, and the debt paid according to priority of time.⁹ The fact that a part of

¹ *Croft v. Lumley*, 5 E. & B. 648, and it matters not that the creditor said at the time he received the money he would not apply it as the debtor directed. His taking the money is enough.

² *Perot v. Cooper*, 17 Colo. 80; *Marryatts v. White*, 2 Stark. 91; *Newmarch v. Clay*, 14 East, 240; *Nash v. Hodgson*, 6 D., M. & G. 474; *Burn v. Boulton*, 2 C. B. 476; *Shaw v. Picton*, 4 B. & C. 715; *Bell v. Buckley*, 11 Ex. 631.

³ *Perot v. Cooper*, 17 Colo. 80; *Burn v. Boulton*, 2 C. B. 476.

⁴ *Gass v. Stinson*, 3 Sumner, 98; *Pattison v. Hull*, 9 Cowen, 747.

⁵ *Marryatts v. White*, 2 Stark. 91.

⁶ *Hanson v. Cordano*, 96 Cal. 441.

⁷ *Conduitt v. Ryan*, 3 Ind. App. 1; *Reed v. Boardman*, 20 Pick. 441.

⁸ *Ellis v. Mason*, 32 S. Car. 277; 10 S. E. Rep. 1069; *Young v. English*, 7 Beav. 10; *Stoveld v. Eade*, 4 Bing. 154.

⁹ *Allen v. Culver*, 3 Denio, 284, where the court said: "In the case of a running account between parties, where there are various items of debit on one side and of credit on the other, occurring at different times,

the account is covered by a guaranty or surety does not prevent the rule from operating. An item secured by a guaranty will not be discharged until the items of debit precedent are discharged;¹ this is also the rule in admiralty.² But when an account is opened with a vessel during a period of two months—her stay in one port—and the account embraces some items which have the force of maritime liens, and others which do not, a payment will be applied in discharge of the items not liens, and the lien of the rest will be preserved.³ The principle that a payment is applied to the earliest item of an account applies to a payment made by the husband, with money belonging to the *corpus* of his wife's statutory estate, although some items of the account are a proper charge against her estate.⁴ California has by a code provision extended this rule to all cases of separate demands, and a payment applicable to either of them is applied to the one earliest in date of maturity.⁵

§ 390. Application by the creditor.—The general rule is that a creditor who holds several obligations or claims against his debtor has the right to apply a payment made to him by the debtor to either of the obligations he holds, unless the debtor at the time of making the payment directs its application, which right the debtor has in every case.⁶ “Accordingly, in

and no special appropriation of payments, constituting the credits, has been made by either party, the successive payments and credits are to be applied in discharge of the items of debit antecedently due in the order of time in which they stand in the account. In other words, each item of payment or credit is applied in extinguishment of the earliest items of debt until it is exhausted.” *National Park Bank v. Seaboard Bank*, 114 N. Y. 28; *Sheppard v. Steele*, 43 N. Y. 52; *Webb v. Dickenson*, 11 Wend. 62; *Thompson v. St. Nicholas Bank*, 113 N. Y. 325; *Conduitt v. Ryan*, 3 Ind. App. 1; *First National Bank v. Hollinsworth*, 78 Iowa, 575. In fact, it is doubtful if any authority can be found contravening this rule. *Field v. Hol-*

land, 6 Cranch, 8; *Schuelenburg v. Martin*, 2 Fed. Rep. 747; *Pardee v. Markle*, 111 Pa. St. 548; *Mack v. Adler*, 22 Fed. Rep. 570; *Hersey v. Bennett*, 28 Minn. 86; *Hannan v. Engelmann*, 49 Wis. 278; *Dennington v. Kirk*, 57 Ark. 595; 22 S. W. Rep. 430.

¹ *Conduitt v. Ryan*, 3 Ind. App. 1; *Truscott v. King*, 6 N. Y. 147; *Worthley v. Emerson*, 116 Mass. 374; *Cushing v. Wyman*, 44 Maine, 121; *Harrison v. Johnston*, 27 Ala. 445.

² *The Tom Lyle*, 48 Fed. Rep. 690.

³ *The D. B. Steelman*, 48 Fed. 580.

⁴ *O'Connor v. Armstrong*, 91 Ala. 265.

⁵ *Coalter v. Hurst*, 97 Cal. 290; 32 Pac. Rep. 248; Civil Code, § 1479.

⁶ *Cohen v. L'Engle*, 29 Fla. 655; 11 So. Rep. 44; *Henry Bill Pub. Co. v. Utley*, 155 Mass. 336; 29 N. E. Rep.

England the debtor may, in the first instance, appropriate the payment, *solvitur in modum solventis*; if he omit to do so, the creditor may make the appropriation, *recipitur in modum recipientis*.¹ Thus, a creditor of a partnership, and also of one of the partners individually, may, upon payment by such partner, apply it to extinguish the partner's individual debt, although the money belonged to the firm.² Likewise, the creditor may apply the money to the payment of an unsecured debt in preference to one secured.³ The creditor may apply a payment to an item the contracting of which is forbidden by law. Thus, where one of the items sold was liquor, the recovery for which was inhibited by statute, it was held that the creditor could apply a payment to extinguish this claim, and sue on the other claims.⁴ One holding two notes by the same maker, one of them secured by mortgage, who receives further security, with an express agreement that he may apply it to either note at his election, may make such application to the unsecured note; and a second mortgagee can make no valid objection thereto.⁵ Where an attorney had claims against a corporation, some of which he could enforce, and some of which he could not by reason of the want of a valid appointment, and money was paid to him generally on account, it was held he might apply such payments to the latter claims.⁶

§ 391. Debts barred by statute of limitations.—Where a creditor has two several items against his debtor, one barred by the statute of limitations, and the other not, and a part payment is made by the debtor without any express appropriation by him at the time of making it, the creditor is at liberty to appropriate the payment towards the satisfaction of that por-

635; *Haynes v. Nice*, 100 Mass. 327; *Henry v. Dietrich*, 7 N. Y. Supl. 505; *Wood v. Callaghan*, 61 Mich. 402; *Northern Bank v. Lewis*, 78 Wis. 475.

¹ *Mills v. Fowkes*, 5 Bing. (N. C.) 455, per Tindal, C. J.

² *Senter v. Williams* (Ark.), 17 S. W. Rep. 1029.

³ *Wood v. Callaghan*, 61 Mich. 402;

Bosanquet v. Wray, 6 Taunt. 597; *Goddard v. Hodges*, 1 Crompt. & M. 33. * *Philpott v. Jones*, 2 A. & E. 41. See also, *Cruickshanks v. Rose*, 1 M. & Rob. 100; *Wright v. Laing*, 3 B. & C. 165.

⁵ *Case v. Fant*, 53 Fed. Rep. 41.

⁶ *Arnold v. Mayor*, 4 M. & G. 860.

tion of the debt which the statute would bar.¹ And it seems that such appropriation by the creditor constitutes such a part payment of a debt as will take the balance out of the operation of the statute.²

§ 392. Rights of third parties.—While as between the debtor owing several debts and his creditor where the former at the time of payment of a sum of money fails to designate the debt on which it is to be applied, the latter may do so, yet there is an exception in case the money was received by the debtor from a third person whose property would be liable for the debt in case the money was not applied upon the third party's liability.³ Where there was a creditor of a firm and also of a surviving partner thereof individually, and the latter made a payment out of the funds belonging to the firm without designating the debt on which it should be applied, it was held that as the funds belonged to the firm they must be applied to the partnership debt.⁴ So, also, where a treasurer of a county was also *ex officio* treasurer of a city, and he mingled and kept the moneys of these corporations together, and during his term of office there was a deficit, the county commissioners, having found money in the treasury exactly sufficient to satisfy the amount due the county and having directed the same to be placed to the credit of the county, it was held that the moneys so mingled belonged to the several corporations *pro rata*, and that the county commissioners could not appropriate the whole to the exclusive use of the county.⁵ An attorney who has several demands against his client, some of which are barred by the statute of limitations, has no right to

¹ *Beck v. Haas*, 31 Mo. App. 180. The weight of American authority seems to be in favor of this view. *Mills v. Fowkes*, 77 Scott 444; *Williams v. Griffith*, 5 M. & W. 300; *Wood on Limitations*, § 110.

² *Beck v. Haas*, 31 Mo. App. 180. *Contra*, *Mills v. Fowkes*, 5 Bing. N. C. 455; *Waters v. Tompkins*, 2 C. M. & R. 723; *Waugh v. Coppe*, 6 M. & W. 824.

³ *Crane v. Keck*, 35 Neb. 683.

⁴ *Wiesenfeld v. Byrd*, 17 S. C. 106. See, also, *Thompson v. Brown*, 1 Moody & M. 40.

⁵ *Commissioners v. Springfield*, 36 Ohio St. 643. See, also, *Van Alen v. American Bank*, 52 N. Y. 1; *Matter of Van Duzer's Estate*, 51 How. Pr. 410; *Farmers' Bank v. King*, 57 Pa. St. 202; *Pennell v. Deffell*, 4 D. M. & G. 372; *Cook v. Tullis*, 18 Wall. 332; *Bayne v. United States*, 93 U. S. 642; *United States v. Bank*, 96 U. S. 30.

appropriate, in payment of the demands so barred, a sum received by him on account of his client for damages recovered in an action.¹

§ 393. Time of appropriation.—The creditor may apply payments up to the time of controversy. Until that time he continues to have the option of applying the several payments as he thinks fit.² And entries made by a man in books which he keeps for his own private purpose are not conclusive on him until he has made a communication on the subject of those entries to the debtor. But if a book has been kept for the common use of both parties, and the entries have been communicated to the debtor, then the creditor would be precluded from altering the appropriation.³ But after a controversy has arisen concerning such payments, the creditor can not then, at his discretion, appropriate payments.⁴ After controversy has begun, there having been no appropriation by either party before, the law will apply the payments according to the recognized rules of law governing the application of unappropriated payments.⁵

§ 394. Appropriation by law.—Where payments are made generally to a party who holds several obligations against the payor, which are not applied by either party, the court will make such application of the payments as equity and justice require, according to its own notion of the intrinsic equity and justice of the case.⁶ Thus the law will apply a payment to the liquidation of an unsecured debt rather than to a secured one.⁷

¹ *Walter v. Lacy*, 1 M. & G. 53, where the court said: "The doctrine of appropriation can not apply to the present case, where money has come to the plaintiff's hands, not by act of the defendant, but by the act of a third party."

² *United States v. Kirkpatrick*, 9 Wheat. 720; *Robinson v. Doolittle*, 12 Vt. 246; *Milliken v. Tufts*, 31 Maine 497; *Marryatts v. White*, 2 Stark 91; *Fairchild v. Holly*, 10 Conn. 175; *Conduitt v. Ryan*, 3 Ind. App. 1.

³ *Simson v. Ingham*, 2 B. & C. 65.

⁴ *Conduitt v. Ryan*, 3 Ind. App. 1; *Applegate v. Koons*, 74 Ind. 247.

⁵ *Applegate v. Koons*, 74 Ind. 247.

⁶ *Camp v. Smith*, 136 N.Y. 187; *Bank of California v. Webb*, 94 N. Y. 467; *Field v. Holland*, 6 Cranch. 8; *Cremer v. Higginson*, 1 Mason 323.

⁷ *Gardner v. Leck*, 52 Minn. 522, 54 N. W. Rep. 746; *Scheik v. Trustees*, 24 Ill. App. 369.

Where a debtor owed his creditor on a judgment, on a running account, and on a note secured by mortgage executed subsequently to the judgment, it was held that the payments should be applied as follows: Those made prior to the execution of the mortgage and the judgment were to be applied to the account; those made after the judgment were to be applied to satisfy it in preference to the secured note.¹ And where a debtor is indebted severally and also jointly with another to the same creditor, the law will apply a general payment upon the individual debt.² Where a surviving partner continues dealings with a creditor of the firm and makes payments generally with funds arising from the firm property the law requires that they shall be applied to the account made by the firm.³ But in order that the law may make an appropriation, the parties themselves must have been able to do so, had they elected. Thus where articles were all bought at one time under a single contract and payments were made on that contract and were applicable to the sum due upon it, and not to any part of that sum, the court refused to appropriate the payments to any one of the articles more than to all the others.⁴

§ 395. Partial payments.—The following is the rule adopted in most of the United States for the computation of interest and the application of payments in cases of interest-bearing

¹ *Frazier v. Lanahan*, 71 Md. 131.

² *Camp v. Smith*, 136 N. Y. 187.

³ *Tootle v. Jenkins*, 82 Texas, 29.

⁴ *Hill v. McLaughlin*, 158 Mass. 307.

See also, *Smith v. Stevens*, 81 Texas, 461, where an appropriation of payments on two notes was made, each in its proportion to the aggregate of the two. *Cohen v. L'Engle*, 29 Fla. 655, holding that payments made by an assignee should be applied *pro rata* to all the separate obligations of the debtor in the proportion that the aggregated claims of the creditor bears to the amount of the payment made; and this, too, whether the creditor for some parts of his claim holds other independent collateral securities or not. *Ayers v. Staley* (N. J. Eq.) 18

Atl. Rep. 1046; *Durrell v. Todd*, 31 Neb. 256; *Camden Bank v. Cilley*, 83 Maine, 72; *Ellis v. Mason*, 32 S. C. 277, appropriating payments from proceeds of mortgaged goods to mortgage. *Flarsheim v. Brestrup*, 43 Minn. 298, to the effect that a debtor, after acquiescing in the application of a payment to one demand, can not avail himself of the same fund to extinguish another demand, although, when he made the payment he directed its application to the latter. *Holley v. Hardeman*, 76 Geo. 328; *Gifford v. Thomas*, 62 Vt. 34; 19 Atl. 1088; *National Bank v. Dean*, 86 Iowa, 656; 53 N. W. Rep. 338, payments secured by the same mortgage shall be paid off in their order.

claims.¹ When partial payments have been made, apply the payment, in the first place to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of the principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal, but the interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal, and interest is to be computed on the balance as aforesaid.² This rule is equally applicable, whether the debt be one which expressly bears interest, or on which interest is given as damages.³ The rule seems to be universal that payments are always first applied to satisfy interest.⁴ The Connecticut courts have adopted a different rule for partial payments, which the supreme court of that state defends in the following language: "However that may be, we should not think fit, at this late period, to disturb the rule which was, on much deliberation, established by our superior court as early as 1784, and which has prevailed ever since. We believe that it is founded on as correct principles as any that can be devised."⁵ By this rule interest is computed upon the principal up to the liquidation of the indebtedness, and then computed on payments up to the same time, and the amount deducted from the principal and interest.⁶

§ 396. Further illustrations.—A subcontractor must apply all payments made by the contractor, the money being furnished by the owner, to the satisfaction of his demands

¹ *Story v. Livingston*, 13 Pet. 359; *Wallace v. Glaser*, 82 Mich. 190; 46 N. W. Rep. 227, "is the rule recognized in most of the United States;" *Payne v. Avery*, 21 Mich. 524.

² *Story v. Livingston*, 13 Pet. 359.

³ *Jacobs v. Ballenger*, 130 Ind. 231; *Green v. Vardiman*, 2 Blackf. 324; *Wasson v. Gould*, 3 Blackf. 18; *Markel v. Spitler*, 28 Ind. 488; *Cormick v. Mitchell*, 57 Ind. 248;

Longworth v. Higham, 89 Ind. 352; *Dean v. Williams*, 17 Mass. 417; *Lash v. Edgerton*, 13 Minn. 210; *Baker v. Baker*, 28 N. J. Law, 13; *Hurst v. Hite*, 20 W. Va. 183; *Case v. Fish*, 58 Wis. 56; *United States v. McLemore*, 4 How. 286.

⁴ *Treat v. Stanton*, 14 Conn. 445, 457.

⁵ *Avery v. Wetmore*, Kirby 49, note.

⁶ *Rogers v. Yarnell*, 51 Ark. 198.

against the contractor arising out of the contract; he can not apply such payments to other demands against the contractor.¹ But the money paid by a contractor to material men, and applied by them on account of another building contract, can not be applied by the owner of the building to reduce the claim of lien of the material men, notwithstanding the fact that the contractor used the receipt from the material men in obtaining a credit on the building contract.² Where a contractor borrowed money for the erection of two distinct buildings, and left the money with the lender to be paid out on the orders of the mechanics doing the work, it being understood that the orders should designate for which building each particular lot of material was procured; it was held that the orders were a direction for the application of the payments, and that the material man could not credit such orders as payment on an old account due him from the mechanics, but must credit them to the contractor's account for the particular building designated in the order.³ Where a creditor takes security for an existing indebtedness, and thereafter continues his account with the debtor in the ordinary running form, charging him with goods sold and crediting him with moneys received, there is no irrebuttable presumption that the payments are to be applied upon the original indebtedness.⁴ Where a bank president borrowed money of a bank, which he lent to a debtor of the bank, the debtor giving the president a mortgage to secure the loan, it was held that, notwithstanding the president promised that the debt to the bank should be paid, yet, having received the proceeds of the mortgage, he might apply them to extinguish the debt to him.⁵

¹ *Mack v. Colleran*, 18 N. Y. Supl. 104; 136 N. Y. 617, where it was reversed on another point.

² *Schallert-Ganahl Co. v. Neal*, 91 Cal. 362.

³ *Western Sash Co. v. Young*, 48 Mo. App. 505.

⁴ *Griffith v. Crocker*, 18 Ont. App. 370.

⁵ *Apperson v. Exchange Bank (Ky.)*, 10 S. W. Rep. 801. See also, *Perdue v. Brooks*, 85 Ala. 459; *O'Cal-*

laghan v. Barrett, 21 N. Y. Supl. 368; *Wells v. Hughes*, 89 Va. 543; 16 S. E. Rep. 689; *Thomas v. Stewart*, 132 N. Y. 580; *Sankey v. Cook*, 78 Iowa, 419; 43 N. W. Rep. 280; *Anderson v. Perkins*, 10 Mont. 154; *Chaffe v. Mackenzie*, 43 La. Ann. 1062; *Weil v. Flowers*, 109 N. C. 212; *Johnson v. Blazer*, 33 Neb. 841; *Arbuckles v. Chadwick*, 146 Pa. St. 393; *North Wisconsin Lumber Co. v. American Express Co.*, 73 Wis. 656; *Sanborn*

§ 397. Exception to the rule of application of payment.—

The general rule is that, when a party indebted to the same person on more than one account makes a partial payment, he has the unqualified right to direct its application to one debt in preference to the other. The payment is voluntary, and the debtor may declare the terms upon which it is made, and the creditor must accept them, or reject the payment. If he accepts the payment, he takes it *cum onere*. Therefore it is that if the debtor pay with one intent, which is known or communicated to the creditor, and the creditor receives with another intent, the intent of the payer must prevail. But if the debtor does not, at or before the time of the payment, give direction for its application, his control of the payment is gone, and the right of the creditor to appropriate it arises, and he has the unqualified right to apply it to any valid, subsisting debt he may hold against the debtor.¹ An exception to this rule obtains when the money with which the payment is made is known to the creditor to have been derived from a particular source or fund. Then, without the consent of the debtor, the creditor can not apply it otherwise than to the exoneration of the source or fund from which it was derived. Nor can the debtor, without the consent of the creditor, divert the payment from the relief of that source or fund.² In the absence of

v. Cole, 63 Vt. 590, holding that if a debtor treats several notes as constituting one demand, and makes a payment, the creditor may apply it upon all the notes; also a part payment will renew a note barred by the statute of limitations, although the credit on the note is made by the application of a general payment; *Henry v. Dietrich*, 7 N. Y. Supl. 505.

¹ *Mayor, etc., v. Patton*, 4 Cranch, 317, 321; 1 Am. Lead. Cas. 330, 341.

² *Strickland v. Hardie*, 82 Ala. 412; 3 So. Rep. 40, where *Stone, C. J.*, referring to *Levystein v. Whitman*, 59 Ala. 345, said: "As to the cotton covered by the mortgage and the application of its proceeds we said: 'If a creditor proposes to divert a pay-

ment from the relief of the source or fund from which it arises he must show for the diversion the authority of the party to be affected.'" To the same effect the learned chief justice cited also *Mahan v. Smitherman*, 71 Ala. 563; *Johnson v. Thomas*, 77 Ala. 367; *Aderholt v. Embry*, 78 Ala. 185. In *Pearce v. Walker*, 103 Ala. 250; 15 So. Rep. 568, in a suit to enjoin the enforcement of a power of sale in a mortgage on the ground that the debt had been paid, it appeared that the mortgagor was indebted to B. on a mortgage, and also to a firm of which B. was a member. A payment was made by a third person, with whom money had been deposited by the mortgagor, to another member, and

evidence of the application by a creditor who holds several demands against the debtor, or by agreement of the parties or of any equities requiring a different application, payments made by the debtor will be applied to the oldest debt and to a secured rather than to an unsecured debt.¹

§ 398. The same subject continued.—Where the debtor pays generally, or fails to make the application when he might do so, the creditor may apply the payment to whatever debt he pleases, unless there are circumstances which would render the exercise of such discretion by him unreasonable, and unjust to the debtor. If no application is made by either party, the court will make it according to the justice and equity of the case.² Where personalty and realty are sold at the same time

the depositary made a memoranda at time of the deposit indicating that the money was to be applied on the mortgage, but neither such member nor the mortgagee had knowledge of it. The uncontradicted testimony of this other member was that he received the money under an agreement with the mortgagor that it was to be applied on the debt due the firm. The payment was not entered on the mortgagor's account with the firm until twelve months later, though written evidence of it was given. It was held that a conclusion that the payment should have been applied in satisfaction of the mortgage was erroneous. *Brickell, C. J.*, said: "There may or may not have been in the mind of the mortgagor an intent, when the payment was made, that it should be applied to the mortgage debt. Such intent was not communicated to the mortgagee, and the payment was unattended by any act or declaration manifesting it; and, if there was nothing else in the case, it would be enough to say that, before the creditor can be affected by the intent of the debtor in making a payment, the intent must be disclosed to him. *Brice v. Hamilton*, 12 S. C. 32; *Long*

v. Miller, 93 N. C. 233. The subsequent declarations of the mortgagor that he intended the payment to be applied to the mortgage debt are not of any consequence. The payment was an act completed. Before or at the time of making it, he could have given direction to it; after it was made, he was without control over it; nor could his past conduct be qualified or explained by his subsequent declarations. The partner receiving the payment did not act or profess to act as the agent of the mortgagee, nor was he dealt with in that capacity. If he had been dealt with in that capacity, the evidence does not disclose authority to receive payment of the mortgage debt. *Smith v. Kidd*, 68 N. Y. 130; 23 Am. Rep. 157."

¹ *Pond v. Harwood* (1893), 139 N. Y. 111; *Thompson v. St. Nicholas Bank*, 113 N. Y. 325; *Nat. Park Bank v. Seaboard Bank*, 114 N. Y. 28.

² *Koch v. Roth*, 150 Ill. 212; 37 N. E. Rep. 317; *McCurdy v. Middleton*, 82 Ala. 131; 2 So. Rep. 721; *Arnold v. Johnson*, 1 Scam. 196; *Mayor v. Pat-ten*, 4 Cranch, 317; *United States v. Kirkpatrick*, 9 Wheat. 720. In *Moose v. Marks*, 116 N. C. 785; 21 S. E. Rep. 561, plaintiff held two notes

to the same person, but a separate price is agreed on for each, and the vendee afterwards pays generally more than the price of the personalty, the vendor may apply such payment, first, to the price of the personalty, and enforce a vendor's lien for the balance due on the realty.¹ Where an agent authorized to collect a judgment takes a check in payment, knowing that there is money in the bank to pay it, and notifies his principal, who draws it out on a check previously given for another debt, but which had been dishonored, so that no money remains to pay the second check, the judgment will be considered paid, so that it may not be enforced against sureties for the debt for which it was obtained.²

§ 399. Payments made under mistake of fact.—In a case where the plaintiff, as surety of an executor, having become liable to legatees because of a misappropriation by the executor of funds of the estate, drew his check in favor of a legatee who had died without issue before testator, but of which fact both plaintiff and the executor were ignorant, and the executor, in whose hands the plaintiff had put the check for delivery to

against defendant—one as executor, the other in his own right, as assignee, without defendant's knowledge; and in answer to his request for money, made on the ground that "one of the heirs" needed it, defendant remitted a check. It was held that the same should be applied on the note held by plaintiff as executor.

¹ *Koch v. Roth* 150 Ill. 212; 37 N. E. Rep. 317, per Magruder, J.: "Where land and personal property are sold together, under one contract, at a gross price, without stating the separate price or value of the land and personalty, so that it can not be determined what part of the gross price is for the one and what part is for the other, there will be a waiver of the vendor's lien, as it will be presumed that the vendor intended to rely upon the personal responsibility of the vendee. *Stringfellow v. Ivie*, 73 Ala. 209; *Wilkinson v. Parmer*, 82 Ala.

367, 3 So. Rep. 4; *McCandlish v. Keen*, 13 Gratt. 615; *Young v. Harris*, 36 Ark. 162. But no such a state of things exists in this case. A price or value was fixed upon the personalty separate from that fixed upon the realty, the price of the one being \$1,000, as above stated in the bill of sale, and of the other being \$13,000, as stated in the deed. As to the payment of the \$2,000 in stock, the vendor had the right to apply one-half of it in payment for the personalty, in the absence of any direction by the vendee to make a different application. The debtor is entitled to elect on which debt the payment shall be credited, and it is the duty of the creditor to so apply it. This election, however, should be made at the time the payment is made."

² *Kallander v. Neidhold* (1894), 98 Mich. 517; 57 N. W. Rep. 571.

the legatee, delivered it to defendant, who was the personal representative of the deceased legatee, it was held that plaintiff could recover the amount of such check as money paid under a mistake of fact, although it had been distributed by defendant among those entitled to the estate of the deceased legatee, unless defendant shows that it would be inequitable to allow such recovery.¹

¹ *Phetteplace v. Bucklin*, 18 R.I. 297; 27 Atl. Rep. 211, per Matteson, C. J.: "The principle is well settled that, if a person pays money which he was not liable to pay in ignorance of the facts, he may recover the money so paid. *Garland v. Salem Bank*, 9 Mass. 408; *Mayer v. Mayor, etc.*, 63 N. Y. 455; *Kingston Bank v. Eltinge*, 40 N. Y. 391; and see note to *Marriott v. Hampton*, 2 Smith Lead. Cas. 421 *et seq.* It is, however, subject to the qualification that, if it is inequitable to allow a recovery, the money can not be recovered, but the person making the payment must bear the loss. *Mayer v. Mayor, etc.*, 63 N. Y. 455. The defendant seeks to bring himself within this qualification, and contends that having paid the money received from the plaintiff to the legatees under the will of Catherine C. Flagg, one of whom resides in Australia, and is therefore not readily accessible, before the plaintiff or the executor demanded repayment, his position is so changed that it would be inequitable to allow the plaintiff to recover. We do not think it is enough to relieve the defendant from liability that he has paid the money to others, even though such payment was made before a repayment was demanded. He must show that a recovery by the plaintiff would be inequitable. If at the time he received the plaintiff's money he knew that Catherine C. Flagg had died before the testatrix, leaving no lineal descendant, so that the legacy to her had lapsed, he was

bound to have communicated those facts to the plaintiff or to the executor. When a person pays money in ignorance of circumstances with which the receiver is acquainted, and which, if disclosed, would have prevented the payment, the parties do not deal on equal terms, and the money is held to be unfairly obtained, and may be recovered. *Martin v. Morgan*, 1 Brod. & B. 289; *George v. Taylor*, 55 Texas, 97; 8 Am. and Eng. Encyc. of Law, 645, note 4; *Kerr on Fraud and Mistake*, 99. The testimony on the part of the defendant does not negative such a state of facts, and certainly, if such a state of facts existed, it would not be inequitable to permit the plaintiff to recover, even if the defendant had paid the money to others before demand for its repayment. Again, assuming that the defendant had no such knowledge, but received the money innocently, he should at least show that he has made some effort to restore the money, or that such effort would be unavailing. The testimony does not show that he has made the slightest effort in that direction, not even that he has requested the legatee here in Providence to give back the portion of the money received by such legatee. It is possible that a simple request to the legatees, accompanied by a statement of the facts showing the injustice of their retention of the money, would result in their returning it to be restored to the plaintiff. Until all reasonable efforts have been made by the defendant to get back the money,

§ 400. Payments under mistake of law.—Where a surety on the general bond of a county treasurer makes a payment to the obligee to avoid suit, knowing that the default of his principal was greater than the amount paid, which was unknown to the obligee, but under the mistaken belief of law that the bond secured school funds as well as the general county fund, he can

and have proved unavailing, how can it be said that it would be inequitable to permit a recovery? But assuming, again, that such efforts had been made, and had proved unavailing, we think it may well be doubted whether such a state of facts would be enough to render a recovery by the plaintiff inequitable. To have that effect, must there not be something besides the mere payment of the money by the plaintiff which has caused the position of the defendant to be changed? Must there not be some negligence or laches on the part of the plaintiff in not promptly demanding repayment of the money on discovery of the true state of facts, but for which the defendant's change of position might not have occurred? In *Durrant v. Ecclesiastical Commissioners*, L. R. 6 Q. B. Div. 234, it was held that a plaintiff who had paid by mistake a tithe rent charge for lands not in his occupation could recover the amount from the defendants, although, at the time when he discovered his mistake, the remedy of the defendants against the lands actually chargeable had become barred. Again, in *Kings-ton Bank v. Eltinge*, 40 N. Y. 391, the sheriff, having received an execution issued on a judgment in favor of the defendant, and afterwards one on a subsequent judgment in favor of the plaintiff against the same defendant, and before the last had run out, but after the sixty days had expired as to the first, made a levy on personal property not sufficient to satisfy both, sold it, and paid over the proceeds to

the defendant in satisfaction of his execution, with the assent of the plaintiff, neither party knowing that the execution had run out before the levy, but supposing the contrary, it was held that the plaintiff could recover the money as paid under a mistake of fact, though the defendant's judgment had been in consequence of the receipt of the money canceled and discharged of record. And see *Standish v. Ross*, 3 Exch. 527; *Rheel v. Hicks*, 25 N. Y. 289; *National Bank of Commerce v. National Mech. Bank. Assn.*, 55 N. Y. 211. In the case at bar neither the plaintiff nor executor learned the true state of the facts until the plaintiff was called on by the attorney for the residuary legatees to pay to them the amount of the legacy which the plaintiff had already paid to the defendant. The precise date when this demand on the plaintiff was made does not appear. The plaintiff testifies that it was two months or more after he had made the check and placed it in the hands of the executor for delivery. It is not claimed, however, that the demand on the plaintiff by the attorney of the residuary legatees was before the defendant had distributed the money, and, consequently, no negligence or laches on the part of the plaintiff after discovering the facts could have had any effect in causing the defendant to change his position by the payment of the money; and, if not, it is difficult to see how there can be any equity in his favor to prevent the plaintiff's recovery."

not, on the ground of mistake or coercion, recover the amount paid in excess of the default as to the general fund.¹ Although a provision in a mortgage for the payment of interest on a note secured by the mortgage can not be enforced in California because it violates the constitution of that state, yet where the mortgagors voluntarily paid such interest under a mistaken belief that they were bound to do so, they can not recover it back, or demand that it be credited on the principal of the loan.²

§ 401. Presumptions of payment—Time of payment.—

Long delay in urging payment of a claim, although a circumstance tending to raise a presumption of payment, will not, in the absence of aiding circumstances, or affirmative proof that the period of the statute of limitations has expired against the claim, establish a conclusive presumption of payment.³ The

¹ *Pass v. Granada County*, 71 Miss. 426; 14 So. Rep. 447, per Cooper, J. "The very truth is that the sureties believed they were discharging their obligation by the payment of a less sum than that for which payment might be enforced. The mistake was one of law, in assuming that the effect of the general bond was to secure the school funds as well as the general fund of the county. In truth the sum paid by the sureties is less than the county would have recovered by suit on the bonds on which Pass was surety, for by suit a recovery would have been for double the amount embezzled by the treasurer. Code, § 375. The appellant, Pass, in the light of the known facts, does not occupy a position to commend him to a court of equity for relief. He withheld from the county authorities facts known to him, and which it was then supposed made the sureties on the bond liable for a much larger sum than the board of supervisors was demanding. He has since discovered that, although these facts might exist, yet by law their ability was less. The payment made under

these circumstances can not be recovered back, and the chancellor should have denied all relief against the county."

² *Harralson v. Barrett* (1893), 99 Cal. 607; 34 Pac. Rep. 342.

³ *Swatts v. Bowen*, 141 Ind. 322; 40 N. E. Rep. 1057, per Hackney, J.: "It is insisted that the appellant lost her right to enforce her mortgage by her long delay and laches. She certainly suffered none from laches during the period of limitation, since the law gave her 20 years in which to maintain an action to foreclose her mortgage. As we have already seen, we can not adjudge, as a question of law arising upon the pleadings, that the period of limitation has yet expired. There is no doubt that, as held in *Long v. Straus*, 124 Ind. 84; 24 N. E. Rep. 664, and *Garnier v. Renner*, 51 Ind. 372, a jury may properly consider long delay in urging a claim as a circumstance tending to raise the presumption of payment. Here there are no other circumstances than delay, and, since the law may have authorized that delay, we can not hold the

burden of proof as to payment, without regard to lapse of time, rests upon the party who pleads it.¹

delay conclusive of payment. See *Potter v. Smith*, 36 Ind. 231; *Harper v. Terry*, 70 Ind. 264; *Scherer v. Ingerman*, 110 Ind. 428; 11 N. E. Rep. 8, and 12 N. E. Rep. 304." In *Mulhall v. Berg* (Iowa, 1895), 63 N. W. Rep. 573, in an action on a note signed by a husband and wife, defendant husband testified that the note was paid by another note signed by him, his wife, and his father-in-law, and that the note in suit was not surrendered because plaintiffs claimed that they had lost it. This evidence was corroborated by that of the wife and the father-in-law, but their knowledge of English was very imperfect, and it did not appear that the transaction involving the payment was not in English. The note in suit was amply secured, and the one alleged to have been given in payment thereof was not secured. A witness testified that he heard one of the defendants ask plaintiff "about that note," and that they replied that they "had not found the note yet," but what note was referred to did not appear. It was held that the presumption of non-payment arising from the fact of plaintiff's possession of the note in suit was not overcome.

¹ *Lanier v. Huguley* (1893), 91 Ga. 791; 18 S. E. Rep. 39. And see *Tip-pin v. Brockwell*, 89 Ga. 467. In *Pearce v. Walker*, 103 Ala. 250; 15 So. Rep. 568, the court said: "A party pleading payment, whether as matter of defense or as ground of affirmative relief, must prove it, if the fact is denied. If of it no evidence is offered, or if the evidence of it be equally balanced, or if the evidence does not generate a rational belief of the fact, the party affirming its existence must fail for want of proof. 3 *Brickell's Digest*, p. 698, §§ 1, 2." In *Gardner v. Burch*, 101 Mich. 261; 59 N. W. Rep. 613, a note setting out that, in consideration that

the B. & C. Ry. Co. will build from B. to C., *via* M., the maker will pay a certain sum upon the first arrival of a regular passenger train at M. from C. over the road of said company by a certain date, is payable on the timely commencement of regular passenger service from C. to M., although nothing has been done on the line from M. to B. except to survey it. Grant, J., said: "It is argued in behalf of the defendant that the consideration for the note was the construction of the entire road, and the running of a regular passenger train from West Bay City to Battle Creek, and that these were conditions precedent to the right of recovery. Three similar contracts have been before this court for construction, in the following cases: *Stowell v. Stowell*, 45 Mich. 364; 8 N. W. Rep. 70; *Toledo, etc., Railroad Co. v. Johnson*, 55 Mich. 456; 21 N. W. Rep. 888; *Gardner v. Walsh*, 95 Mich. 505; 55 N. W. Rep. 355. In *Stowell v. Stowell*, 45 Mich. 364, the note was as follows: 'In consideration of the construction of the Chicago and Canada Southern Railway through or within one-half a mile of the village of Dundee, in the county of Monroe, state of Michigan, within three years of this date, and the building of passenger and freight depot at Dundee, Mich., I promise to pay to the treasurer of said railway company, or bearer, the sum of fifty dollars in thirty days after said road and depot are constructed as aforesaid.' In *Toledo, etc., Railroad Co. v. Johnson*, 55 Mich. 456, as follows: 'For the purpose of promoting and aiding the construction of the Toledo, Ann Arbor and Northern Railroad, and in consideration of the benefits to be derived therefrom, I do hereby pledge and agree to pay to the order of the Toledo, Ann Arbor and

§ 402. Executor's duty to pay debt.—An executor who has notice of a debt outstanding against the testator, and who resists payment on the ground that the debt was discharged by the testator in his life-time, can not justify himself for the non-production of assets with which to pay it by setting up that he retained in his hands an ample amount of stock in a private corporation, and that, pending litigation which he inaugurated and carried on in resistance to the creditor's suit, the stock became depreciated in value, so as to be insufficient to satisfy the creditor.¹ It is the duty of the executor to pay

Northern Railroad Company the sum of one hundred dollars, payable in six months after the first cars run over the road from Ann Arbor to Toledo. Payable on or before the time specified, without interest.' In *Gardner v. Walsh*, as follows: 'For the purpose of promoting and aiding the construction of the Battle Creek and Bay City Railroad, and in consideration of the benefits to be derived therefrom, I do hereby promise and agree to pay to the order of George H. Young, trustee, the sum of twenty-five dollars, payable when the road is constructed and the cars are running thereon from Midland to West Bay City, Michigan.' In all these cases the right of recovery was sustained, notwithstanding that the road in each case was not completed. We think they are conclusive in the present case. While the language of each contract is different, still in each the termini were fixed, and it was contemplated that the road should be eventually completed between them. But it was held that the notes became due before that time. In the present case it is clear that a complete construction before payment was not in the minds of the parties. The only condition precedent was the construction of the road from West Bay City,

which was not a terminus, to Midland, another intermediate station. To complete the road to Bay City would require the building of a costly bridge, with a draw, over the Saginaw river. The expression 'the first arrival of a regular passenger train at Midland from West Bay City over the road of said company' can not, under the facts, be fairly construed to mean the running of a train over the entire length of the road."

¹ *Lanier v. Huguley* (1893), 91 Ga. 791; 18 N. E. Rep. 39, per Simmons, J.: "In the case of *McIntosh v. Hambleton*, 35 Ga. 94, this court held: 'Though an administrator is not liable for property lost or destroyed without fault on his part, he is bound to administer the estate according to law, by paying the debts before making distribution to legatees or heirs. This duty is enjoined upon him by law, by his oath of office, and by a sound public policy. An administrator who, with notice of an outstanding debt, paid to the heir, before the expiration of 12 months from the grant of administration, a portion of the estate, retaining, in slaves and other property, enough to meet said debt, is not protected against the creditor's claim by the results of the late war in the way of the abolition of slavery and the

the debts of the estate, or amply to secure the payment thereof, before he makes any distribution. This is true, notwithstanding the will disposed of the whole estate, including the stock, by directing the executor to deliver the same to the legatees in kind.

serious depreciation of the other assets retained. The administrator, in such case, must make good the deficiency caused by his own illegal act.' See also, *Sharp v. Bonner*, 36 Ga. 418."

CHAPTER XI.

BREACH OF CONTRACT.

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| § 403. Putting it out of one's power to perform. | § 412. The same subject continued. |
| 404. Further illustrations. | 413. Character of notice. |
| 405. Promisee disabling promisor. | 414. Notice repudiated. |
| 406. Ill treatment. | 415. Notice retracted. |
| 407. Bankruptcy or insolvency. | 416. Further illustrations. |
| 408. The same subject continued. | 417. <i>Scienter</i> . |
| 409. Refusal to perform, the time for performance not having arrived—The English rule. | 418. <i>Locatio operis faciendi</i> —Defective performance. |
| 410. The same subject continued—Illustrations of the English rule. | 419. Seller's breach—Buyer's remedy. |
| 411. American rule as to renunciation of contract. | 420. Loss of profits as damages for breach. |
| | 421. Partial or entire breach—Profits as damages. |

§ 403. Putting it out of one's power to perform.—Where the promisor has expressly or impliedly undertaken to keep himself ready to perform at any time, the disabling himself is a breach.¹ But whether merely temporarily disabling one's self, the time for performance not having arrived, constitutes a breach, is doubtful; from language used by Lord Kenyon, it is to be inferred that it would not.² The rule in Massachu-

¹ Lovelock v. Franklyn, 8 Q. B. 371.

² Lovelock v. Franklyn, 8 Q. B. 371. "The plaintiff has a right to say to the defendant: 'You have placed yourself in a situation in which you can not perform what you have promised; you promised to be ready during the period of seven years; and during that period, I may at any time tender you the money and call for an assignment, and expect that you should keep yourself ready; but if I now were to tender you the money, you would not be ready.' That is a breach

of the contract. No case contradicts this view; the language in the authorities relied upon by the defendants relates to a different state of things. Where a party agrees to sell, or to lease, on a given future day, he may have all the intermediate time open to him for acquiring the means of performing his contract, but here the party puts it out of his power to perform what he has agreed to perform; that is, to assign at any time at which he may be called upon. This distinction shows that the passage cited from

setts is, however, otherwise.¹ Accordingly, if one agree to convey land to another, and convey the land to a third person, such other has a cause of action, although there has been no tender on his part; and it is no defense that such party was unable to pay the money.² The winding up of an insurance company, and transferring all its assets and obligations to a new company, gives a policy-holder a right to consider his contract terminated, and to demand what is justly due him in that exigency.³ Likewise, an order for winding up a company is notice of discharge to all the persons in the employment of the company, who are entitled at once to their salary for the full time.⁴ An agreement to make a will of a certain kind is broken at once when another kind of will is executed, although the testator has not deceased.⁵ Where the promisor agreed to furnish the promisee a show case and shelving with which to conduct a stationery business, the leasing part of the store for a dyeing establishment and putting up a partition so the show case could not be seen was held a breach.⁶

§ 404. Further illustrations.—The marrying another by a person engaged to be married is a breach, although the time

Lord Coke is inapplicable; that proves no more, on the point now before us, than that, if an act is to be performed at a future time specified, the contract is not broken by something which may merely prevent the performance in the meantime. We are introducing no novelty. In all the cases put for the defendants, the party had the means of rehabilitating himself before the time of performance arrived; here he has incapacitated himself at the very time when he may be called on and should be ready."

¹ *Heard v. Bowers*, 23 Pick. 455. "The general doctrine undoubtedly is, that where a party stipulates to make a conveyance of an estate to another at a future day, and before the day conveys the estate to a third person, he is to be considered as guilty of a breach of his stipulation, and is liable

to be sued before the day arrives. So, although he should repurchase the same estate before the day appointed for the performance of his contract, he would still be liable for a constructive breach of his contract, and he could not compel the other party to perform it on his part." See also, *Lowe v. Harwood*, 139 Mass. 133.

² *Lowe v. Harwood*, 139 Mass. 133; *Newcomb v. Brackett*, 16 Mass. 161; *Buttrick v. Holden*, 8 Cush. 233; *Farrington v. Hodgdon*, 119 Mass. 453.

³ *Lovell v. St. Louis Ins. Co.*, 111 U. S. 264; *Cook's Policy*, L. R. 9 Eq. 703; *Holdich's Case*, L. R. 14 Eq. 72.

⁴ *In re Oriental Bank*, L. R. 32 Ch. Div. 366.

⁵ *Jenkins v. Stetson*, 9 Allen, 128.

⁶ *Dickinson v. Hart*, 142 N. Y. 183; 36 N. E. Rep. 801, affirming s. c. 21 N. Y. Supl. 307.

has not yet arrived for performance and the promisee has made no request to marry.¹ Where a telegraph company agreed to maintain a telegraph office at a certain place, but subsequently leased their lines to another company which offered to maintain the office, this was held a breach.² And where a party by dissipation renders himself incompetent to perform his contract, the contract may be rescinded by the other.³ In the sale of specific goods, to be delivered on request, a sale of the goods to a third person is a breach.⁴ In Michigan it seems to be the rule that, even if the promisor has disabled himself, the promisee must tender performance before suit.⁵ But this is opposed to the weight of authority to the effect that such disability dispenses with the performance of all conditions precedent or concurrent.⁶

§ 405. Promisee disabling promisor.—A breach of the contract takes place when the promisee disables the promisor from performing. Thus, where there was a contract to exchange land for a homestead right and the party owning the land abandoned the contract and refused to perform it before the time at which the other was required to procure the homestead right, and in consequence of which the homestead right could not be

¹ Short v. Stone, 8 Q. B. 358.

² Tufts v. Atlantic Tel. Co., 157 Mass. 269; 23 N. E. Rep. 844.

³ Rector v. McDermott (Ark.), 13 S. W. Rep. 334.

⁴ Bowdell v. Parsons, 10 East, 359.

⁵ Thomas v. Corey, 74 Mich. 216, 41 N. W. Rep. 901, where a declaration to recover damages for breach of a contract to let the sawing of a quantity of logs, because of the sale of the logs to a third person, was held demurrable on account of not alleging a readiness to saw.

⁶ Lowe v. Harwood, 139 Mass. 133; Newcomb v. Brackett, 16 Mass. 161; Buttrick v. Holden, 8 Cush. 233; Lovelock v. Franklyn, 8 Q. B. 371; Bowdell v. Parsons, 10 East, 359; Reid v. Explosives Co., L. R. 19 Q. B. D. 264; Stirling v. Maitland, 5

B. & S. 840; Caines v. Smith, 15 M. & W. 189; Maclure, *Ex parte*, L. R. 5 Ch. 737; Charnley v. Winstanley, 5 East, 266; *In re* Imperial Wine Co., 42 L. J. C. 5; Carrington v. Waff, 112 N. C. 115; 16 S. E. Rep. 1008; Heard v. Bowers, 23 Pick. 455; United States v. Behan, 110 U. S. 338; De Peyster v. Pulver, 3 Barb. 284; Christy v. Stafford, 22 Ill. App. 430; Ford v. Tiley, 6 B. & C. 325; Ruesens v. Mexican Co., 20 Central Law Jour. 34; McNish v. Coon, 13 Wend. 26; Rhodes v. Forwood, L. R. 1 App. Cas. 256, holding that where one party agrees to employ another as agent at a certain place, for a fixed time, there is no implied condition that the business itself shall continue to be carried on during the period named.

procured, it was held that the land-owner should comply with his contract, even though he got nothing for his land, and specific performance was decreed.¹ A creditor holding a life insurance policy on the life of his debtor, thinking the widow would obstruct him in its collection, contracted with her that "she is to do all within her power in aid of the collection of the policy;" in consequence of her voluntarily making an affidavit to the effect that at the time the creditor took out his policy the debt was much less than the policy, he was compelled to compromise with the company; she was held precluded from recovering by her action in making the affidavit.² In accordance with this principle the promisor may always recover in assumpsit the value of his work done before the promisee's act rendered it impossible to proceed; as in case of mechanics hindered and delayed in the further prosecution of their work.³ When an act of the promisee disables the promisor he may abandon his contract at once and sue. Thus, where the promisor agreed to saw a certain number of feet of lumber according to specifications to be furnished by the promisee, the failure to furnish the specifications is a breach, warranting the promisor in abandoning the contract and enabling him to recover *pro tanto*.⁴

§ 406. Ill treatment.—In all cases of contracts for personal services the treatment by the promisee of the promisor in such a manner that he can not reasonably be required to submit is a breach. This principle is most frequently invoked in cases of parents conveying property to their children in considera-

¹ *Dulin v. Prince*, 124 Ill. 76. See also, *McClure v. Otrich*, 118 Ill. 320; *Towner v. Tickner*, 112 Ill. 217; *Cohn v. Mitchell*, 115 Ill. 124; *Lyman v. Gedney*, 114 Ill. 388. 27 Hun, 557; *Garretty v. Brazell*, 34 Iowa, 100; *Wells v. Calnan*, 107 Mass. 514; *Applebee v. Percy*, L. R. 9 C. P. 657.

² *Alexander v. Sanders*, 93 Ala. 345; 9 So. Rep. 521.

³ *Gilbert, etc., Co. v. Butler*, 146 Mass. 82; 15 N. E. Rep. 76; *Cleary v. Sohler*, 120 Mass. 210; *Lord v. Wheeler*, 1 Gray, 282; *Niblo v. Binsee*, 1 Keyes (N. Y.), 476; *Rawson v. Clark*, 70 Ill. 656; *Whelan v. Ansonia Clock Co.*,

⁴ *DeLoach v. Smith*, 83 Geo. 665; *Branch v. Palmer*, 65 Geo. 210. Nor need he demand further specifications. See also, *Soderberg v. Crockett*, 17 Nev. 409; *Chandler v. Thompson*, 30 Fed. Rep. 38; *Gates v. National Bldg. Co.*, 46 Minn. 419; 49 N. W. Rep. 232; *Wright v. Lothrop*, 149 Mass. 385.

tion of being supported, nursed and attended during life. Any treatment of the parent which he can not reasonably be required to endure is a breach of the condition in the deed and ejectment can be brought.¹ But contracts of this kind are often improvidently made on both sides, and their general policy has been doubted,² and probably there never was a case

¹ *Winch v. Bean*, 62 N. H. 427; *Bethlehem v. Annis*, 40 N. H. 34; *Center v. Center*, 38 N. H. 318; *Whitton v. Whitton*, 38 N. H. 127; *Barker v. Cobb*, 36 N. H. 344; *Eastman v. Batchelder*, 36 N. H. 141; *Holmes v. Fisher*, 13 N. H. 9; *Rhoades v. Parker*, 10 N. H. 83; *Flanders v. Lamphear*, 9 N. H. 201; *Dearborn v. Dearborn*, 9 N. H. 117; *Hartshorn v. Hubbard*, 2 N. H. 453; *Currier v. Currier*, 2 N. H. 75; *Pettee v. Case*, 2 Allen, 546; *Gilson v. Gilson*, 2 Allen, 115; *Marsh v. Austin*, 1 Allen, 235; *Robinson v. Robinson*, 9 Gray, 447; *Gibson v. Taylor*, 6 Gray, 310; *Wales v. Mellen*, 1 Gray, 512; *Fiske v. Fiske*, 20 Pick. 499; *Thayer v. Richards*, 19 Pick. 398; *Lanfair v. Lanfair*, 18 Pick. 299; *Wilder v. Whittemore*, 15 Mass. 262; *Fales v. Hemenway*, 64 Maine, 373; *Bryant v. Erskine*, 55 Maine, 153; *Sibley v. Rider*, 54 Maine, 463; *Philbrook v. Burgess*, 52 Maine, 271; *Lamb v. Foss*, 21 Maine, 240; *Norton v. Webb*, 35 Maine, 218; *Brown v. Leach*, 35 Maine, 39; *Allen v. Parker*, 27 Maine, 531; *Hoyt v. Bradley*, 27 Maine, 242; *Clinton v. Fly*, 10 Maine, 292; *Henry v. Tupper*, 29 Vt. 358; *Frizzle v. Dearth*, 28 Vt. 787; *Dunklee v. Adams*, 20 Vt. 415; *Olcott v. Dunklee*, 16 Vt. 478; *Briggs v. Beach*, 18 Vt. 115; *Crane v. Stickles*, 15 Vt. 252; *Austin v. Austin*, 9 Vt. 420; *Ferguson v. Kimball*, 3 Barb. Ch. 616; *Chase v. Peck*, 21 N. Y. 581; *Ferguson v. Ferguson*, 2 N. Y. 360; *Tucker v. Tucker*, 24 Mich. 426; *Hawkins v. Clermont*, 15 Mich. 511; *Daniels v. Eisenlord*, 10 Mich. 454; *Smith v. Smith*, 34 Wis. 320.

² *Soper v. Guernsey*, 71 Pa. St. 219.

In the opinion in this case Judge Sharswood impressively said: "The wisdom of such a contract is very questionable, even where the most entire confidence is felt at the time in the affection of the child. The son of Sirach pronounces emphatically against it: 'Give not thy son and wife, thy brother and friend, power over thee while thou livest and give not thy goods to another; lest it repent thee, and thou entreat for the same again. As long as thou livest and hast breath in thee, give not thyself over to any. Far better it is that thy children should seek to thee than that thou shouldst stand to their courtesy. In all thy works keep to thyself the pre-eminence; leave not a stain in thine honor. At the time when thou shalt end thy days and finish thy life, distribute thine inheritance.' The most striking illustration of the same thing is in the pathetic tragedy of Lear, where the fool confirms the opinion of the wise man of the Apocrypha: 'Would I had two coxcombs and two daughters. If I gave them all my living, I'd keep the coxcombs myself.' One of the evil consequences which seems almost invariably to attach itself to such arrangements is the distressing family discord and lawsuits which spring from them. Many of them have been brought to this court. It is not always easy to administer justice in such cases in conformity to law. The natural feeling of right prompts to the rule which would hold the child to the strict performance of his part of the contract, and give to the parent

in which some breach of the contract, more or less important, might not be proved. But these are usually overlooked or excused. It would be a violation of correct principles to hold in those cases that a breach of which no serious notice was taken of the time is sufficient to enable the parent to maintain ejectment.¹

§ 407. Bankruptcy or insolvency.—The fact that the promisor becomes insolvent or bankrupt does not of itself constitute any breach of contract. Thus, where a bank has issued a letter of credit, on the terms that the bills which they agree to accept are to be covered by bills of lading to a like amount, suspension of payment by the bank before there has been time for the letter of credit to be used is not a breach of the contract.² Where a person who had contracted for a certain quantity of oil, to be delivered to him at a future day, became bankrupt before that day arrived and obtained his certificate, it was held he was nevertheless liable to an action for not accepting and paying for the oil.³ Insolvency does not excuse performance;⁴ nor can a contract be rescinded on the ground of insolvency.⁵ As to what the rights of a party to a contract are, in case of insolvency of the other, the following language of Mellish, L. J., speaking in reference to a sale, is pertinent: "I am of opinion that the result of the authorities is this—that in such a case the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and that, if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more until he is paid the debt due for those already delivered, as well as the price of those still to be delivered."⁶

the right to recall the gift if he fails."

¹ *Smith v. Smith*, 34 Wis. 320, holding refusal to serve the parent at table no breach warranting ouster.

² *In re Agra Bank*, L. R. 5 Eq. Cas. 160.

³ *Boorman v. Nash*, 9 B. & C. 145.

⁴ *Jones v. Anderson*, 82 Ala. 302.

⁵ *Ex parte Chalmers*, L. R. 8 Ch. App. 289.

⁶ *Ex parte Chalmers*, L. R. 8 Ch. App. 289. See also, *Bloxam v. Sanders*, 4 B. & C. 941; *Hanson v. Meyer*, 6 East, 614.

§ 408. The same subject continued.—While insolvency of itself is no breach of contract and does not authorize rescission, there may be such an admission of the insolvency as amounts to a declaration of intention not to abide by a contract, and it may operate as a renunciation.¹ A trustee of a bankrupt, who has elected to perform a continuing contract of the bankrupt, does not adopt the contract personally.² A party may, upon discovering the insolvency, make such arrangements as will likely prevent losses arising therefrom, and he need not await the day to see whether the insolvency will prevent the other party from performing.³

§ 409. Refusal to perform, the time for performance not having arrived—The English rule.—In England it is well settled that the positive and absolute refusal by one party to carry out the contract is in itself an immediate complete breach of it on his part, and gives immediate right of action.⁴

¹ *Ex parte Stapleton*, L. R. 10 Ch. Div. 586, where Jessel, M. R., said: "I am of opinion that if a person who has entered into a contract of this kind gives to the vendor before he has parted with the goods that which amounts in effect to this notice, 'I have parted with all my property, and am unable to pay the price agreed upon,' it is equivalent to a repudiation of the contract." *In re Phoenix Bessemer Steel Co.*, L. R. 4 Ch. Div. 108; *Ex parte Carnforth, etc.*, Co., L. R. 4 Ch. Div. 108.

² *Ex parte Davis*, L. R. 3 Ch. Div. 463.

³ *Chamber of Commerce v. Sollitt*, 43 Ill. 519. See also, *Lowe v. Harwood*, 139 Mass. 133; *Follansbee v. Adams*, 86 Ill. 13; *Fox v. Kitton*, 19 Ill. 519; *Bingham v. Mulholland*, 25 U. C. C. P. 210; *Morgan v. Bain*, L. R. 10 C. P. 15.

⁴ *Roper v. Johnson*, L. R. 8 C. P. 167; *Hochster v. De La Tour*, 2 E. & B. 678; *Frost v. Knight*, L. R. 7 Ex. 111, where Cockburn, C. J., said: "It is true, as is pointed out by the

Lord Chief Baron, in his judgment in this case [*Hochster v. De La Tour*, 2 E. & B. 678], that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. But, on the other hand, there is—and the decision in *Hochster v. De La Tour* proceeds on that assumption—a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime, he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him.

The English doctrine of anticipatory breach of contract is summed up by Lord Esher as follows: "I think that in all of them the effect of the language used with regard to the doctrine of anticipatory breach of contract is that a renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract, but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not, of course, amount to a rescission of the contract, because one party to a contract can not by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He can not, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue."¹

It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract and bring his action accordingly." See also, *Danube and Black Sea Co. v. Xenos*, 13 C. B. (N. S.) 825.

¹ *Johnstone v. Milling*, L. R. 16 Q. B. D. 460, 467.

§ 410. The same subject continued—Illustrations of the English rule.—Where a party agreed to employ one as a courier, but, before the time of service arrived, refused to perform the agreement, and notified the courier that he would not employ him, it was held that an immediate action lay for such renunciation.¹ Where a man promised to marry a woman so soon as his father should die, but during the father's life-time refused absolutely to marry the woman, it was held that this was a breach of contract, and the woman could sue at once.² Likewise, where a renunciation of a marriage contract to wed in a reasonable time is made before the expiration of the time, there is an immediate breach.³ The election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages. Thus, where the seller of personal property repudiates his contract before the time for delivery has arrived, the damages are to be estimated by the difference between the contract price and the market price at the day or days appointed for performance, and not at the time of breach. That is, the damages are such as the buyer would sustain at the day appointed for performance of the contract.⁴ Where a party, by his agent, agreed with a railway company to receive certain goods on board his ship, to be carried to a port in the Black Sea, and, before the time for the first shipment arrived, he wrote the company that he would not abide by the contract, as the agent had no authority to make it, but offered a substituted contract, it was held the company could accept such renunciation as a breach, and negotiate with another ship owner for the conveyance of the goods.⁵

¹ *Hochster v. De La Tour*, 2 E. & B. 678.

² *Frost v. Knight*, L. R. 7 Ex. 111.

³ *Cherry v. Thompson*, L. R. 7 Q. B. 573, 574, per Blackburn, J.

⁴ *Roper v. Johnson*, L. R. 8 C. P. 167, a sale to be delivered in monthly installments; it was held that the measure of damages was the sum of the differences between the contract

price and the market price at the several periods for delivery, notwithstanding that the last period had not elapsed when the cause was tried. *Brown v. Muller*, L. R. 7 Ex. 319; the rule laid down in this case was applied to the preceding, *cy pres*.

⁵ *Danube, etc., R. Co. v. Xenos*, 13 C. B. (N. S.) 825.

§ 411. **American rule as to renunciation of contract.**—The New York Court of Appeals has gone to the extent, that where one party to a contract declares to the other that he will not make the performance on the future day, and does not, before the time arrives for an act to be done by the promisee, withdraw his declaration, the promisee is excused from performance on his part, or offer to perform, and may maintain his action for a breach of the contract when the day has passed.¹ But it seems doubtful whether an action can be commenced at once upon renunciation,² lays down the rule that “it is now well settled that if a person enters into a contract for service, to commence at a future day, and before that day arrives does an act inconsistent with the continuance of the contract, an action may be immediately brought by the other party.”³ But this doctrine was somewhat qualified in a subsequent case.⁴ The only extent, then, to which the doctrine is carried is, that a renunciation of a contract before the time for performance arrives will dispense with the performance, or the offer to perform, conditions precedent or concurrent.⁵

§ 412. **The same subject continued.**—The Massachusetts courts adopt the doctrine that a renunciation may give cause for treating the contract as rescinded, and excuse the other party from making ready for performance on his part, or relieve him from the necessity of offering performance in order

¹ *Shaw v. Republic Ins. Co.*, 69 N. Y. 286; *Franchot v. Leach*, 5 Cow. 506; *Traver v. Halsted*, 23 Wend. 66.

² *Freer v. Denton*, 61 N. Y. 492.

³ *Howard v. Daly*, 61 N. Y. 362, a leading case, containing a review of all the cases.

⁴ *Shaw v. Republic Ins. Co.*, 69 N. Y. 286, 293.

⁵ *Bunge v. Koop*, 48 N. Y. 225; *Goodsell v. Western Union Tel. Co.*, 130 N. Y. 430; *Parr v. Village of Greenbush*, 112 N. Y. 246; *Ferris v. Spooner*, 102 N. Y. 10; *Canda v. Wick*, 100 N. Y. 127; *Burtis v. Thompson*, 42 N. Y. 246. In this case the parties having

entered into an engagement to marry “in the fall,” the man told the woman in October that he would not perform the contract. It was held that an action commenced immediately was not prematurely brought. But the court expressly refuse to extend this rule to any other case than an engagement to marry. *Schwab v. Coghlan*, Daily Reg. (N. Y.), Dec. 4th, 1883; 1 *Brightly’s Digest*, 1679, § 399; *Gast v. Johnston*, 3 St. Rep. 258; *Crist v. Armour*, 34 Barb. 378; *Wills v. Simmonds*, 8 Hun, 189; holding an action may be brought at once.

to enforce his rights. But it does not constitute a present violation of a legal right of the other party, or confer upon him a present right of action.¹ The courts of Iowa go to the full extent of the English cases and allow an action to be brought at once upon renunciation.² So do the courts of West Virginia.³ The federal courts, it would seem, apply this rule.⁴ And so also in Michigan.⁵ Illinois follows the Massachusetts ruling and holds a renunciation not enough of itself to work a breach.⁶ But the promisee need not wait until the day of performance before making new arrangements. He does not lose his remedy against the promiser by providing at once against losses likely to arise.⁷

§ 413. Character of notice.—The renunciation must be absolute and unequivocal “A mere assertion that the party will

¹ *Daniels v. Newton*, 114 Mass. 530, where the court said: “An executory contract ordinarily confers no title or interest in the subject-matter of the agreement. Until the time arrives when, by the terms of the agreement, he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right, nor loss upon which to found an action. The true rule seems to us to be that in order to charge one in damages for breach of an executory personal contract, the other party must show a refusal or neglect to perform, at a time when and under conditions such that he is or might be entitled to require performance.” *Heard v. Bowers*, 23 Pick. 455; *Collins v. Delaporte*, 115 Mass. 159; *Clement v. Meserole*, 107 Mass. 362.

² *McCormick v. Basal*, 46 Iowa, 235; *Holloway v. Griffith*, 32 Iowa, 409; *Crabtree v. Messersmith*, 19 Iowa, 179.

³ *James v. Adams*, 16 W. Va. 245, allowing an action to be maintained by the seller against the buyer, on his declaration in advance that he would not accept the goods.

⁴ *Dingley v. Oler*, 11 Fed. 372, reversed in 117 U. S. 490, but upon the ground that there had been no renunciation. *Hancock v. New York Life Ins. Co.*, 13 Am. Law Reg. 103. See *Smoot's Case*, 15 Wall. 36; *Saylor's Case*, 14 Ct. Cl. 453.

⁵ *Platt v. Brand*, 26 Mich. 173; *Hosmer v. Wilson*, 7 Mich. 299. See also, *McGregor v. Estate of Ross*, 96 Mich. 103; *Sullings v. Goodyear, etc., Co.*, 36 Mich. 313.

⁶ *McPherson v. Walker*, 40 Ill. 371. *Contra*, *Fox v. Kitton*, 19 Ill. 519. See also, *Wight v. Gardner*, 66 Ill. 94.

⁷ *Chamber of Commerce v. Sollitt*, 43 Ill. 519. See also, *Mountjoy v. Metzger*, 12 Am. Law Reg. 442; *Harkreader v. Eubanks* (Miss.), 12 So. Rep. 210; *Haines v. Tucker*, 50 N. H. 307; *Smith v. Lewis*, 26 Conn. 110; *Smith v. Lewis*, 24 Conn. 624; *Green v. Haley*, 5 R. I. 260; *Buffkin v. Baird*, 73 N. C. 283; *Casey v. Gunn*, 29 Mo. App. 14; *Black v. Woodrow*, 39 Md. 194; *Simmons v. Green*, 35 Ohio St. 104; *Mowry v. Kirk*, 19 Ohio St. 375; *Curtis v. Smith*, 48 Vt. 116; *Allen v. Thrall*, 36 Vt. 711; *Derby v. Johnson*, 21 Vt. 17.

be unable or will refuse to perform his contract is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made."¹ Thus, where a party had contracted to deliver ice, and wrote to the buyer: "We can not, therefore, comply with your request to deliver the ice claimed, and respectfully submit that you ought not to ask this of us, in view of the facts stated herein and in ours of the 7th. * * * We will be glad to hear from you in reply, but will be more pleased to have a personal interview, and venture the suggestion that you come here for the purpose," it was held that this was not a final refusal to perform the contract.² Where the government had a contract to purchase cavalry horses, and, subsequent to the contract, adopted a code of rules touching their inspection before purchase, this was held to be no notification that the government would not accept the horses unless the rules were complied with.³ A charter-party provided that a ship should lay up at a port forty days for cargo. When the officers of the ship applied to the agent of the charterer for cargo, he said: "We have none for you; you had better go away." It was held this did not relieve the ship from the obligation to remain forty days.⁴ A mere assertion of inability to go on with a contract is no notice of repudiation.⁵ And it is doubtful, in case of a lease or other contract containing various stipulations, where the whole contract can not be treated as put an end to upon the wrongful repudiation of one of the stipulations, whether any notice of repudiation of one stipulation can be construed as a renunciation of the whole contract.⁶

¹ Benjamin on Sales, § 860, cited with approval in *Dingley v. Oler*, 117 U. S. 490, 503, and *Smoot's Case*, 15 Wall. 36, 49.

² *Dingley v. Oler*, 117 U. S. 490.

³ *Smoot's Case*, 15 Wall. 36.

⁴ *Avery v. Bowden*, 5 E. & B. 714, and 6 E. & B. 953. See also, *Phillipotts v. Evans*, 5 M. & W. 475.

⁵ *Johnstone v. Milling*, L. R. 16 Q. B. D. 460.

⁶ *Johnstone v. Milling*, L. R. 16 Q. B. D. 460. See also, *Barrowman v. Free*, L. R. 4 Q. B. D. 500; *Mersey Steel Co. v. Naylor*, L. R. 9 App. Cas. 434, holding a mere refusal to pay for one installment, not being willful, was not a repudiation, but that a willful refusal to pay would be. See also, *Withers v. Reynolds*, 2 B. & Ad. 882.

§ 414. Notice repudiated.—The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.¹ Thus, where a ship, in accordance with the provisions of a charter-party, proceeded to a port to load, and the charterer renounced the contract but the officers of the ship refused to accept the renunciation and waited at the port for cargo, and war broke out between the two countries, rendering it impossible for the charterer to furnish cargo, this was held a valid defense for the charterer.² And, in accordance with this principle, “it is not competent for the purchaser of property which is to be delivered in the future to impose upon the vendor the legal duty to take such steps with reference to the subject of the contract, as by at once reselling the property on the market on the buyer’s account or making a forward contract for the purchase of other property of like amount, to be delivered at the same time, as shall most effectually mitigate the damages to be paid by the buyer in consequence of his refusal, though no loss would thereby result to the vendor.”³

¹ *Frost v. Knight*, L. R. 7 Ex. 111, 112, per Cockburn, C. J.; *Johnstone v. Milling*, L. R. 16 Q. B. D. 460: “If the promisee does not elect to treat the promisor’s announcement of intention not to perform as a wrongful putting an end to the contract, and treats the contract as still subsisting, he lets in the promisor to claim the benefit of any subsequent contingency under the contract which may prevent a breach from arising.” The foregoing is a quotation from counsel’s brief, approved by the court.

² *Reid v. Hoskins*, 6 E. & B. 953. See also, *Barrick v. Buba*, 2 C. B. (N. S.) 563.

³ *Sutherland on Damages*, § 648, citing *Leigh v. Paterson*, 8 Taunt. 540; *Phillipotts v. Evans*, 5 M. & W. 475; *Ripley v. McClure*, 4 Exch. 345; *Kadish v. Young*, 108 Ill. 170; *Windmuller v. Pope*, 107 N. Y. 674; *Stewart v. Cauty*, 8 M. & W. 160; *Boorman v. Nash*, 9 B. & C. 145; *Clement v. Meserole*, 107 Mass. 362; *Smith v. Lewis*, 24 Conn. 624; *Haines v. Tucker*, 50 N. H. 307. “The original con-

§ 415. **Notice retracted.**—A refusal before it operates as an anticipatory breach may be retracted; but such refusal unretracted, down to and inclusive of the time when the promisee is bound to perform a condition, is evidence of a continuing refusal and a waiver of any conditions precedent. Thus, when there is an executory contract for the manufacture and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more as he has no occasion for them and will not accept or pay for them, the vendor may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract.¹ Where a buyer wrote to the seller, that unless he sent word at once (being before the time performance was due) that he intended to keep his contract he would purchase elsewhere, and later wrote again that he had bought, and on the day fixed for delivery the buyer demanded delivery, it was held that as the seller had not acted on the communications of the buyer, he was bound to deliver the oil.² And where the act of the party in renouncing a contract is relied on to excuse the performance of conditions precedent, it must be the proximate and not the remote cause of the failure to perform, and be of such a character as to induce the belief that performance was waived, or if attempted would not be accepted.³ Thus, in a sale of bonds, the mere fact that the vendor denied having made the contract and refused to deliver the bonds, was held no such evidence of an intention to break the contract as released the buyer from a tender of payment when the day for performance arrived;⁴ it seems that one party has no right to

tract was in no way modified by the notice, and the plaintiffs were not bound then to sell in order to reduce the damages." Lord Abinger, C. B., in *Phillpotts v. Evans*, 5 M. & W. 474, 476.

¹ *Cort v. Ambergate R. Co.*, 17 Q. B. 127; *Daniels v. Newton*, 114 Mass.

530; *Southwestern Stage Co. v. Peck*, 17 Kan. 271; *Davis Sewing Machine Co. v. McGinnis*, 45 Iowa, 538.

² *Westlake v. Bostwick*, 35 N. Y. Super. Ct. 256.

³ *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538.

⁴ *Mowry v. Kirk*, 19 Ohio St. 375.

exact from the other, before performance is due, a declaration, either formal or informal, that he expects to keep his contract.¹

§ 416. Further illustrations.—A contract payable “in trade,” without time or place for a payment, is payable on demand, or within a reasonable time, and at the residence or place of business of the promisor; and, before the promisee is entitled to a money judgment against the promisor for non-performance, he must show a demand on his part and a refusal upon the part of the other.² Thus, where the owner of a stallion agreed to allow him to serve a mare, it was held that it was the duty of the owner of the mare to take her to the stallion within a reasonable time, and a failure to do this precluded an action against the owner of the stallion, although he had notified the mare’s owner that he would not allow the stallion to serve.³ Where a contract provides a penalty for the failure to do an act, the failure to do the act is not a breach; it merely liquidates the penalty.⁴ Where one covenanted not “to engage, directly or indirectly, or concern himself in carrying on or conducting the ice business, either as principal or agent, within ten miles” of a certain place, his riding upon an ice cart, delivering ice for a rival dealer, is a breach thereof.⁵ A contract to pay a certain sum upon the receipt of specified funds is not broken by a failure to pay upon the receipt of a part of the funds.⁶ That can not constitute a breach which can not be prevented by the promisor. Thus, an agreement not to appoint any other agent to sell goods in a locality is not broken

¹ *Ripley v. McClure*, 4 Ex. 345. See also, *Zuck v. McClure*, 98 Pa. St. 541; *Coffin v. Reynolds*, 21 Minn. 456; *Pennell v. Mayor, etc.*, 14 N. Y. Supl. 376; *Benavides v. Hunt*, 79 Texas, 383.

² *Schriner v. Peters*, 39 Ill. App. 309; *Rice v. Churchill*, 2 Denio, 145; *Lobdell v. Hopkins*, 5 Cowen 516; *Vance v. Bloomer*, 20 Wend. 196; *Woods v. Dial*, 12 Ill. 72; *Wehrli v. Rehwooldt*, 107 Ill. 60.

³ *Schriner v. Peters*, 39 Ill. App. 309.

⁴ *Ehrlich v. Ætna Ins. Co.*, 103 Mo. 231; 15 S. W. Rep. 530, where an insurance agent agreed to furnish the company with a certain amount of insurance each year, and in case of failure to obtain that amount he was to pay a certain sum; it was held to be no breach authorizing his discharge, because of his failure to obtain the requisite amount.

⁵ *Babcock v. Clear*, 17 N. Y. Supl. 664.

⁶ *Fox v. Walker*, 62 N. H. 419.

by a sale by persons without authority.¹ But if the agreement contains an express or implied term to prevent such sales, then the fact of the sales being unauthorized does not prevent them from constituting a breach.²

§ 417. **Scienter.**—Where, in an action on a contract for putting parquet floorings in defendant's house, the work to be "first-class," the evidence showed that first-class work required the blocks to be so seasoned and so well laid that there would be no space between them; that after being laid the blocks shrank, and plaintiff repeatedly repaired the work; and that, after it was repaired, defendant expressed satisfaction with the work, but the blocks again shrank, it was held that a nonsuit was proper, although plaintiff gave evidence that the floors were of the best material and workmanship.³ And where defendant agreed to furnish plaintiff a show case and shelving with which to conduct a stationery business in defendant's jewelry store for five years, but after two years removed his business, and leased one part of the store for a dyeing establishment and the other for a second-hand clothing store, putting a partition through the middle, it was a question for the jury whether the contract was violated.⁴ An Illinois corporation having a con-

¹ *Doctor Harter Co. v. Hopkins*, 83 Wis. 309.

² *Doctor Harter Medicine Co. v. Hopkins*, 83 Wis. 309. See the following cases for discussion of what will constitute breach: *Gray v. Journal Pub. Co.*, 21 N. Y. Supl. 967; *Fairbrother v. England*, 40 Wkly. Rep. 220; *Teall v. Consolidated Co.*, 119 N. Y. 654; *Vance v. Hartzell* (Tex. App.), 18 S. W. Rep. 88; *Widiman v. Brown*, 83 Mich. 241; *Bates v. Herrick*, 82 Mich. 295; *Stewart v. Huntington*, 124 N. Y. 127; *McDonald v. Liggett*, 146 Pa. St. 460; 23 Atl. Rep. 338; *Rigdon v. Conley*, 141 Ill. 565; 30 N. E. Rep. 1060; *Swallow v. Bain* (N. M.), 32 Pac. Rep. 501.

³ *Boughton v. Smith* (1894), 142 N. Y. 674; 37 N. E. Rep. 470, per Andrews, C. J. "We fail to find in

the record any evidence that the plaintiffs substantially performed their contract, and we think the motion for nonsuit on that ground should have been granted. The plaintiffs gave evidence that the floors were of the best materials and workmanship. This does not meet the specific and contradicted evidence as to shrinkage, and the acts of the plaintiffs in relaying and repairing them show that the general statements were not intended to cover this defect."

⁴ *Dickinson v. Hart* (1894), 142 N. Y. 183; 36 N. E. Rep. 801. "The defendant could not, after the plaintiff entered upon his business in the store, so change the character of the business to be carried on there, and the arrangements of the store, as to make it wholly unfit and unsuitable for the

tract right to be furnished by a Pennsylvania corporation with patented lamps to be sold by it, exclusively, within a prescribed territory, made a similar contract as to part of its own territory with a local company, and stipulated that it would "not knowingly sell, or permit other parties to sell," lamps for use therein. It was held that the *scienter* was an essential term of the covenant, and that an assignee of the Illinois company could not be held responsible, in the absence of proof of knowledge on the part of itself or its assignor, for sales made within such territory by the Pennsylvania company.¹

§ 418. *Locatio operis faciendi*—Defective performance.—

Where materials are furnished by one, and labor is to be performed upon it by another, and the identical article produced is to be returned to the employer, who pays a compensation for the labor, the contract is one of bailment, although the manufacturer or workman may have furnished some accessorial material or ornaments. This is the *locatio operis faciendi* of the civil law.² In the case of vendor and vendee under an ex-

plaintiff's business. The contract was made, not only in reference to the plaintiff's business, but also to the defendant's business. While the defendant may not have been obliged to continue the jewelry business, yet he could not so change the internal arrangement of the store, and so introduce other business therein, as to render impracticable and unprofitable, and destroy the plaintiff's business. We think, upon all the evidence, it was a question of fact for the jury to determine whether the defendant, by what he did and said, did not oust the plaintiff from the store, break up his business there, and violate the agreement he had made with him."

¹ *Cincinnati, etc., Gas Co. v. Western, etc., Co.* (1894), 14 Sup. Ct. Rep. 523; 152 U. S. 200, per Brewer, J. "With reference to the sale by the Pennsylvania corporation, the stipulation in the contract is that the Chicago com-

pany 'will not knowingly sell, or permit other parties to sell, for use in said territory, any burners, lamps,' etc. The *scienter* is an essential term in this covenant. There is no presumption, and no evidence, that the original Chicago corporation or the plaintiff knew what the Pennsylvania company was doing, and, if they did not know of such a sale, the fact that one was made involved no breach of the contract."

² Story on Bailments, §§ 422, 423; 2 Kent's Commentaries (13th ed.), 588; *Foster v. Pettibone*, 7 N. Y. 433; *Mallory v. Wilms*, 4 N. Y. 76; *Pierce v. Schenck*, 3 Hill, 28. The title to the completed article generally rests, by accession, in the party who has furnished the principal material, in such cases. *Merritt v. Johnson*, 7 Johns. 473; *Pulcifer v. Page*, 32 Maine, 404; *Wetherbee v. Green*, 22 Mich. 311; *Beers v. St. John*, 16 Conn. 322.

ecutory contract, on delivery of the goods the title passes conditionally only to the vendee. It is necessary to the proper protection of the vendor that the vendee, if he rejects the goods, and thereby throws them back upon the vendor, should act with reasonable promptness. It would be unjust to permit him to retain the goods after opportunity for inspection, giving no sign, and subsequently claim that they were not according to the contract. He is bound to express his dissent, and thus enable the vendor to protect his interests. The reason upon which the doctrine governing executory contracts for the sale of chattels subsequently delivered rests is inapplicable to contracts for the manufacture of articles from materials furnished to the manufacturer by the other party to the contract. The title to the things manufactured is in the owner of the materials, whether they conform to the contract or not. The claim of the other party is for work and labor. The employer may await the presentation of the claim of the other party before acting. His retention of the articles manufactured is the exercise of an absolute right, and he is neither bound to inspect the articles, nor to notify the other party of his objections.¹ Thus, if cloth be delivered to a tailor to make a coat, and it is delivered to the owner when made, who accepts it, or re-

¹ *Mack v. Snell* (1893), 140 N. Y. 193; 35 N. E. Rep. 493, Andrews, C. J.. "The omission to object may in many cases be material evidence on the question of performance, and, in case of continuous deliveries of articles manufactured from time to time, the duty to speak after knowing the defects might arise. But in the present case the findings exclude the inference of bad faith on the part of the defendant, or that, knowing that the shears delivered were defective, he kept silent, and permitted the plaintiffs to manufacture the others. The fact that the defendant retained the shears delivered, and did not offer to return them, after he discovered that they were defective, is no answer to the defense that the plaintiffs had not performed their contract. The defend-

ant's possession followed the title, and the plaintiffs in no event were entitled to have the shears delivered returned to them. The owner of real property, who has employed another to erect a house on his land, does not, by taking possession of the house and occupying it, preclude himself from denying that the builder has performed his contract. *Smith v. Brady*, 17 N. Y. 173. In like manner, the owner of materials, who employs another to manufacture them into garments or chattels of any description, does not lose his property in the materials, nor is he precluded by receiving the manufactured articles from asserting his title thereto, and at the same time resisting a recovery for the value of the work on the ground that the workman had not performed his contract."

tains and uses it for a long time, without any objection or claim of defective workmanship, he can not be heard to claim, when sued for the price of the work, that it was not done according to agreement; and it would not strengthen such a claim to call the workman's agreement to make the coat according to a certain style or pattern a warranty that survived acceptance. In such cases, acceptance, or omission to object within a reasonable time after delivery or opportunity for examination, operates to extinguish all claims for breach of the contract.¹

§ 419. Seller's breach—Buyer's remedy.—In an executory contract for the sale of goods, in the absence of fraud or warranty, the right of the vendee to claim damages, set up as a defense to an action for the purchase price, or by way of counter-claim, does not survive a delivery of the goods by the seller and an acceptance by the purchaser. The retention of the property by the purchaser without objection is an admission on his part that the contract has been performed. Of course he is not bound to receive or pay for an article he has not purchased, but he is bound to ascertain, when it is delivered to him, whether or not it is what he wants, or whether it conforms to the contract; and, if it does not, he must either return it to the vendor, or give him notice to take it back, or he will be presumed to have acquiesced in its quality. He can not accept the delivery of property under the contract, retain it after examination, or full opportunity for examination, as to its quality, and afterwards be heard to urge, as a defense to the purchase price, or in support of a claim for damage, that the quality was inferior to that specified in the contract.² Where there is an express warranty, that survives the acceptance, and the purchaser may subsequently sue on it, if the price of the goods has been paid, or defend in suit for the price.³

¹ *Sprague v. Blake*, 20 Wend. 61; *Cop- lay Iron Co. v. Pope*, 108 N. Y. 232; 15 N. E. Rep. 335; *Brown v. Foster*, 108 N. Y. 387; 15 N. E. Rep. 608; *Studer v. Bleistein*, 115 N. Y. 316; 22 N. E. Rep. 243; *Pierson v. Crooks*, 115 N. Y. 539; 22 N. E. Rep. 349; *Mason v. Smith*, 130 N. Y. 474; 29 N. E. Rep. 749; *Norton v. Dreyfuss*, 106 N. Y. 90; 12 N. E. Rep. 428.

² *Reed v. Randall*, 29 N. Y. 358.

³ *Zabriskie v. Central, etc., Railroad Co.*, 131 N. Y. 72; 29 N. E. Rep. 1006; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260; 23 N. E. Rep. 372; *Brigg v. Hilton*, 99 N. Y. 517; 3

§ 420. Loss of profits as damages for breach.—An inadvertent sale of a patented article in territory for which the seller has granted an exclusive right to another renders him liable only for actual damages, represented by the profits actually realized, and not for profits which the grantee would have realized if he himself had made the sale, at the higher prices established by him; especially when there is evidence that he could not have effected such a sale.¹ The profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.² The grounds upon which the general

N. E. Rep. 51; *Norton v. Dreyfuss*, 106 N. Y. 90; 12 N. E. Rep. 424.

¹ *Cincinnati, etc., Gas Co. v. Western, etc., Co.* (1894), 152 U. S. 200; 14 Sup. Ct. Rep. 523, per Brewer, J.: "It is against all the rules in respect to damages for a breach of contract to give to the defendant the profits of a sale which it did not make, and which there is no reason to believe it ever would have made. (There is no pretense of any wanton and willful breach by the plaintiff; nothing that suggests punitive damages, or that shows wherein the defendant was damnified, other than by the loss of the profits which the plaintiff received. Pass beyond that, and there is only a domain of speculation,—a mere guess as to what might have happened. The case of *Seymour v. McCormick*, 16 How. 480, is in point.) Actual damage is what the law gave in case of an infringement (*Birdsall v. Coolidge*, 93 U. S. 64); actual damage is all the law gives in case of a breach of contract. Indeed, the real difference between that case and this is not so

great as would be suggested by a description of the respective causes of action; for here, under the contract made by the plaintiff's assignor with the Cincinnati parties, the defendant became vested with a monopoly of sales within the prescribed territory, of like nature to the monopoly given by the government for the whole territory of the United States whenever it issues a patent; and the act of the plaintiff in making a sale within that territory was an infringement similar to that of a sale of a patented article made within the limits of the United States in defiance of the rights of the patentee. Nevertheless, it must be conceded that in the case at bar there is technically a claim for a breach of a contract, and it is undeniable that in some cases the profits that would have been made are proper elements of damage in such an action."

² *United States v. Behan*, 110 U. S. 338, 345, 347; 4 Sup. Ct. 81; *Western, etc., Telegraph Co. v. Hall*, 124 U. S. 444, 454, 456; 8 Sup. Ct. 577.

rule of excluding profits in estimating damages rests are (1) that in the greater number of cases such expected profits are too dependent upon numerous, uncertain, and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) that such loss of profits is ordinarily remote, and not, as a matter of course, the direct and immediate result of the nonfulfillment of the contract; and (3) that most frequently the engagement to pay such loss of profits in case of default in the performance is not a part of the contract itself, nor can it be implied from its nature and terms.¹ When an entire contract to lumber several tracts of land is broken by the owner's sale of the one tract out of which the contractors expected to make their profit, they are not obliged to finish the other tracts in order to maintain a suit on the contract, or to recover merely for money expended and the value of work done, but they may abandon, and recover, as damages for the breach, the profits they would have made on the whole job; since the profits that would have been made on an abandoned lumbering contract are ascertainable, and not speculative.²

§ 421. Partial or entire breach—Profits as damages.—Where a contract for railroad construction provides for payment in installments as the work progresses, a failure to pay an installment when due is not such a breach of the entire contract as to authorize the contractor to refuse to proceed further and to sue to recover the profits which he would have earned had the contract been fully performed. In such case, the contractor may

¹ *Howard v. Stillwell Manufacturing Co.*, 139 U. S. 199; 11 Sup. Ct. 500; *Sedgwick on Damages* (7th ed.), p. 108; *The Lively*, 1 Gall. 315, 325, Fed. Cas. No. 8,403, per Mr. Justice Story; *The Anna Maria*, 2 Wheat. 327; *The Amiable Nancy*, 3 Wheat. 546; *La Amistad de Rues*, 5 Wheat. 385; *Smith v. Condry*, 1 How. 28; *Parish v. United States*, 100 U. S. 500, 507; *Bulkley v. United States*, 19 Wall. 37.

² *Lee v. Briggs* 99 Mich. 487; 58 N. W. Rep. 477, per Long, J.: "In *Rayburn v. Comstock*, 80 Mich. 448; 45 N. W. Rep. 378, it was held, in a suit for breach of a logging contract by being prevented from cutting and removing the timber, that the difference between the cost of said cutting and removal and the contract price was the proper measure of damages. These damages are not speculative, but are capable of ascertainment. *Leonard v. Beaudry*, 68 Mich. 312; 36 N. W. Rep. 88; *Atkinson v. Morse*, 63 Mich. 276; 29 N. W. Rep. 711."

at once rescind and recover for what he has done, or proceed with performance and sue to recover the past due installment.¹ And if an action is brought by the contractor before completion of the contract by him, to authorize a recovery of prospective profits, a willingness on his part to complete the work, and defendant's refusal to be further bound by the contract, must appear.² Where, by the terms of a contract of sale, the property is to be delivered in specified portions, from time to time, the purchaser to give his notes for each portion delivered, and, before completion of the contract, he refuses to give notes demandable for deliveries made, and also refuses to give notes for future deliveries, or to be further bound by the terms of the contract, this constitutes a breach of the entire contract, and gives a present right of action to recover damages for the breach. The vendor is not required to wait until the expiration of the terms of credit for the goods delivered in order to recover therefor, nor is he required to make further deliveries.³

¹Wharton v. Winch (1893), 140 N. Y. 287; 35 N. E. Rep. 589. *muller v. Pope*, 107 N. Y. 674; *Ferris v. Spooner*, 102 N. Y. 10; *Freer v.*

²Wharton v. Winch, 140 N. Y. 287. *Denton*, 61 N. Y. 492, 496; *Howard v.*

³*Nichols v. Scranton Steel Co.* *Daly*, 61 N. Y. 362, 374; *Burtis v.* (1893), 137 N. Y. 471, and see *Wind-Thompson*, 42 N. Y. 246.

CHAPTER XII.

ACCORD AND SATISFACTION

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| <p>§ 422. Accord and satisfaction defined.</p> <p>423. The subject illustrated.</p> <p>424. Further illustrations.</p> <p>425. The same subject continued.</p> <p>426. Accord supported by a consideration.</p> <p>427. Contracts under seal.</p> <p>428. The same subject continued.</p> <p>429. Subject-matter of an accord.</p> <p>430. The same subject continued.</p> <p>431. Payment of less sum than due.</p> <p>432. Compromises.</p> <p>433. The same subject continued.</p> <p>434. As to unliquidated demands.</p> <p>435. The same subject continued.</p> <p>436. Illegal claims.</p> <p>437. Accord executory.</p> <p>438. The same subject continued.</p> <p>439. Further illustrations.</p> <p>440. Accord without satisfaction.</p> | <p>§ 441. New promise.</p> <p>442. The same subject continued.</p> <p>443. Composition with creditors.</p> <p>444. The same subject continued.</p> <p>445. Liability of third party.</p> <p>446. The same subject continued.</p> <p>447. Further illustrations.</p> <p>448. Settlement by third person—
New consideration.</p> <p>449. Accord and satisfaction by a joint creditor.</p> <p>450. Accord and satisfaction with a joint debtor.</p> <p>451. Reserving rights against co-debtors.</p> <p>452. Co-tort-feasors.</p> <p>453. Accord and satisfaction by a stranger.</p> <p>454. Rescinding accord for mistake or fraud.</p> <p>455. Pleading.</p> |
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§ 422. **Accord and satisfaction defined.**—An accord, in the case of contracts, is an agreement whereby one party consents to accept some other thing in lieu of that which is contracted or promised to be done by the other party, and when this agreement is performed, it constitutes what is technically called accord and satisfaction.¹ “By the accord, the parties agree upon a sum of money or other matter to be given and accepted as compensation for the breach, instead of the legal remedy provided by process of law; and by the execution of

¹ *Kromer v. Heim*, 75 N. Y. 574, 1 Ld. Ray. 122; *Lynn v. Bruce*, 2 H. 576; 3 Blackstone's Commentaries, Bl. 317; *Peytoe's Case*, 9 Coke, 78; 15; *Bacon's Abridgment*, tit. Accord; *Goodrich v. Stanley*, 24 Conn. 613; and *Satisfaction*; *Cock v. Honychurch*, T. Ray. 203; *Allen v. Harris*, v. Russell, 33 Fed. Rep. 5.

the accord, that is, by the actual delivery and acceptance of the matter agreed upon, the right of action is satisfied and discharged."¹

§ 423. The subject illustrated.—In a case where the defendants mailed plaintiff a check for a less amount than he claimed, and in the letter said: "We claim this to be in full settlement of account, but admit that you do not allow the claim," and the plaintiff retained the check, and gave defendants credit for the amount, it was held that the retention of the check did not operate as an accord and satisfaction.² So also, where the defendant, being indebted to plaintiffs in a certain sum, sent them a check for part thereof, with a letter saying: "It is understood that I am retaining the following moneys under the following conditions," specifying the sums and the conditions, there being no dispute as to the amounts, and the items named in the paper were not in any way connected, it was held that the acceptance of the check with such a letter did not constitute an accord and satisfaction.³ To constitute an accord

¹ Leake on Contracts, 876. See also, *Pulliam v. Taylor*, 50 Miss. 251.

² *Van Dyke v. Wilder*, 66 Vt. 579; 29 Atl. Rep. 1016, per Thompson, J.: "The defendants contend that the retention of the \$609.55 by the plaintiff, under these circumstances, operates as an accord and satisfaction. The referee does not find that the check was accepted by the plaintiff in satisfaction, or that it was in fact offered as an accord. This was a question of fact for the referee to determine. *Miller v. Holden*, 18 Vt. 337. Do the facts reported by him constitute, in law, an accord and satisfaction? The answer to this question depends upon the construction put upon the letter of defendants. There was no declaration in the defendants' letter that, if the plaintiff took and retained the \$609.55, it must be taken in full satisfaction of his claim. On the contrary, it in effect informed him that the defendants did not understand

it was to have such an effect, and that he could take it without such taking operating as an admission on his part that it was in full satisfaction of his claim, or precluding him from any of his rights in the premises. This is the fair construction of the letter itself, and, were it ambiguous, it must receive this construction, in view of what occurred in respect to a payment before the letter was sent. We therefore hold there was no accord and satisfaction."

³ *Pennell v. Bucki* (1894), 84 Hun, 432; 32 N. Y. Supl. 407, per Brown, P. J.: "It is the defendant's contention that this paper and the acceptance of the check constituted a compromise of disputed claims, and that it is a bar to the prosecution of this action. We can not concur in that view of the testimony. The amount paid to the plaintiffs did not represent a compromise of any kind. Defendant was indebted to them in the sum of \$5,192.50, and

and satisfaction, it is necessary that the money should be offered in satisfaction of the claim, and be accompanied with such acts and declarations as amount to a condition that if the money is accepted it is to be accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it he takes it subject to such condition.¹ But where the defendant contended that a claim made against him by plaintiff had been paid, but he finally sent plaintiff a check for part of the amount, stating therein that it was in "full settlement" of the claim, and at the same time wrote plaintiff that he sent the check because he could not spare the time to hunt up proofs of payment, and that he would "expect in return a receipt in full," and plaintiff retained the check, and sued on the balance of his claim, it was held that the acceptance and collection of the check was an accord and satisfaction.² A receipt in full is not an accord and satisfaction merely because it purports to be in full payment of the claim in issue.³

he claimed that they were liable to him in the sum of \$3,901.40. There was no dispute about the difference between these two amounts. That was due to the plaintiffs in any event, and its payment could not constitute a consideration for an agreement by which the plaintiffs surrendered the right to the payment of the balance. The items named in the paper are not connected together, either in the paper itself or by the oral testimony. Each stands upon its own facts. The paper is evidence of an agreement only, and the utmost effect that can be claimed for it is that it tends to corroborate the defendant's testimony that an agreement was entered into with reference to the items named in it, by which plaintiffs surrendered the right to present payment upon conditions which, at the time of the commencement of this action, had not been fulfilled.²

¹ *Preston v. Grant*, 34 Vt. 201. To the same effect are *Towslee v. Healey*, 39 Vt. 522, and *Boston Rubber Co. v.*

Peerless Wringer Co., 58 Vt. 551; 5 Atl. Rep. 407; *Brigham v. Dana*, 29 Vt. 1; *Gassett v. Andover*, 21 Vt. 342.

² *Brown v. Symes* (1894), 31 N. Y. Supl. 629, per *Dykman, J.*: "The acceptance of the check under the circumstances stated, and the collection and retention of the money, constituted an accord and satisfaction of the plaintiff's claim. *Fuller v. Kemp*, 138 N. Y. 231; 33 N. E. Rep. 1034." In *Field v. Aldrich*, 162 Mass. 587; 39 N. E. Rep. 288, A. being indebted to F., they agreed to form a corporation, one-fourth of the stock to be transferred to F. in trust to dispose of it, and apply the proceeds in payment of the debt, the balance of the proceeds and all stock remaining after the debt was paid to be equally divided between them; F. was unable to sell any of the stock; it was held, that the agreement was not an accord and satisfaction of the debt.

³ *Ahrens v. United Growers' Co.* (1895), 31 N. Y. Supl. 997.

§ 424. **Further illustrations.**—An agreement to accept less than the face amount of a note is not good as an accord and satisfaction.¹ In a suit upon a note the answer alleged that, under an agreement between the payee and the defendant, whereby the defendant was to employ the payee at a stipulated salary, and to pay him at the close of his term of service, in full satisfaction of the note, a sum less than the amount due, the defendant had so employed the payee at a salary larger than his work was worth, and had tendered him the agreed sum in payment of the note when he quit work, and had since paid him more than the amount due on the note, and it was not alleged that this last amount was paid or accepted in discharge of the note, nor that the agreement to accept less than the amount due on the note was made in consideration of the contract of employment, it was held that this was not a good plea of accord and satisfaction.² Where a draft for part of an indebted-

¹ *Swope v. Bier*, 10 Ind. App. 613; 38 N. E. Rep. 340, per Davis, J.: "The facts do not constitute a good accord and satisfaction, and can not be pleaded in bar of the right of action on the note. *Fletcher v. Wurgler*, 97 Ind. 223; *Smith v. Tyler*, 51 Ind. 512. If it appeared in the reply that there was any additional consideration for the discharge of the debt, the agreement would be upheld. It is not alleged that appellee was the wife of Michael Bier, nor that she signed the note as surety. Neither is any other reason given to excuse payment of full debt by her."

² *Sheets v. Russell*, 12 Ind. App. 677; 40 N. E. Rep. 30, where Davis, J., cited and relied upon *Swope v. Bier*, 10 Ind. App. 613; and *Renihan v. Wright*, 125 Ind. 536. In *Pottlitzer v. Wesson*, 8 Ind. App. 472; 35 N. E. Rep. 1030, plaintiff having notified defendant that the goods shipped him were as ordered and that he should hold him for the full price, defendant, three weeks later, sent plaintiff a check "in settlement for" the goods held subject to plaintiff's order,

which defendant had sold for his account; inclosed an invoice, showing net proceeds to the amount of the check; and trusted that same would prove satisfactory, and "to hear from you again." Plaintiff wrote defendant that he would place the check to his credit, and had handed the claim to an attorney. To this defendant did not reply. It was held, that since defendant had not required acceptance of said check in full, or its return, no accord and satisfaction was made out, in the face of a finding for plaintiff below. Davis, J., said: "In the case of *Curran v. Rummell*, 118 Mass. 482, a check for a sum less than the debt was sent by the debtor's attorney to the creditor in a letter stating that the check was 'in settlement of your account.' The check was received and collected in the ordinary course of business, but the court held that the creditor was not bound to treat it other than as a part payment by the debtor, to be applied in reduction of the debt only. * * * The case of *Hutton v. Stoddart*, 83 Ind. 539, cited by appellant's counsel,

edness was sent by letter, both draft and letter stating that it was to be in full payment of the debt, the creditor, by converting the draft into money, elects to accept the compromise, and the debt is thereby discharged in full.¹

is entirely unlike this case. In that case the letter containing the check expressly stated that the check was to be returned if not accepted in full satisfaction of the debt. See also, *Fuller v. Kemp*, 138 N. Y. 231; 33 N. E. 1034. In the last case cited the court says: 'To make out the defense, the proof must be clear and equivocal that the observance of the condition was insisted upon, and must not admit of the inference that the debtor intended that his creditor might keep the money tendered in case he did not assent to the condition upon which it was offered.' The case of *Hills v. Sommer* (Sup.), 6 N. Y. Supl. 469, as stated by counsel for appellants in his brief, is more nearly in point in favor of appellants. In that case it appears that when the dispute arose the plaintiffs drew on defendants for the invoice price, which draft was returned with the indorsement: 'Amount incorrect. Will remit.' Then to a letter from plaintiffs, asking what they intended to do, defendants inclosed draft for the amount which they stated they would pay for the goods. As applicable to the facts in this case, however, we prefer to follow the principles enunciated in *Curran v. Rummell*, 118 Mass. 482; and *Fuller v. Kemp*, 138 N. Y. 231."

¹ *Petit v. Woodlief*, 115 N. Car. 120; 20 S. E. Rep. 208, *Avery, J.*: "Our statute (Code, § 575) having been declared constitutional, the offer of a part in satisfaction of the whole, if accepted, discharges a debt as fully and effectually as if the entire sum originally due is paid in full. When the amount due is uncertain or unliquidated, if an offer in sat-

isfaction of the claim is accompanied with such acts and declarations as amount to a condition that the money shall be accepted only as a payment in full of the claim, and the party to whom the offer is made must of necessity understand from its very terms that if he takes the money he takes it subject to such condition, then in law the payment operates to discharge the whole claim. *Preston v. Grant*, 34 Vt. 201; *Towslee v. Healey*, 39 Vt. 522; *Boston Rubber Co. v. Peerless Wringer Co.*, 58 Vt. 551, 5 Atl. 407. Under the construction placed upon our statute, the offer of a less sum than is due, when the amount of the debt is certain, is in effect the same as an offer of a given sum in satisfaction of a contingent or unliquidated claim. We can not rely as authority, therefore, upon the earlier cases decided by the court, or upon the authorities in other states, where the principle still prevails that an agreement to accept a payment of a part of an unconditional claim for a sum certain in satisfaction of the whole is, unless there is an actual release, but a *nudum pactum*. We must, therefore, be governed by the rule adopted in reference to offers to settle contingent claims, because they are analogous to proposals of compromise of indebtedness under our statute. The plaintiff knew from the face of the draft that the defendant intended it to be accepted upon condition that it should discharge the debt, and that the draft itself should be in the nature of a receipt or voucher for the full payment. With that knowledge he chose to use the draft, and take his chances to collect more. We think the question of

§ 425. **The same subject continued.**—In an action for breach of warranty in a deed, where the defendant answered, alleging that subsequently to the delivery of the deed the parties entered into an agreement to the effect that defendant place in the hands of a certain person a certain sum, to be paid to plaintiff in satisfaction of any damages from a breach of the covenant, and that said sum was placed in the hands of such person, who was advised of the disposition to be made thereof, it was held that it was a good plea of accord and satisfaction.¹ When a settlement is made, and a promissory note is given as a result of the settlement, the giving of the note is *prima facie* evidence that all matters in difference between the parties at the time of the settlement were settled in the settlement; and

intent was no more an open one, for the jury to determine upon the testimony, than would be the question of acceptance, where the drawee writes the word 'Accepted' on the back of a bill of exchange, and signs his name under it. There is no difference in principle between the case at bar and that of *Boykin v. Buie*, 109 N. C. 501; 13 S. E. Rep. 879. There the creditor agreed by letter to accept an offer from the debtor of a part in discharge of his whole debt, but when the latter forwarded a check in compliance with the agreement the creditor entered the amount paid as a credit. In our case the defendant sent a draft and a letter, both expressing the condition upon which the draft was to be accepted; the terms of the proposition being unmistakably, we think, that the acceptance of the money was an implied assent to the proposal, the legal effect of which was to discharge the whole debt."

¹ *Reichel v. Jeffrey*, 9 Wash. 250; 37 Pac. Rep. 296, per Dunbar, C. J.: "The fact that they agreed upon the person to whom it was to be paid, and that the person agreed upon was instructed to pay the same to the plain-

tiffs in case of a breach, amounts substantially to an allegation of payment to and acceptance by the plaintiffs. No subsequent action by either party remained to be done to perfect the agreement, and the manner and circumstances under which the parties to the agreement placed this money would preclude either of them from denying the execution of the agreement; and as the reply of the plaintiffs in no way denies this affirmative allegation in the answer, but substantially admits it, the accord and satisfaction stand confessed by the pleadings. This agreement would also be good under the doctrine announced in *Hart v. Gould*, 62 Mich. 262; 28 N. W. Rep. 831, where the doctrine was announced that the law favors settlements of disputed matters by the parties without recourse to litigation, and, presuming that in such settlements the parties consulted their own interests, will not interfere, except in the case of fraud or mistake; and, where such settlement has been made by way of compromise, it can not be avoided by either party excepting on the grounds of fraud or mistake."

this presumption must prevail until a preponderance of the evidence shows that there were matters in the difference at the time between the parties that were not included in such settlement.¹ Where plaintiff's intestate was accidentally killed while in the defendant's employ and defendant paid a certain sum to a relative of decedent in full satisfaction of any claim against defendant on account of such death, and afterwards the relative and the father of decedent took out letters of administration and brought an action against defendant, it was held that the receipt in full before given by the relative to defendant did not operate as an accord and satisfaction and did not estop the plaintiffs from bringing the action.²

¹ *Wagner v. Ladd* (1893), 38 Neb. 161; 56 N. W. Rep. 891, per Maxwell, C. J.: "In *McKinster v. Hitchcock*, 19 Neb. 100; 26 N. W. Rep. 705, this court held that: 'An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect to such transactions. As distinguished from a mere admission or acknowledgment, it is a new cause of action, it is not a contract upon a new consideration, and does not create an estoppel, but establishes, *prima facie*, the accuracy of the items charged without further proof.' In our view, the instruction comes within the rule there stated, and, as applied to the testimony in the case, is not erroneous. There is no error in the record, and the judgment is affirmed."

² *Stuber v. McEntee* (1894), 142 N. Y. 200; 36 N. E. Rep. 878, per O'Brien, J.: "It is only necessary to refer to the two leading cases in this state. *Ratton v. Overacker*, 8 Johns. 126; *Priest v. Watkins*, 2 Hill, 225. These cases hold that when a person assumes to collect the assets or credits belonging to the estate of a deceased person, and who subsequently is appointed administrator of the estate, and in that capacity brings an action upon the claim so collected, the prior

payment made to him before his appointment is a defense to the party against whom the claim existed, and who made the payment. For the purpose of protecting parties making payment in good faith to the widow or other person without authority to collect the assets at the time, the letters, when subsequently issued to them, are deemed to relate back so as to legalize such payments. But these cases do not hold that a stranger may compromise a claim due to an estate on receiving a part only of what is due, and thereby estop himself in a subsequent suit, in a representative capacity, from collecting the residue. If there is any such rule of law in the administration of the estates of deceased persons, it has no application in an action like this for the recovery of unliquidated damages, under a special statute, by the next of kin, resulting from a negligent or wrongful act, causing the death of their intestate. We have no doubt that the defendant was entitled to prove the fact of payment and its application to the expenses of the funeral and burial of the deceased, and to be credited with the same by the jury in making its estimate of the damages which the plaintiff should recover, if any. In this way the principle decided in the

§ 426. Accord supported by a consideration.—The fact that the accord is supported by a consideration is not enough of itself either to constitute a new contract, or to do away with the necessity of performance; and likewise reducing the accord to the form of a sealed instrument does not change its effect.¹

§ 427. Contracts under seal.—In England it was questioned in the common law courts whether accord and satisfaction was a good plea to a sealed instrument. If the accord and satisfaction was after breach it was a good plea;² but a satisfaction before breach, not made through the instrumentality of a deed, was a bad plea.³ This distinction, however, was rejected in equity and an accord and satisfaction before breach was a ground to stay proceedings at law.⁴ It would seem that the

cases above referred to is given full effect, but to hold that the receipt operated as an accord and satisfaction would be extending its operation in a manner to accomplish results that can not be sustained by reason or authority."

¹ *Hosler v. Hursh*, 151 Pa. St. 415. "The legal notion of accord is a new agreement on a new consideration to discharge the debtor. And it is not enough that there be a clear agreement or accord and a sufficient consideration, but the accord must be executed."

² *Smith v. Trowsdale*, 3 E. & B. 83.

³ *Spence v. Healey*, 8 Exch. 668, holding that a covenant for payment of a sum certain, although the payment does not accrue until after notice given, can not be discharged by parol before breach. The court said: "I am sorry that I am compelled to agree in holding that the plea is bad. It is difficult to see the correctness of the reasons upon which the rule is founded." The following cases sustain the proposition that a satisfaction and discharge before breach by parol can not be set up as an answer to an action for the breach of a covenant

under seal: *Snow v. Franklin*, 1 Lutw. 358; *Blake's Case*, 6 Coke, 44; *Alden v. Blague*, Cro. Jac. 99; *Neal v. Sheffield*, Cro. Jac. 254; *Kaye v. Waghorne*, 1 Taunt. 428; *Covill v. Gefery*, 2 Roll. Rep. 96; *Mayor of Berwick v. Oswald*, 1 E. & B. 295.

⁴ *Steeds v. Steeds*, L. R. 22 Q. B. D. 537, where the court said: "It is clear that at law accord and satisfaction of a debt due upon a bond is no bar to the action. This is, however, purely the result of a technicality absolutely devoid of any particle of merits or justice, viz.: that a contract under seal can not be got rid of except by performance or by a contract also under seal; so that supposing it had really been the case that in satisfaction of an overdue bond for £1,000 the person liable had given property worth £2,000, which had been accepted in discharge of the obligation, still at law the obligee of the bond might recover his £1,000 without returning the property." See also, *Webb v. Hewitt*, 3 K. & J. 438; *Taylor v. Manners*, L. R. 1 Ch. 48; *Yeomans v. Williams*, L. R. 1 Eq. 184; *Wallace v. Kelsall*, 7 M. & W. 264; *Nicholson v. Revill*, 4 A. & E. 675; *Cross v. Sprigg*, 6 Hare, 552.

common law went to the extreme that a debt in a sum certain covenanted to be paid presently could not in any wise be gotten rid of by an accord and satisfaction.¹

§ 428. **The same subject continued.**—The technical distinction between a satisfaction before and after breach seems to be generally disregarded in this country, and a new agreement by parol, followed by actual performance of the substituted agreement, whether made and executed before or after breach, is treated as a good accord and satisfaction of the covenant. And likewise a new agreement by parol, although without performance, if based on a good consideration, will be a satisfaction, if accepted as such.² In North Carolina the distinction is

¹ Blake's Case, 6 Coke, 44; Massey v. Johnson, 1 Exch. 241.

² McCreery v. Day, 119 N. Y. 1, where the court said: "The plaintiffs make a point, founded on the doctrine of the common law, that a contract under seal can not be dissolved by a new parol executory agreement, although supported by a good and valuable consideration, 'for every contract or agreement ought to be dissolved by matter of as high a nature as the first deed.' The application of this rule often produced great inconvenience and injustice, and the rule itself has been overlaid with distinctions invented by the judges of the common law courts to escape or mitigate its rigor in particular cases. But in equity the form of the new agreement is not regarded, and under the recent blending of the jurisdiction of law and equity, and the right given by the modern rules of procedure in this country and in England to interpose equitable defenses in legal actions, the common law rule has lost much of its former importance. * *

* * Courts of equity often interfered by injunction to restrain proceedings at law to enforce judgments, covenants or obligations equitably discharged by transactions of which

courts of law had no cognizance. It is a necessary consequence of our changed system of procedure, that whatever formerly would have constituted a good ground in equity for restraining the enforcement of a covenant or decreeing its discharge will now constitute a good equitable defense to an action on the covenant itself. It was one of the subtle distinctions of the common law as to the discharge of covenants by matter *in pais*, that although a specialty before breach could not be discharged by a parol agreement, although founded on a good consideration, nor even by an accord and satisfaction, yet after breach the damages, if unliquidated, could be discharged by an executed parol agreement, because, as was said, in the latter case the cause of action is founded not merely on the deed, but on the deed and the subsequent wrong. The absurd results to which the common law doctrine sometimes led is illustrated by the case of Spence v. Healey, 8 Exch. 668, in which it was held that a plea to an action on covenant for the payment of a sum certain, that before breach defendant satisfied the covenant by the delivery to and acceptance by the plaintiff, of goods, machinery, etc., in satisfaction,

taken that while generally accord and satisfaction before breach is no defense, yet where the covenant sounds altogether in damages, although secured by a penalty, accord and satisfaction in parol is a good defense.¹

§ 429. Subject-matter of an accord.—Anything may constitute the subject-matter of an accord and satisfaction; but it must be advantageous to the party and of some value.² Thus, a mere acknowledgment of satisfaction is not sufficient to sustain the plea of accord and satisfaction, as in the case of an action of trespass for taking cattle, a plea that the owner expressed himself satisfied because he received back his cattle again was held demurrable.³ And the accord must refer to the present or future. In other words, the agreement of accord must take place antecedently to, or at the time of, the act of satisfaction. Accordingly, a prior delivery of goods can not be pleaded as an accord.⁴

§ 430. The same subject continued.—The acceptance of a collateral thing, without regard to its value, is a good accord and satisfaction; and the promissory note of the debtor is such collateral thing.⁵ Thus, where the holder of a promissory note surrenders it to the maker, and takes one of less amount in satisfaction, it is a full discharge, and no action can be

was bad, Martin B., saying, 'I am sorry I am compelled to agree in holding that the plea is bad. It is difficult to see the correctness of the reason upon which the rule is founded.' I suppose there can be no doubt that the facts presented by the plea in the case of *Spence v. Healey* would have constituted a good ground for relief in equity. The technical distinction between a satisfaction before or after breach seems to have been disregarded in this state, and a new agreement by parol, followed by actual performance of the substituted agreement, whether made and executed before or after breach, is treated as a good accord and satisfaction of covenant." See also, *Fleming v. Gil-*

bert, 3 Johns. 528; *Lattimore v. Harsen*, 14 Johns. 330; *Dearborn v. Cross*, 7 Cow. 48; *Allen v. Jaquish*, 21 Wend. 628; *Kromer v. Heim*, 75 N. Y. 574; *Rutland's Case*, 5 Coke, 26; *Cabe v. Jameson*, 10 Ired. Law (N. C.) 193; *Garvey v. Jarvis* 54 Barb. 179; *Mitchell v. Hawley*, 4 Denio, 414; and *Esmond v. Van Benschoten*, 12 Barb. 376, holding that a judgment can not be discharged by accord and satisfaction.

¹ *Davis v. Noaks*, 3 J. J. Marsh. (Ky.) 494, 497; *Logan v. Austin*, 1 Stew. (Ala.) 476.

² *Keeler v. Neal*, 2 Watts (Pa.), 424.

³ *Stead v. Poyer*, 1 C. B. 782.

⁴ *Tucker v. Murray*, 2 Pa. Dist. Rep. 497.

⁵ *Draper v. Hitt*, 43 Vt. 439.

maintained for the unpaid portion.¹ But if the note is not delivered up, it is not extinguished by a less payment agreed to be accepted in full.² A mere proposal to give a note, although money is paid to cover part of the proposed note, is no accord and satisfaction.³ Where a creditor held a note against copartners, and it was agreed by all that, in consideration of the transfer, by one partner to the others, of all his interest in the partnership property, the latter would pay the note, this was held a valid accord and satisfaction.⁴ Ordinarily, there is no presumption that the cashing of a check sent in payment is a consent to its being in full,⁵ and the acceptance in silence of a sum of money, declared to be all that was due, is no accord and satisfaction, where the creditor needed the money, and was afraid that a receipt in full would be demanded.⁶ The fact that the debtor is insolvent, and the creditor thinks he will lose all unless he accepts part, is not such consideration as will uphold an accord.⁷ There may be an accord and satisfaction of a right of action for usury paid, even though the sum advanced on such an agreement be less than the usury received. The agreeing not to bid on property sold at auction is a good accord and satisfaction of a debt;⁸ and any claim which can be urged under color of right may either form the subject-matter of an accord and its foregoing, the satisfaction, or it may itself constitute a good consideration to uphold an accord.⁹

¹ *Pearson v. Thomason*, 15 Ala. 700.

² *Rising v. Cummings*, 47 Vt. 345.

³ *Rusk v. Gray*, 83 Ind. 589.

⁴ *Nassoiv v. Tomlinson*, 65 Hun, 491; *Looby v. West Troy*, 24 Hun, 78; *Hills v. Sommer*, 53 Hun, 392; *McKeen v. Morse*, 1 U. S. App. 7.

⁵ *Sicotte v. Barber*, 83 Wis. 431. See also, *Hills v. Sommer*, 53 Hun, 392.

⁶ *Vance v. Lukenbill*, 9 B. Mon. 249.

⁷ *Rogers v. Ball*, 54 Geo. 15.

⁸ *Jones v. Wilson*, 104 N. C. 9.

⁹ *Wilder v. St. Johnsbury Railroad Co.*, 65 Vt. 43; 25 Atl. Rep. 896; *Weber v. Couch*, 134 Mass. 26; *Brooks v. Moore*, 67 Barb. 393. See further,

Twitchell v. Shaw, 10 Cush. 46; *Bradt v. Scott*, 63 Hun, 632; *People v. Board*, 63 Hun, 625; *Loan, etc., Bank v. Miller*, 39 S. C. 175; 17 S. E. Rep. 592; *Edgcombe v. Rodd*, 5 East, 294; *Mitchell v. Knight*, 7 Ohio Ct. Ct. 204; *Looby v. West Troy*, 24 Hun, 78; *Hayes v. Davidson*, 70 N. C. 573; *Mains v. Mingle*, 86 Iowa, 742; 53 N. W. Rep. 256; *Hanselman v. Doyle*, 90 Mich. 142; 51 N. W. Rep. 195; *Gordon v. Mitchell*, 68 Geo. 11; *Strong v. Comer*, 48 Minn. 66; 50 N. W. Rep. 936; *Clifton v. Litchfield*, 106 Mass. 34; *Richelieu Hotel Co. v. International, etc., Co.*, 41 Ill. App. 268.

§ 431. **Payment of less sum than due.**—A parol agreement by a creditor to accept from his debtor less than is due, by way of compromise, is *nudum pactum* and void, and can not be set up in bar as accord and satisfaction.¹ The steadfast adherence to this doctrine by the courts, in spite of a current of condemnation by individual judges, and in the face of the demands and conveniences of business, demonstrates the force of the doctrine of *stare decisis*, and the doctrine is further illustrated by the course of judicial decision upon this subject; for, although the courts still hold to the doctrine, they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or, in other words, to extract, if possible from the circumstances of each case, a consideration for the new agreement, and to substitute the new agreement in place of the old,

¹ *Baird v. United States*, 96 U. S. 430, where the court said: "It is, no doubt, true that the payment by a debtor of a part of his liquidated debt is not a satisfaction of the whole, unless made and accepted upon some new consideration." *Jaffray v. Davis*, 124 N. Y. 164, where the court said: "This single question was presented to the English court in 1662, when it was resolved (if not decided) in *Pinnel's Case*, 5 Coke, 117, 'that payment of a lesser sum on the day in satisfaction of a greater can not be any satisfaction for the whole,' and that this is so, although it was agreed that such payment should satisfy the whole. This simple question has arisen in the English courts and in the courts of this country in almost numberless instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness or honesty. No reputable authority that I have been able to find

has, after such unanimous disapproval by all the courts, held otherwise than was held in *Pinnel's Case*, 5 Coke, 117; and *Cumber v. Wane*, 1 Str. 426." *Foakes v. Beer*, L. R. 9 App. Cas. 605; *Goddard v. O'Brien*, L. R. 9 Q. B. D. 37; *Reynolds v. Reynolds*, 55 Ark. 369; *Gates v. Steele*, 58 Conn. 316; *Duluth Chamber of Commerce v. Knowlton*, 42 Minn. 229; 44 N. W. Rep. 2; *Helling v. United Order*, 29 Mo. App. 309; *Commonwealth v. Cummins*, 155 Pa. St. 30; *Tucker v. Murray*, 2 Pa. Dist. Rep. 497; *Capital City Ins. Co. v. Detwiler*, 23 Ill. App. 656; *Line v. Nelson*, 38 N. J. Law, 358; *Daniels v. Hatch*, 21 N. J. Law, 391; *Bryan v. Foy*, 69 N. C. 45; *Warren v. Skinner*, 20 Conn. 559; *Curran v. Rummell*, 118 Mass. 482; *Mitchell v. Sawyer*, 71 N. C. 70; *Cavaness v. Ross*, 33 Ark. 572; *Loney v. Bailey*, 43 Md. 10, 22; *Geiser v. Kershner*, 4 Gill & Johns. 305; *Hardey v. Coe*, 5 Gill, 189; *Jones v. Ricketts*, 7 Md. 108; *Allen v. Roosevelt*, 14 Wend. 101; *Rose v. Daniels*, 8 R. I. 381; *Troutman v. Lucas*, 63 Geo. 466.

and thus to form, create or sanction a defense to the action brought upon the old agreement.¹

§ 432. Compromises.—A compromise of honest differences, whereby a less sum than that claimed has been paid and accepted in full of plaintiff's claim, bars the right of plaintiff to insist upon a recovery of the amount originally claimed by him.² But where a claim is undisputed, payment of a part thereof furnishes no consideration for a promise by the creditor to wholly discharge the debtor; and the creditor need not, before bringing suit for the unpaid balance of the claim, tender a return of the part paid on the attempted settlement.³

¹ *Jaffray v. Davis*, 124 N. Y. 164. See Chap. V, *supra*, where the cases are collected.

² *Slade v. Swedeburg El. Co.*, 39 Neb. 600; 58 N. W. Rep. 191.

³ *Leeson v. Anderson*, 99 Mich. 247; 58 N. W. Rep. 72, per Montgomery, J.: "This case presents the question of whether the acceptance, by the holder of a promissory note past due, of a less sum than the face of the note, with an agreement to discharge the debt, operates to fully release the debtor. We are constrained to hold that it does not. The debtor, in paying a portion, only, of the debt, when he is bound to pay the whole, furnishes no consideration for a promise by the creditor to discharge him, and such payment is treated in law as a payment *pro tanto* only. See 2 Daniel on Negotiable Instruments, § 1289, and cases cited. See also, *Harrison v. Close*, 2 Johns. 448; *Ryan v. Ward*, 48 N. Y. 204; *American Bridge Co. v. Murphy*, 13 Kan. 35; *Smith v. Schulenberg*, 34 Wis. 41; *Wheeler v. Wheeler*, 11 Vt. 60; *Bailey v. Day*, 26 Maine, 88; *Bright v. Coffman*, 15 Ind. 137; *Headley v. Hackley*, 50 Mich. 43; 14 N. W. Rep. 693. See also, note to *Cumber v. Wane*, 1 Smith Lead. Cas. 357 (633) *et seq.* The result is different if payment is made in compromise of a claim over which

there is an honest dispute, or by general composition with creditors, or if the payment be in something other than money. It was contended in the present case that, before suit was brought for the portion remaining unpaid, the plaintiff should have been tendered back the amount received, and thus repudiated the settlement; and defendant's counsel cite *Pangborn v. Continental Insurance Co.*, 67 Mich. 683; 35 N. W. Rep. 814, as sustaining this contention. But in that case the plaintiff's only ground for setting aside the settlement was that it was effected by fraud. If there had been no fraud, the settlement was admittedly valid, and effectual to discharge the debt. Such was also the case in *Jewett v. Petit*, 4 Mich. 508. The settlement, but for the alleged fraud, was good and valid, and it was held that the plaintiff was bound to rescind this transaction before he could treat it as a nullity. But such is not the case here. No fraud was practiced. The defendant has simply failed to pay the amount which he owed, and, under the authorities cited, this was payment *pro tanto*, leaving the remainder unpaid. The defendant, by paying a portion of his indebtedness, has not been induced to part with any money which, by the obligation of his

§ 433. The same subject continued.—Where the plaintiff agreed to a settlement of a claim for injuries while in a condition of physical pain which rendered the agreement voidable, and there was no evidence that the agreement was procured by fraud, an acceptance of the amount of such settlement by her attorney with her consent, at a time when she fully understood what she was doing, is a ratification of the settlement.¹ But where an agent who renders services in an endeavor to purchase real estate for another accepts payment in full therefor, he can not recover an additional sum, although he was originally entitled to more, and although such services facilitated the subsequent purchase of the property by the principal.²

contract, he was not bound to pay; and the payment which he has made is ineffectual to discharge wholly plaintiff's claim, because it was not sufficient in amount, and because the plaintiff's agreement to release the defendant was not upon any valid consideration, and hence the relations of the parties are the same as though such agreement had not been made. We do not overlook the several objections to the proceedings which are taken by defendant's counsel, but there was a finding of law and fact, and a general exception, which, with the error assigned upon such finding, is sufficient to raise the question of whether the findings support the judgment. The conclusion of law stated by the trial judge was that 'the parties had a right to compromise the debt, and that the plaintiff had a right to take less than the face of the claim upon condition of a payment of a part of the same; and, if he did so, that was a sufficient consideration to make the compromise valid and binding.' This conclusion of law was necessary to support the judgment, and, being at variance with the views of this court, as herein expressed, it follows that the judgment below should be reversed."

¹ *Drohan v. Lake Shore R. Co.*,

162 Mass. 435; 38 N. E. Rep. 1116, per Lathrop, J.: "When the tender was made of the amount mentioned in the agreement of July 9th, and was received by her without objection from her or her counsel, we can have no doubt that she adopted and ratified the former agreement. If either of them had any concealed intention to the contrary, it would be bad faith, and could not be shown. *Alden v. Thurber*, 149 Mass. 271, 275; 21 N. E. Rep. 312. See also, *O'Donnell v. Clinton*, 145 Mass. 461; 14 N. E. Rep. 747; *Rosenberg v. Doe*, 146 Mass. 191; 15 N. E. Rep. 510; *Mansfield v. Hodgdon*, 147 Mass. 304; 17 N. E. Rep. 544. The verdict ordered for the defendant might well rest upon the ground of ratification."

² *Ford v. Hubinger* (1894), 64 Conn. 129; 29 Atl. Rep. 129, per Andrews, C. J.: "If the plaintiff had accepted payment in full, that was a bar to his recovering anything more. The receipt of a payment tendered and accepted in full was a discharge of his entire claim. *Aborn v. Rathbone*, 54 Conn. 444; 8 Atl. Rep. 677; *Gates v. Steele*, 58 Conn. 316; 20 Atl. 474; *Buell v. Flower*, 39 Conn. 462; *Ayer v. Ashmead*, 31 Conn. 447; *Beam v. Barnum*, 21 Conn. 200; *Canfield v. Eleventh School Dist.*, 19 Conn. 529; *McGuire*

§ 434. As to unliquidated demands.—The New York rule is that where a debtor offers a certain sum of money in full satisfaction of an unliquidated demand and the creditor accepts and retains the money, his claim is canceled and no protest, declaration or denial on his part, so long as the condition is insisted on by the debtor, can vary the result. The law favors the adjustment of such controversies without judicial intervention, and will not permit the creditor to accept and retain money which has been tendered by way of compromise and then successfully litigate with his debtor for the recovery of a greater sum.¹ A similar rule exists in many other states.² But where

v. Lawrence Manufacturing Co., 156 Mass. 324; 31 N. E. Rep. 3. The request was apparently predicated on the law as laid down in these and other like cases, and it should have been complied with in the very words in which it was made, or in equivalent words. If the defendant satisfied the jury that he had made such a payment as he claimed to have made, he was entitled to have them told explicitly what its effect would be on the plaintiff's right to recover. This was not done. The instructions given implied that the payment, although the jury should find that it was made and accepted in full of all claims, would not preclude a further recovery, unless it should also appear that the services which the plaintiff had rendered did not in any way facilitate the subsequent purchase of the property. Each time the judge alludes to this payment in the charge he couples it with this condition. It is, perhaps, true that the judge did not get the entire meaning of the request in looking it over. The defendant contended that he had made a payment to the plaintiff in September, 1891, to be in full, and which the plaintiff accepted in full, of all the matters claimed in the action. If such a payment was made, then the defendant owned all the

services which the plaintiff had rendered, and might make such use of them as he chose, or as he found advantageous. He might rightfully, and without further liability to the plaintiff, use such services in facilitating a purchase of the property. If such a payment had been made, then the plaintiff had parted with and the defendant had acquired those services, as fully as though the plaintiff had sold to the defendant some tangible thing—as barrels of flour, or tons of coal."

¹ *Fuller v. Kemp* (1893), 138 N. Y. 231. The same principle has been applied on varying facts in *Palmerton v. Huxford*, 4 Den. (N. Y.) 166; *Looby v. West Troy*, 24 Hun, 78; *Hills v. Sommer*, 53 Hun, 392. In *Baird v. United States*, 96 U. S. 430, a claimant presented an unliquidated claim for \$151,000, which was audited by the accounting officers and allowed for \$97,000. He was informed of this adjustment and a draft for the \$97,000 payable to his order was sent to him which he received and collected without objection. It was held that his receipt of the money was equivalent to an acceptance of it in satisfaction of the claim.

² *McDaniels v. Lapham*, 21 Vt. 222; *Preston v. Grant*, 34 Vt. 201; *Towslee v. Healey*, 39 Vt. 522; *Boston Rubber*

the demand is liquidated and the debtor's liability is not in good faith disputed a different rule has been applied. In such cases the acceptance of a less sum than is due will not of itself discharge the debt even if a receipt in full is given. The element of a consideration is lacking and the debtor's obligation to pay the entire debt is not satisfied.¹ Where sales agents hold a note of a corporation under an agreement that they are to pay themselves from collections which they make and the collections to be applied on the note until it is paid, and they thereafter remit a balance to the corporation after deducting a commission which the corporation notifies them is illegal, the receipt by the corporation of such money in partial payment, together with its statement that such sums would be received on account, do not amount to an accord and satisfaction and do not estop the corporation from recovering the sums withheld by the agents.²

§ 435. The same subject continued.—The mere fact that the creditor receives from the debtor less than the amount of his claim in silence, and with knowledge that the debtor claims to be indebted to him only to the extent of the payment made, does not conclusively and as matter of law establish an accord and satisfaction.³ Neither will the retention by the creditor of money to which he is entitled absolutely amount to an accord and satisfaction, although tendered or transmitted to him as payment in full.⁴ But where a debtor sends a certain sum in full satisfaction of an unliquidated demand, and the creditor

Co. v. Peerless Wringer Co., 58 Vt. 551; *Bull v. Bull*, 43 Conn. 455; *Potter v. Douglass*, 44 Conn. 541; *Reed v. Boardman*, 20 Pick. (Mass.) 441; *Donohue v. Woodbury*, 6 Cush. (Mass.) 148; *Hilliard v. Noyse*, 58 N. H. 312; *Brick v. Plymouth Co.*, 63 Iowa, 462; *Hinkle v. Minneapolis, etc., R. Co.*, 31 Minn. 434.

¹ *Fuller v. Kemp*, 138 N. Y. 231.

² *Eames Brake Co. v. Prosser* (1895), 88 Hun, 343.

³ *Perkins v. Headley*, 49 Mo. App. 556. But where a controversy as to

the amount of the indebtedness exists between a creditor and his debtor, and the debtor tenders to the creditor the amount which he claims is due on condition that the acceptance of it should discharge the entire demand, the acceptance will, as a matter of law, constitute an accord and satisfaction; since an acceptance of a conditional tender assents to the condition.

⁴ *Duluth Chamber of Commerce v. Knowlton*, 42 Minn. 229; 44 N. W. Rep. 2.

accepts and retains the money, his claim is canceled, and no protest, declaration or denial on his part, so long as the condition is insisted on by the debtor, can vary the result.¹ In Connecticut, the payment of a less sum to extinguish a liquidated greater one is an accord and satisfaction if a receipt in full is also given.² The payment at a different place, or before due, will discharge the debt.³ But the acceptance by a creditor of a dividend, under a voluntary assignment made by a debtor, without the concurrence of his creditor, is no bar to an action for the balance.⁴ When the payment is before the sum is due, in order to constitute a good discharge the whole sum agreed to be paid must be paid; a part payment of the stipulated sum is no defense.⁵

§ 436. Illegal claims.—An illegal claim can not be the consideration of an accord and satisfaction. Thus, if a purchaser of intoxicating liquors sold in violation of law, in settling mutual accounts with the seller, credit him with the price thereof, receiving from him payment of the balance found due after such an allowance, and gives him a receipt in full settlement of the accounts, such payment and receipt do not have the effect of an accord and satisfaction to bar an action to recover the amount so credited.⁶ And the reverse of the

¹ *Fuller v. Kemp*, 138 N. Y. 231.

² *Gates v. Steele*, 58 Conn. 316; *Buell v. Flower*, 39 Conn. 462; *Ayer v. Ashmead*, 31 Conn. 447; *Beam v. Barnum*, 21 Conn. 200; *Aborn v. Rathbone*, 54 Conn. 444; *Canfield v. Eleventh School District*, 19 Conn. 529.

³ *Cavaness v. Ross*, 33 Ark. 572.

⁴ *Loney v. Bailey*, 43 Md. 10; *Allen v. Roosevelt*, 14 Wend. 101.

⁵ *Troutman v. Lucas*, 63 Ga. 466.

See also, *McKenzie v. Culbreth*, 66 N. C. 534; *Bryan v. Foy*, 69 N. C. 45; *Hayes v. Davidson*, 70 N. C. 573; *Mitchell v. Sawyer*, 71 N. C. 70.

⁶ *Walan v. Kerby*, 99 Mass. 1, where the court said: "The allowance of the illegal items by way of set-off can have no greater effect than would have been given to their actual payment in cash.

In the present case there was no adjustment of unliquidated claims or compromise of disputed demands on either side. Nothing was done except to ascertain and pay the difference between a larger and smaller account. We can not treat this payment as an accord and satisfaction sufficient to preclude future inquiry into the illegality of a part of the items. They were necessarily as well as actually embraced in the settlement. If a balance had been struck without them, there would have been no consideration to support even an express promise to accept the smaller sum paid in full discharge of the larger sum actually due. Such an agreement being without consideration as to the excess, notwithstanding a receipt in full,

rule is equally true, an illegal accord and satisfaction will not extinguish a claim. As where a contract was made by an aged man with his grandson, that if the latter would aid the grandfather in inducing a young lady to marry him, the latter would deliver to the grandson a note held against him, this was held not to extinguish the note.¹

§ 437. Accord executory.—The accord agreement must be fully executed, and the thing to be taken must have been received and accepted in satisfaction, in order to constitute a bar to a recovery.² A part performance of an accord, and readiness to perform the rest, is no defense.³ Colorado adopts

the difference could still be recovered.” *Smith v. Grable*, 14 Iowa, 429; *Donohue v. Woodbury*, 6 Cush. 148, also holding that when money is paid it is the duty of the party receiving the money to pay attention to what the payer says; and if the words are so spoken that, with ordinary care, he might have heard them, and, through carelessness or inattention, he fails to do so, he assents to the terms spoken by the payer. *Alvord v. Marsh*, 12 Allen, 603; *Tuttle v. Tuttle* 12 Metc. 551; *Brooks v. White*, 2 Metc. 283; *Twitchell v. Shaw*, 10 Cush. 46.

¹ *Johnson v. Hunt*, 81 Ky. 321. See also, *Cole v. Gibson*, 1 Vesey Sen. 503; *Drury v. Hooke*, 1 Vernon, 412.

² *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548; *Giboney v. German Ins. Co.*, 48 Mo. App. 185; *Wilkerson v. Bruce*, 37 Mo. App. 156; *German Bank v. Mulhall*, 8 Mo. App. 558; *Shaw v. Burton*, 5 Mo. 478; *Goff v. Mulholland*, 28 Mo. 397; *Sanford v. Abrams*, 24 Fla. 181; *Bragg v. Pierce*, 53 Me. 65; *Brooklyn Bank v. De Grauw*, 23 Wend. 342; *Piper v. Kingsbury*, 48 Vt. 480; *Ballard v. Noaks*, 2 Ark. 45; *Bayley v. Homan*, 5 Bing. N. C. 915, where the court said: “It appears by a long train of authorities, commencing with that in *Dyer*, 356, that a plea of accord, to

be a good plea, must show an accord which is not executory at a future day, but which ought to be executed, and has been executed, before the action brought. The same law is laid down in *Rolle’s Abridgment*, 129, ‘Accord,’ 11, 12, 13. Again, in *Peytoe’s Case*, 9 Rep. 78, where it is broadly stated by the court that in an accord, if the thing is to be performed at a day to come, an averment of tender and refusal is not sufficient, without actual satisfaction and acceptance. In *Allen v. Harris*, *Ld. Raym.* 122, the court says, ‘the books are so numerous that an accord ought to be executed, that it is now impossible to overthrow all the books, but if it had been a new point, it might have been worthy of consideration.’ * * * We think, if this plea amounted to a plea of an accord executory made upon mutual promises, it must, upon the authorities above referred to, be held to be bad.” *Lynn v. Brace*, 2 H. Bl. 317; *James v. David*, 5 T. R. 141; *Case v. Barber*, *Sir T. Jones*, 158, where the rule is doubted and it is held that a plea of accord executory is good; *Good v. Cheesman*, 2 B. & Ad. 328; *Gabriel v. Dresser*, 15 C.B. 622; *Hogan v. Burns* (Cal.), 33 Pac. Rep. 631.

³ *Hearn v. Kiehl*, 38 Pa. St. 146, where the court said: “Mere readi-

the rule that if the performance of the accord is prevented by the creditor, he thereby waives its performance;¹ and, generally, a tender of performance casts no duty on the creditor of accepting it.² No action can be brought on the accord by either party.³ "The accord is in the nature of a mere negotiation or offer which the creditor may refuse or withdraw, and during the pendency of which he may commence an action; and which the debtor may execute or not, as he pleases, nor will an action lie against him for the non-execution. The accord not amounting to a contract, therefore, does not require the forms of a contract; it may be proved by parol evidence for the purpose of explaining the performance in satisfaction, although it involve matter which, as the subject of an executory contract, would be within the statute of frauds; and as an accord alone without execution does not discharge or affect the right of action, the statute of limitations continues to run from the time the right of action first accrued."⁴

§ 438. The same subject continued.—There is a distinction between an accord and a condition; in an accord the debtor engages to do something, but in the case of a condition the creditor may impose it without the debtor engaging to do it.⁵ Thus a mortgage given and accepted in satisfaction of a claim on which an action is pending against another person, who is liable as a tort-feasor equally with the mortgagor, constitutes

ness to perform the accord, or a tender of performance, or even a part performance and readiness to perform the rest, will not do. Such is the law between debtor and creditor." *Carter v. Wormald*, 1 Ex. 81; *McKean v. Read*, *Littell's Select Cases*, 395; *Flack v. Garland*, 8 Md. 188; *Kromer v. Heim*, 75 N. Y. 574; *Noe v. Christie*, 51 N. Y. 270; *Tilton v. Alcott*, 16 Barb. 598; *Dolsen v. Arnold*, 10 How. Pr. 528; *Russell v. Lytle*, 6 Wend. 390; *Brooklyn Bank v. De Grauw*, 23 Wend. 342; *Bragg v. Pierce*, 53 Maine, 65.

¹*Tucker v. Edwards*, 7 Colo. 209; *Cary v. McIntyre*, 7 Colo. 173.

²*Brennan v. Ostrander*, 50 N. Y. Super Ct. 426; *Kromer v. Heim*, 75 N. Y. 574; *Noe v. Christie*, 51 N. Y. 270.

³*Brennan v. Ostrander*, 50 N. Y. Super Ct. 426.

⁴*Leake on Contracts*, 879, citing, *Reniger v. Fogassa*, *Plowden*, 1; *Allen v. Harris*, L. Raym. 122; *Linn v. Bruce*, 2 H. Bl. 317; *Reeves v. Hearne*, 1 M. & W. 323; *Hardman v. Bellhouse*, 9 M. & W. 596; *Massey v. Johnson*, 1 Ex. 241; *Lavery v. Turley*, 6 H. & N. 239.

⁵*Francis v. Deming*, 59 Conn. 108.

an accord and satisfaction; but if the acceptance of the mortgage is conditional on an executory agreement which is not complied with, it has no such effect.¹ So also, where a seller of lumber failed to deliver according to contract, it was held that the buyer's agreement to receive other lumber at a different place, and the actual receipt of a part thereof, was no satisfaction.² The mere setting apart certain securities and notifying the creditor is no execution of an accord to give security.³ And it seems that a promise by a third person to pay a debt can not assume the form of accord and satisfaction, unless the debtor is present and assent.⁴ The adjustment of the amount of a claim for fire insurance between the insured and the insurer is a mere accord, not binding on the insured.⁵ And the written transfer of a policy of insurance purporting to be for the benefit of certain creditors is not of itself the performance of an accord; there must be evidence of the transfer being accepted as satisfaction by the creditors.⁶ So also, an agreement to accept a smaller sum of money in satisfaction sooner than the debt fell due, and a tender of this sum, was held to be no defense.⁷ The giving of notes is no satisfaction, even although indorsed by third parties; if the notes are not paid at maturity the debtor can not plead accord and satisfaction.⁸ Where the plaintiff made a stipulation stating that he consented to dismiss his action, and the suit was thereby discontinued, and the cause of action released in consideration of the payment of the costs and seventy dollars to plaintiff's attorney, defendant paid the seventy dollars and tendered the costs, and set up an accord and satisfaction, it was held that this was at most a simple, unexecuted accord, and not a satisfaction.⁹

¹ *Cobb v. Malone*, 86 Ala. 571.

² *Gabriel v. Dresser*, 15 C. B. 622.

³ *Geary v. Page*, 9 Bosw. 290.

⁴ *Meyer v. Stitz*, 9 N. Y. Supl. 805.

See also, *Gifford v. Whittaker*, 6 Q. B. 249; *Baillie v. Moore*, 8 Q. B. 489; *Allies v. Probyn*, 9 C. M. & R. 408; *McManus v. Bark*, L. R. 5 Ex. 65; *Mitchell v. Hawley*, 4 Denio, 414; *Rising v. Cummings*, 47 Vt. 345; *Schilling v. Durst*, 42 Pa. St. 126; *Clark v. Bowen*, 22 How. 270; *Robin-*

son v. Detroit, 84 Mich. 658; *Holton v. Noble*, 83 Cal. 7.

⁵ *Giboney v. German Ins. Co.*, 48 Mo. App. 185; but it is intimated in this case that a tender of the amount found due would be a satisfaction.

⁶ *Wilkerson v. Bruce*, 37 Mo. App. 156.

⁷ *Hearn v. Kiehl*, 38 Pa. St. 147.

⁸ *Dolsen v. Arnold*, 10 How. Pr. 528.

⁹ *Noe v. Christie*, 51 N. Y. 270.

§ 439. Further illustrations.—Where a note was given in payment for pianos purchased under a contract by which the purchaser was to be the exclusive sales agent of the payee for a certain period, and, by reason of the revocation of the agency without cause, the buyer had been unable to dispose of the pianos, this was held sufficient to prevent a judgment against the buyer.¹ But where there is merely a claim for unliquidated damages by the buyer against the seller, and an agreement is reached that the seller shall deduct from his claim a certain amount on account thereof, this is a mere unexecuted accord.² So, also, the payment of money into court, or the depositing property with an officer of the law, is no satisfaction.³ A person being injured in a collision agreed with the company's agent to accept a certain sum in satisfaction. According to the practice of the company a voucher was made out and passed through the various departments, and when it was ready to be paid the party was notified thereof, but he refused to accept. This was held a satisfaction.⁴

§ 440. Accord without satisfaction.—The fact that a person, injured through the negligence of a city, agreed to accept a certain sum in satisfaction of his claim does not bar his right of action against the city when the city council afterward merely authorized the comptroller to pay him such sum, and he did not accept it, and no tender was made to him.⁵ The Mississippi

¹ *Ludington v. North*, 141 Pa. St. 184.

² *Heilman v. Lebanon R. Co.*, 145 Pa. St. 23; 23 Atl. Rep. 389.

³ *Cannon River Co. v. Rogers*, 46 Minn. 376; 49 N. W. Rep. 128.

⁴ *Gulf R. Co. v. Harriett*, 80 Texas, 73; 15 S. W. Rep. 556: "The law bearing upon this issue is very clearly stated in Chitty on Contracts: 'Upon the whole, the true distinction would seem to be between the cases in which the plaintiff has agreed to accept the promise of the defendant in satisfaction, and those in which he has agreed to accept the performance of such promise in satisfaction; the rule be-

ing that, in the latter case there shall be no satisfaction without performance, while in the former, if the promise be not performed, the plaintiff's only remedy is by action for the breach thereof, and he has no right to recur to the original demand.'"

⁵ *Rogers v. City of Spokane*, 9 Wash. 168; 37 Pac. Rep. 300, per Dunbar, C. J.: "*Goodrich v. Stanley*, 24 Conn. 613, which is the main case cited by appellant in his reply brief, holds that: 'Where it is claimed that an agreement, with promises on the one side to pay, and on the other to accept payment of, an obligation in a mode other than according to its

rule is that, while a promise to perform may be accepted as satisfaction of an accord, it will not be so held if the parties contemplated immediate performance, as by payment of the sum agreed. Thus, where plaintiff agrees to accept a sum in compromise of a suit, and gives a receipt therefor as actually paid, on defendant's promise to remit, but the defendant, who has been garnished in another state in respect to his debt to plaintiff, does not remit, but answers the garnishment, admitting an indebtedness, for which judgment is entered, there is no satisfaction of the accord, and the right of plaintiff to recover on his original demand is not affected.¹ An accord without satisfaction is not conclusive evidence upon the amount of damages to be recovered in an action; as,

tenor, is a satisfaction or extinguishment of such obligation, it should explicitly appear that such was the intention of the parties. That where the payee of a negotiable promissory note, both before and after its transfer, promised the maker that if the latter would continue to labor for him he would apply the amount of such labor in payment of the note; that in consideration thereof the maker promised to continue so to labor until the note should be fully paid, and the payee agreed to accept the labor in satisfaction of the note,—it was held that this was only an agreement on the part of the payee to accept the labor of the maker, and not an agreement to accept merely his promise to render it, in satisfaction of such note.' It was further held: 'Where the payee, for a valuable consideration, assigned such note when overdue, but the labor agreed to be performed in satisfaction of it had not been rendered at the time of the assignment, that said agreement to labor not only constituted no satisfaction of the note, but was merely an unexecuted accord, and therefore imposed no legal duty upon the maker, prior to the assign-

ment, or consequently upon the assignee, afterwards, to accept such labor, even if it had been tendered.' And the court, after commenting upon cases of this character, proceeds as follows: 'In order that such an accord should be a defense to the original debt, it is necessary, in the language of Park, B., in the case last cited (namely, *Evans v. Powis*, 1 Ex. 601), that the plaintiff should have 'agreed to accept the agreement itself, and not the performance of it, as a satisfaction for his debt, so that if it was not performed his only remedy would be by an action for the breach of it, and not a right to recur to the original debt.' There must be a valid agreement substituting a new cause of action in place of the old. It is not sufficient that there is a mere accord between the same parties, with mutual promises, but there must be a new agreement, with a new consideration.'" See also, *Babcock v. Hawkins*, 23 Vt. 561.

¹ *Yazoo, etc., R. Co. v. Fulton* (1893), 71 Miss. 385; 14 So. Rep. 271; *Whitney v. Cook*, 53 Miss. 551.

where the decedent agreed to take a certain sum in satisfaction of damages sustained by the illegal sale of liquor.¹ Where the plaintiff, the holder of notes, agreed to release defendants from all liability as indorsers thereon, on payment of twenty-five per cent. of the indebtedness represented by the notes, and the defendants were to give notes for that amount, secured by deed of trust; and it was stipulated that plaintiff should hold the original notes, that, on failure of defendants to pay the composition notes at maturity, the amount paid thereon by sales of land under the trust deed should be credited on the original indebtedness, and that the plaintiff should have the right to enforce full payment of the balance due on the original notes, and the composition notes were not paid at maturity, and plaintiff made no agreement to extend them, or to receive them as a discharge of the original notes, it was held that plaintiff was not estopped to assert its claim on the original notes by receiving payments from defendants, partly derived from sales of property covered by the trust deed, and crediting them on the composition notes after maturity.²

§ 441. New promise.—The rule that a promise to do another thing is not a satisfaction, is subject to the qualification that where the parties agree that the new promise shall itself be a

¹ *Herrmann v. Orcutt*, 152 Mass. 405; 25 N. E. Rep. 735.

² *Third Nat. Bank v. Humphreys* (1895), 66 Fed. Rep. 872, per Sage, J.: "The general rule is well understood to be in accord with the express terms of the contract made in this instance, —that a composition necessarily involves the fact of payment, as was observed by Willes, J., in *Edwards v. Coombe*, L. R. 7 C. P. 519. To make a composition agreement operate as more than a suspension of the remedy, there must be a performance of the condition; that is, due payment of the composition. *Edwards v. Hancher*, 1 C. P. Div. 111. In *Re Hatton*, 7 Ch. App. 723, Mellish, L. J., said that, where creditors accept a composition, they may either agree to take the

promises of the debtor with or without a surety in satisfaction of the debts, or they may agree that payment shall be a condition precedent, and that, if the debtor pays the composition at a certain time and place, the creditors will accept such payment in satisfaction of their debts. He adds that: 'It is a question of construction of the instrument of arrangement, and it is not uncommon for the creditors to accept a promise by the debtor and a surety as a satisfaction of their debts. But where they agree to accept a composition, the debtor is not discharged unless he pays the composition, for that is the only thing which compels him to pay it, and that is the only hold which the creditors have upon him.' "

satisfaction of the prior debt or duty, and the new agreement is based upon a good consideration, and is accepted in satisfaction, then it operates as such, and bars the action.¹ An accord unperformed, consisting of mutual promises, and thus having a new consideration, is binding upon the parties, and an action will lie for the breach of it.² Whether the creditor agreed to accept the promise itself, and not its performance, as a satisfaction for his debt, is one of fact for the jury.³ But when all the facts are admitted, whether they show an agreement to accept the promise in satisfaction is one of law for the court.⁴

§ 442. The same subject continued.—In every case, where one security, or contract, is agreed to be received in lieu of another, whether the substituted contract be of the same or a higher grade, the action, in case of failure to perform, must be upon the substituted contract.⁵ Where two persons, each having a cause of action against the other, met to adjust their differences, and the damages of one was agreed upon and paid and a receipt was given in full in addition thereto, this was held a new agreement canceling the claims on both sides.⁶ So also, where two persons having suits for false imprisonment against each other, agreed to discontinue their respective suits, this was held a new agreement;⁷ but where a note was

¹ *Kromer v. Heim*, 75 N. Y. 574; *Kinsler v. Pope*, 5 Strobhart, 126; *Evans v. Powis*, 1 Ex. 601, where Parke, B., said: "If the plea had been that a new mutual agreement between the plaintiffs and defendant and the other creditors, binding on each at the time when it was made, was given as a substitution for or satisfaction of the debt due from the defendant to the plaintiff, we think such a plea would have been good, on the authority of Comyn's Digest, 'Accord;' this not being a mere accord between the same parties with mutual promises, but a new agreement with new consideration pleaded. If so, the question would have been for the jury to decide

whether the plaintiff agreed to accept the agreement itself, not the performance of it, as a satisfaction for his debt, so that if it was not performed his only remedy would be by an action for the breach of it, and not a right to recur to the original debt."

² *Billings v. Vanderbeck*, 23 Barb. 546; *Cartwright v. Cooke*, 3 B. & Ad. 701.

³ *Evans v. Powis*, 1 Exch. 601, 607, per Parke, B.

⁴ *Vedder v. Vedder*, 1 Denio, 257.

⁵ *Babcock v. Hawkins*, 23 Vt. 561; *Thatcher v. Dudley*, 2 Root, 169.

⁶ *Vedder v. Vedder*, 1 Denio, 257.

⁷ *Foster v. Trull*, 12 John. 456. See also, *Crowther v. Farrer*, 15 Q. B. 677.

given for a certain sum, and afterwards a written agreement was entered into by the maker and payee to the effect that the note should be paid by installments, it was held that this subsequent agreement was not a new promise canceling the note, inasmuch as it was not founded on any valuable consideration.¹ A claim on notes may be canceled and discharged by a new agreement, and it is not necessary that there should be any formal or written promise; all that is required is a distinct contract to that effect.² In Kentucky one note can not be discharged by another note for the same sum, signed by the same party and due at the same time.³ Where it is claimed that an agreement, with promises on the one side to pay, and on the other to accept payment of an obligation, in a mode other than according to its tenor, is a satisfaction or extinguishment of such obligation, it should explicitly appear that such was the intention of the parties.⁴

§ 443. Composition with creditors.—A composition agreement by several creditors, although by parol, so as to be incapable of operating as a release, and although unexecuted, so as not to amount in strictness to a satisfaction, is a good answer to an action by the creditor for the original debt, if he accepted the new agreement in satisfaction thereof; the consideration of the agreement is the undertaking by the other creditors to give up a part of their claim.⁵ Mutuality between the creditors as respects the consideration is therefore essential to the validity of an agreement for a composition. The creditors must join together; they must stipulate one with the other.⁶ At com-

¹ *McManus v. Bark*, L. R. 5 Ex. 65.

² *Whitney v. Cook*, 53 Miss. 551; *Barnes v. Lloyd*, 1 How. (Miss.) 584; *Guion v. Doherty*, 43 Miss. 538; *Heirn v. Carron*, 11 S. & M. 361; *Pulliam v. Taylor*, 50 Miss. 251.

³ *Bank v. Letcher*, 3 J. J. Marsh. 195.

⁴ *Goodrich v. Stanley*, 24 Conn. 613. See also, *Hall v. Smith*, 15 Iowa, 584; *Levi v. Karriek*, 13 Iowa, 344; *Molyneux v. Collier*, 13 Geo. 406; *Haskins v. Newcomb*, 2 John. 405; *Billings v. Vanderbeck*, 23 Barb. 546; *Kromer*

v. Heim, 75 N. Y. 574; *McCreery v. Day*, 119 N. Y. 1; *Plevins v. Downing*, L. R. 1 C. P. D. 220, discussing the distinction between the alteration of a contract and a mere arrangement as to time or mode of performing it. *Henderson v. Stobart*, 5 Ex. 99.

⁵ *Renard v. Tuller*, 4 Bosw. (N. Y.) 107; *Norman v. Thompson*, 4 Ex. 755; *Good v. Cheeseman*, 2 B. & Ad. 328; *Boyd v. Hind*, 1 H. & N. 938.

⁶ *Sage v. Valentine*, 23 Minn. 102; *Perkins v. Lockwood*, 100 Mass. 249.

mon law, where a body of creditors accept a composition, they may either agree to take the promise of the debtor with or without a surety in satisfaction of the debts, or they may agree that payment shall be a condition precedent, and that if the debtor pays the composition at a certain time and place the creditors will accept that composition in satisfaction of their debts. It is a question of construction of the instrument of arrangement, and it is not uncommon for the creditors to accept a promise by the debtor and a surety as a satisfaction of their debts. But where they agree to accept a composition, the debtor is not discharged unless he pays the composition, for that is the only thing which compels him to pay it, and that is the only hold which the creditors have upon him.¹ It is impossible for a composition to be made between the debtor and a single creditor. There is no consideration for the release.² Where the creditors of a failing debtor contract with a third person to sell and assign to him their claims at a certain percentage, in the absence of proof that such third person was acting merely as agent of the debtor, the transaction is to be considered as a purchase and sale, not a composition; and a creditor who has received the percentage agreed upon, and has assigned his claim, can not enforce the balance of the indebtedness upon proof simply that some of the creditors received more than the stipulated per cent. for their claims.³ In all compositions, the creditors are moved by some advantage to be obtained in a distribution of the property of the debtor, or by fixed payments to be made securing to each a certain proportion of his assets; and therefore a mere agreement by creditors to grant an extension of time and not sue, is no valid composition.⁴ But it seems, that in Indiana a contrary rule prevails, and there a debtor may compound with a single creditor.⁵ It is not necessary that a composition deed should express the

¹ *In re Hatton*, L. R. 7 Ch. App. 723, 726.

² *Norman v. Thompson*, 4 Ex. 755; *Renard v. Tuller*, 4 Bosw. (N. Y.) 107; *Pierson v. McCahill*, 21 Cal. 122.

³ *Goldenbergh v. Hoffman*, 69 N. Y. 322; *Blair v. Wait*, 69 N. Y. 113.

⁴ *Henry v. Patterson*, 57 Pa. St. 346.

⁵ *Devou v. Ham*, 17 Ind. 472; *Kahn v. Gumberts*, 9 Ind. 430. By the terms "compound" and "composition" is meant a parol agreement by a creditor to accept less of a liquidated debt than is due him.

mutuality of all the signers. It is sufficiently implied by the nature of the agreement.¹

§ 444. The same subject continued.—Where the payment of the composition debt is made a condition precedent to the canceling the original debt, the cause of action on the original debt is suspended until default is made in paying the composition.² Because when the creditors have resolved upon a composition, if the debtor complies with the conditions of that resolution, or rather, until he fails to comply with them—for which purpose he must have a reasonable time—the resolution is binding upon the creditors.³ But when default is made the creditor may sue for his original debt.⁴ Where the composition deed is conditioned on the giving of notes by the debtor, to bear a certain date, but does not specify when they are to be given, the question whether a neglect to give them is a violation of the contract depends on the fact of an offer being made within a reasonable time after the date, and is a question for the jury.⁵ An agreement of a creditor with his debtor to accept a certain percentage of the debt in full satisfaction thereof, “provided that no other creditor shall receive more than the same percentage of his claim,” is void for want of consideration.⁶ It is not necessary that the debtor be a party to the composition; his acting upon it is sufficient to bind the creditors.⁷ A creditor who has signified his assent to a composition between his

¹ *Horstman v. Miller*, 35 N. Y. Super. Ct. 29, where the deed, purporting that the creditors “severally and each for himself agree,” was held to be good, the court saying: “Whatever may be the nature of the obligation in terms, it must necessarily in all cases be several. Each creditor must agree for himself with the debtor, and his several agreement is joint, or his joint agreement is several only so far as it is mutual with the others signing.” See also, *Hall v. Merrill*, 5 Bosw. 266, where the agreement was joint.

² *Slater v. Jones*, L. R. 8 Ex. 186; *Edwards v. Coombe*, L. R. 7 C. P. 519.

³ *Edwards v. Coombe*, L. R. 7 C. P. 522.

⁴ *Edwards v. Coombe*, L. R. 7 C. P. 519.

⁵ *Hall v. Merrill*, 9 Abb. Pr. 116.

Perkins v. Lockwood, 100 Mass. 249. See also, *Harriman v. Harriman*, 12 Gray, 341; *Brooks v. White*, 2 Metc. (Mass.) 283; *Eaton v. Lincoln*, 13 Mass. 424; *Steinman v. Magnus*, 11 East, 390.

⁷ *Eaton v. Lincoln*, 13 Mass. 424.

debtor and the other creditors can not subsequently withdraw his assent without the consent of the debtor.¹

§ 445. Liability of third party.—The law is well settled that the acceptance by a creditor of the liability of a third person, in full satisfaction of an existing debt, is an extinguishment of the original indebtedness. But properly to be called “accord and satisfaction,” as distinguished from payment or purchase, the third person must become a party to a valid contract to that effect.² Also the liability of the debtor must be completely canceled and discharged. The reservation of any right by the creditor against his original debtor will destroy the effect of the acceptance of the third party’s liability as an accord and satisfaction.³

¹ *Fellows v. Stevens*, 24 Wend. 294. See also, *Farrington v. Hodgdon*, 119 Mass. 453; *Sage v. Valentine*, 23 Minn. 102; *Williams v. Carrington*, 1 Hilt. (N. Y.) 515; *Paddleford v. Thacher*, 48 Vt. 574; *Pierce v. Jones*, 8 S. C. 273; *Good v. Cheesman*, 2 B. & Ad. 328; *Steinman v. Magnus*, 11 East, 390; *Pfleger v. Browne*, 28 Beav. 391; *Gillfillan v. Farrington*, 12 Ill. App. 101; *Way v. Langley*, 15 Ohio St. 392; *Murray v. Snow*, 37 Iowa, 410; *Fasdyke v. Nixon*, 107 Ind. 410; 8 N. E. Rep. 11; *Parkerson v. Sessions*, 40 Geo. 171; *Renard v. Tuller*, 4 Bosw. 107; *Lanes v. Squyres*, 45 Texas, 382; *Greenwood v. Lidbetter*, 12 Price, 183.

² *Henderson v. Stobart*, 5 Ex. 99. “We are satisfied that this is an agreement which would have been broken if the company had gone on with the original action; for, a new person being made a party to the contract, it becomes a binding agreement, and not a mere accord.”

³ *Cuxon v. Chadley*, 3 B. & C. 591. As this matter is well summed up by Abbott, C. J., we quote at length from the opinion: “This case came before us on a motion for a nonsuit. We are of opinion that the rule must

be discharged. Sweet, the bankrupt, had sold goods to the amount of £14 to James Chadley, the defendant. The bankrupt, and Robert Chadley, the brother of the defendant, were concerned together in accommodation bills, and there was another account between them, in which Robert Chadley was debtor to Sweet. Robert Chadley was also debtor to his brother James. About the month of August or September, Robert Chadley spoke to Sweet and desired that he would put down the goods which had been sold to James Chadley to the account of him, Robert. Sweet agreed to this, and Robert Chadley informed his brother of what had passed between them. Towards the end of the year, when Sweet gave in an account of the moneys due to him from Robert, he put at the end of the account this entry: ‘December the 1st, 1822, your brother’s account of £14 1s.’ This is all that passed. Sweet is not proved ever to have said ‘I will take you, Robert, as my debtor and discharge James’; he is not proved ever to have said or done that which would have the effect of discharging James. It is contended by the defendant’s counsel

§ 446. **The same subject continued.**—Accordingly the acceptance in full satisfaction by a creditor of the note of a third person is an accord and satisfaction.¹ And equally the note of a third person may be taken in payment of a judgment.² But it seems that the presumption is that such a note is subject to an implied condition of its payment, and default in payment will warrant an execution on the judgment.³ Where, therefore, the note of a third person is taken in full satisfaction of a debt, on condition that such note shall be paid at maturity, and not otherwise, if the note is not paid when due, the creditor may insist that the contract is broken, and claim the whole amount of the original debt.⁴ Where a note is not negotiable the *onus* of proving that it was taken in full satisfaction is on the debtor.⁵ The liability of the third person must, as of course, be enforceable. Thus, where the note of an infant is taken, the agreement to receive it in satisfaction is without consideration and void.⁶ Where a creditor received several notes held by his debtor against third persons, and one of them was worthless, it was held the creditor could return all the notes and sue on his original debt, although his debtor supposed all the notes to be good and the creditor agreed to accept them in satisfaction.⁷ An attorney at law to whom a claim has been sent for collection, and who has obtained judgment thereon, can not,

that this is accord and satisfaction; but, admitting the previous agreement, where is the satisfaction? But I consider the entry made by Sweet to mean no more than this; I will debit the account of Robert for £14 1s.; not, I will discharge James, at all events, from this sum. Nor are the dealings of the parties at all varied by this arrangement; the bankrupt's condition is not improved by it, nor the defendant's deteriorated. It amounts at most to an accord, but certainly not to a satisfaction."

¹Booth v. Smith, 3 Wend. 66; Conkling v. King, 10 Barb. 372; Currie v. Kennedy, 78 N. C. 91; Brassell v. Williams, 51 Ala. 349; Lee v. Oppenheimer, 32 Me. 253; Brooks v. White,

2 Metc. (Mass.) 283; Webb v. Goldsmith, 2 Duer, 413; Dryden v. Stephens, 19 W. Va. 1; Hunter v. Moul, 98 Pa. St. 13; Mehan v. Thompson, 71 Me. 492; Goodnow v. Smith, 18 Pick. 414.

²New York Bank v. Fletcher, 5 Wend. 85.

³Sanders v. Branch Bank, 13 Ala. 353.

⁴Conkling v. King, 10 Barb. 372.

⁵Smith v. Bettger, 68 Ind. 254.

⁶Wentworth v. Wentworth, 13 Johns. 87; Wright v. First, etc., Co., 5 N. H. 410; Crawford v. Millspaugh, 1 N. H. 281.

⁷Wiswall v. Harriman, 62 N. H. 671.

without special authority, receive, by way of accord and satisfaction, notes of third persons in satisfaction of the judgment.¹

§ 447. Further illustrations.—The acceptance by a creditor of the sole and separate liability of one of two or more joint debtors is a good consideration for an agreement to discharge all the other debtors from liability.² So also, the acceptance of the note of a third person from one of the members of a firm is an accord and satisfaction. So a judgment confessed by one of the partners for the debt of the firm is a satisfaction;³ and and where one of two partners pays a debt of the partnership by compromise with the creditor, it is not competent for the creditor to keep the debt alive, and authorize the partner paying to enforce it by action against the other partner.⁴ An accord and satisfaction may be made by a debtor taking up his own note and giving another made by him and indorsed by a third party;⁵ but there must be the liability of a third person accepted. The fact that the third person advances money to assist the debtor to pay is not an acceptance of payment from such third party.⁶

§ 448. Settlement by third person—New consideration.—An agreement by the payee of a note, with the maker's widow, that certain sums paid by the maker, and by her after his death, for the payee's benefit, together with a sum paid by her to the payee, should be accepted in full settlement of the note, constitutes a valid satisfaction thereof.⁷ Where one indebted

¹ *Jones v. Ransom*, 3 Ind. 327. See *Letcher v. Bank*, 1 Dana (Ky.), 82.

² *Lyth v. Ault*, 7 Exch. 669; *Thompson v. Percival*, 5 B. & Ad. 925; *Hart v. Alexander*, 2 M. & W. 484.

³ *Frisbie v. Larned*, 21 Wend. 450.

⁴ *Le Page v. McCrea*, 1 Wend. 164.

⁵ *Boyd v. Hitchcock*, 20 John. 76.

⁶ *Bunge v. Koop*, 5 Robertson, 1. See also, *Guild v. Butler*, 127 Mass. 386; *Stagg v. Alexander*, 55 Barb. 70; *Bliss v. Schwartz*, 64 Barb. 215; *Coonley v. Anderson*, 1 Hill, 519; *Cadens v. Teasdale*, 53 Vt. 469, holding that insolvency of the third party

does not warrant recurring to the original debt; *Wagner v. Union Stock Yards Co.*, 41 Ill. App. 408; *Bullen v. McGillicuddy*, 2 Dana (Ky.), 90.

⁷ *Beck v. Snyder*, 167 Pa. St. 234; 31 Atl. Rep. 555: "There was no allegation of, nor was there any attempt to prove, payment and acceptance from the maker of the note or his administrator of any smaller sum than the amount actually due, in satisfaction of the note. In saying, by way of illustration, what is complained of in the second specification, the learned judge doubtless had in

on an open book account gave to his creditor his notes for one-half of his debt secured by a chattel mortgage under an agreement with the creditor that he would accept the same in full satisfaction and discharge of the debt, and the debtor paid the notes as they became due and the creditor satisfied the mortgage, it was held that the new agreement was a valid accord and satisfaction and supported by a sufficient consideration, and estopped the creditor from bringing action to recover the balance of the debt.¹ An overdue demand, whether liquidated or unliquidated, may by agreement be discharged by payment of a thing different from that contracted to be paid, although of less pecuniary value.²

mind the facts of the case, as indicated by the defendants' testimony, and meant a settlement, not with the maker of a note, but with a third party—such a settlement as that shown to have taken place between plaintiffs' intestate and Mrs. Shoemaker after her husband's death."

¹ *Jaffray v. Davis* (1891), 124 N. Y. 164.

² *Bush v. Abraham*, 25 Ore. 336; 35 Pac. Rep. 1066, Lord, C. J.: "For instance, £1,000 by the payment of a peppercorn. *Pinnel's Case*, 5 Coke, 117; *Cumber v. Ware*, 1 Smith Lead. Cas. (337) 633. Although a money demand, liquidated and not doubtful, can not be satisfied with a smaller sum of money, yet, if any other personal property is received in satisfaction, it will be good, no matter what the value. *Bull v. Bull*, 43 Conn. 455. In such case the court will not inquire into the adequacy of the consideration. *Reed v. Bartlett*, 19 Pick. 273; *Fisher v. May's Heirs*, 2 Bibb, 448. 'A claim or demand,' Mr. Sutherland says, 'may be satisfied by the party liable delivering, paying, or doing, and the claimant accepting, something different from that which was owing or claimed, if they so agree. It is a substituted payment. When such agreement is executed—carried fully

into effect—the original demand is canceled, satisfied, extinguished. It is thus discharged by what the law denominates accord and satisfaction. It is a discharge of the former obligation or liability by receipt of a new consideration, mutually agreed upon.' 1 *Sutherland on Damages* (2d ed.), § 246. In support of such agreements, if the consideration has some value, the law regards it as sufficient without regard to its extent. *Savage v. Everman*, 70 Pa. St. 315. The fact that the mill property was of less value than the amount remaining unpaid of the purchase-price notes is not material if its conveyance was accepted in satisfaction and discharge of such notes. In *Strang v. Holmes*, 7 Cow. 224, it was held that a conveyance of land, given in satisfaction of money due on a bond, would operate as a release of the bond, if given and accepted in full satisfaction. Sutherland, J., said: 'The sufficiency of the satisfaction can not be questioned. It was the conveyance of land which, like the gift of a horse, hawk, or robe, shall be intended might be more beneficial to the plaintiff than the money; or otherwise he would not have accepted it in satisfaction.' In *Eaton v. Lincoln*, 13 Mass. 424, Parker, C. J., said: 'The execution and delivery of

§ 449. Accord and satisfaction by a joint creditor.—Where one of two or more joint creditors makes an accord and satisfaction with the debtor, this puts an end to the debt.¹ Thus where three creditors sue on a joint demand and the debtor pleaded an accord and satisfaction with one of the creditors, by a payment in cash and a set-off of a debt due from that one to the debtor, the plea was held good.² Where two or more are interested in a contract the presumption of law is that their interest is joint, and either may make a valid accord and satisfaction. Thus where two persons bought a quantity of goods in their own names, and then sold the goods to a corporation and one of them made an accord and satisfaction for the price with the corporation, this was held to discharge the corporation from the other's demand.³ So also, where one partner makes an accord and satisfaction with a debtor of the firm, and it does not appear whether it is intended to apply to separate or to partnership demands, the presumption is that it is a discharge

the deed by the defendant, in pursuance of the agreement of the creditors, and the acceptance of that deed by their agent, and his sale of the property afterwards, was a complete execution of the contract on both sides. These facts would have maintained the issue for the defendant upon a plea of accord and satisfaction.' To constitute an accord and satisfaction there must be a satisfaction of the entire debt so as to completely extinguish it."

¹ Wallace v. Kelsall, 7 M. & W. 264.

² Wallace v. Kelsall, 7 M. & W. 264. "Were we to decide otherwise, it is plain it might lead to this absurdity, that supposing the plaintiff Wallace to have received a full discharge of the debt, yet he might, if he survived the other parties, recover the whole of it over again."

³ Osborn v. Martha's Vineyard R. Co., 140 Mass. 549. "The interest of the three plaintiffs in their joint claim against the defendant was such that

each had an interest in the entire claim. One of them had not only an interest in the third which might be his share, but also in the two-thirds belonging to the others. It has been settled in this action that one can not maintain an action for his share; the three must join in the suit, because each one has a joint interest in the entire amount due them, and in every part thereof. Osborn is debarred from bringing suit for his third part, because Norton and Jernegan own that third as fully as does Osborn. Each having such an interest in the debt due, one being unable to sue for the whole or his share thereof, it follows that each one, being interested in the entire claim, can settle it with the defendant. Each of the three, by the manner of their dealing with the defendant and with the property, has effectually authorized his partners in the contract to dispose of his interest by payment, settlement, or accord and satisfaction, etc."

from partnership claims.¹ Tenants in common are likewise bound by an accord and satisfaction made by one of them.² But in Ohio, it seems, that joint creditors, between whom no partnership exists, can not either release or make an accord and satisfaction with the common debtor so as to conclude their co-creditors who do not assent to such release or accord.³

§ 450. Accord and satisfaction with a joint debtor.—The creditor discharges all joint debtors by an accord and satisfaction with one.⁴ And likewise a partial accord and satisfaction by one joint debtor is a satisfaction *pro tanto* as to all.⁵ Where a creditor of a corporation, by an accord and satisfaction with a stockholder released such stockholder from all personal liability for his debt, he was held to thereby discharge the corporation, and other stockholders to the same extent as the one with whom the accord was made.⁶ A covenant not to sue one of the joint obligors does not amount to an accord and satisfaction. It does not prevent the creditor from proceeding against all the joint debtors.⁷ While as a general rule a covenant not to sue is not pleadable in bar—it being a covenant only, and the covenantee being put to his cross-action to re-

¹ *Emerson v. Knower*, 8 Pick. 63.

² *Austin v. Hall*, 13 John. 286.

³ *Upjohn v. Ewing*, 2 Ohio St. 13. "It is true, they may defeat an action at law, but it does not follow that a recovery in equity can not be had. At law, joint creditors must join in the action, and all must recover, or none can. Hence if part of them are barred all are. But the forms of equity procedure require no such joinder when justice would be defeated by it. It may be admitted, that as a general rule joint creditors can not, by a division between themselves, acquire a separate right of action against the debtor, either at law or in equity. But where the debtor himself procures the release of a part of them, we do not see how he can object to the others proceeding against him in equity."

⁴ *Nicholson v. Revill*, 4 A. & E. 675; *Lamb v. Gregory*, 12 Neb. 506; *Neligh v. Bradford*, 1 Neb. 451; *Vandever v. Clark*, 16 Ark. 331; *Heckman v. Manning*, 4 Colo. 543; *Elliott v. Holbrook*, 33 Ala. 659; *Arnold v. Camp*, 12 Johns. 409; *McLaurine v. Monroe*, 30 Mo. 462; *Shaw v. Pratt*, 22 Pick. 305; *Booth v. Campbell*, 15 Md. 569.

⁵ *Merchant's Bank v. Curtiss*, 37 Barb. 317.

⁶ *Prince v. Lynch*, 38 Cal. 528.

⁷ *Frink v. Green*, 5 Barb. 455; *Tuckerman v. Newhall*, 17 Mass. 581; *Snow v. Chandler*, 10 N. H. 92; *Walker v. McCulloch*, 4 Me. 421; *Smith v. Bartholomew*, 1 Metc. (Mass.) 276; *Rowley v. Stoddart*, 7 Johns. 207; *Spencer v. Williams*, 2 Vt. 209; *Berry v. Gillis*, 17 N. H. 1; *Winston v. Dalby*, 64 N. C. 299.

cover the damages which a breach may occasion him—there is an exception to this rule in case of a sole obligor. It then amounts to accord and satisfaction, and may be pleaded.¹

§ 451. Reserving rights against co-debtors.—There is some difference of judicial opinion as to whether a creditor can settle with one joint-debtor and reserve his rights against the others. In Ohio,² Connecticut³ and Maryland,⁴ the courts will not enforce agreements between a creditor and a joint-debtor which do not equally inure to the benefit of all the debtors. But Pennsylvania allows an accord and satisfaction between a creditor and joint-debtor so that on payment of his proportion of the debt he alone is discharged.⁵ The same rule likewise probably obtains in New York.⁶ A receipt given to one joint-debtor on a note, for a part payment, coupled with the words “which is in full on his part on the within note, and the said A. B. is hereby discharged from all obligations on the same,” is not such a release as will discharge the others.⁷ In Maine the courts not only will not allow an accord and satisfaction with one joint-debtor to discharge the others, but adopt the rule that where one of two joint debtors has been discharged such discharge is no defense to either in an action against both. The only remedy of the discharged debtor is to sue for a breach of the contract of discharge.⁸ In California the code provides that the release of one joint-debtor does not extinguish the obligation of any of the others.⁹

§ 452. Co-tort-feasors.—An accord and satisfaction with a tort-feasor discharges the liability of all the co-tort-feasors, although

¹ *Line v. Nelson*, 38 N. J. Law, 358; *Crane v. Alling*, 15 N. J. Law, 423; *Walker v. McCulloch*, 4 Me. 421.

² *Ellis v. Bitzer*, 2 Ohio, 289; where in an action to trespass against five, the plaintiff accepted a note from two for a sum of money to be paid at a future day, in satisfaction as to them, but not to operate as a satisfaction for the other defendants, it was held a good discharge for all.

³ *Ayer v. Ashmead*, 31 Conn. 447.

⁴ *Gunther v. Lee*, 45 Md. 60.

⁵ *Burke v. Noble*, 48 Pa. St. 168.

⁶ *Honegger v. Wettstein*, 47 N. Y. Super. Ct. 125.

⁷ *Armstrong v. Hayward*, 6 Cal. 183.

⁸ *Drinkwater v. Jordan*, 46 Me. 432; *McAllester v. Sprague*, 34 Me. 296; *McCrillis v. Hawes*, 38 Me. 566.

⁹ *Northern Ins. Co. v. Potter*, 63 Cal. 157; Civ. Code, § 1543.

it is expressly stipulated that they shall not be discharged ;¹ but the discharge of a party not shown to be a joint wrongdoer will not operate as a discharge of the others.² A written instrument, given to one of two joint tort-feasors, and reciting the receipt from him of a certain sum "as full payment, as per claim," is a bar to an action against the other tort-feasor ; and oral evidence is inadmissible to show that the sum paid was intended to be received as part, and not as full payment ;³ but in an action against one of several co-trespassers, evidence of payments by any one of them, though not received in full satisfaction or in discharge of the claim, is admissible, for their effect is to diminish the recovery.⁴ A right of action by the owner of a chattel for injuries done to it in the possession of a bailee is not barred by a settlement between the owner and the bailee, accompanied by an agreement that the bailee may bring a suit in the owner's name, but at his own risk and expense and for his own benefit.⁵

§ 453. Accord and satisfaction by a stranger.—An accord and satisfaction, moving from a stranger or person having no pecuniary interest in the subject-matter, if accepted in discharge of the debt, constitutes a good defense to an action to enforce the liability against the debtor.⁶ Thus, a bond was given to the bank comptroller of a state for the security of the circulating notes of a bank. The owner of the bank sold and transferred its entire stock and the purchaser delivered a new bond for the same purpose. The old bond was given up and the new one accepted in its place. It was held that the old bond was extinguished ;⁷ but some authorities allow the accord and satisfaction of a stranger to be taken advantage of only

¹ *Urton v. Price*, 57 Cal. 270; *Gilpatrick v. Hunter*, 24 Me. 18; *Sloan v. Herrick*, 49 Vt. 327; *Brown v. Cambridge*, 3 Allen, 474; *McAllister v. Dennin*, 27 Mo. 40.

² *Wardell v. McConnell*, 25 Neb. 558.

³ *Goss v. Ellison*, 136 Mass. 503.

⁴ *Chamberlin v. Murphy*, 41 Vt. 110.

⁵ *Rindge v. Coleraine*, 11 Gray, 157.

See also, *Ward v. Johnson*, 13 Mass. 148; *Pond v. Williams*, 1 Gray, 630; *Bloss v. Plymale*, 3 W. Va. 393; holding a discharge of one joint tort-feasor not to discharge another if the accord expressly so stipulated. *Dudley v. Bland*, 83 N. Car. 220.

⁶ *Leavitt v. Morrow*, 6 Ohio St. 71.

⁷ *Rusk v. Soutter*, 67 Barb. 371.

when it is subsequently ratified by the debtor. The pleading it will be sufficient satisfaction.¹

§ 454. **Rescinding accord for mistake or fraud.**—Parties to an accord and satisfaction may, by a subsequent agreement, rescind it, and restore the debt to its original status.² But a party seeking to rescind a settlement or compromise on the ground of fraud or mistake must in general first place the other party *in statu quo*.³ Where an accord and satisfaction is

¹ *Snyder v. Pharo*, 25 Fed. Rep. 398. See, *Grymes v. Blofield*, Cro. Eliz. (2 Croke) 541; *Jones v. Broadhurst*, 67 E. C. L. 173; *Belshaw v. Bush*, 73 E. C. L. 191; *Goodwin v. Cremer*, 83 E. C. L. 757; *Kemp v. Balls*, 10 Exch. 607; *Simpson v. Eggington*, 10 Ex. 845. *Contra*, *Clow v. Borst*, 6 John. 37; *Daniels v. Hallenbeck*, 19 Wend. 408; *Bleakley v. White*, 4 Paige, 654; *Atlantic Co. v. Mayor*, 53 N. Y. 64. *Cf.*, *Webster v. Wyser*, 1 Stew. (Ala.) 184; *Scott v. Alexander*, 1 Wash. (Va.) 77; *Allen v. Farrington*, 2 Sneed, 526; *Cornell v. Masten*, 35 Barb. 157; *Vroom v. Van Horne*, 10 Paige Ch. 549; *Priest v. Watkins*, 2 Hill, 225; *Britton v. Lewis*, 8 Rich. Eq. 271; *Lovejoy v. Murray*, 3 Wall. 1; *Phoenix Bank v. Bumstead*, 18 Pick. 77; *Eastman v. Grant*, 34 Vt. 387; *Reigart v. Ellmaker*, 14 S. & R. 121; *Brown v. Inhabitants of Chesterville*, 63 Me. 241; *Armstrong v. School District*, 28 Mo. App. 169; *Dana v. Taylor*, 150 Mass. 25; *Copley v. Hyland*, 46 Minn. 205; 48 N. W. Rep. 777; *Marrett v. Babb*, 91 Ky. 88; 15 S. W. Rep. 4; *Stimpson v. Poole*, 141 Mass. 502; *President, etc., v. Doolittle*, 14 Pick. 123; *Blewett v. Gaynor*, 77 Wis. 378; *United States v. Thompson*, Gilp. (U. S.) 614; *Simpson v. Eggington*, 10 Ex. 845; *Belshaw v. Bush*, 11 C. B. 191; *Brown v. Marsh*, 7 Vt. 320; *Collier v. Field*, 1 Mont. Ter. 612; *Richardson v. McLemore*, 5 Baxter, 586; *Simpson v. Moore*, 6 Baxter, 371; *Frisbie v. Larned*, 21 Wend. 450; *Waydell v.*

Luer, 3 Denio, 410; *Luddington v. Bell*, 77 N. Y. 138; *Gray v. Brown*, 22 Ala. 262; *Williams v. Hitchings*, 10 Lea (Tenn.), 326; *Kendrick v. O'Neil*, 48 Geo. 631; *Long v. Long*, 57 Iowa, 497; *Irwin v. Scribner*, 15 La. Ann. 583; *Mitchell v. Allen*, 25 Hun, 543; *Irvine v. Millbank*, 36 N. Y. Super. Ct. 264; *Bronson v. Fitzhugh*, 1 Hill, 185; *Allen v. Wheatley*, 3 Blackf. 332; *Metz v. Soule*, 40 Iowa, 236; *Ellis v. Esson*, 50 Wis. 138; *Stone v. Dickinson*, 5 Allen, 29; *Knickerbacker Co. v. Colver*, 8 Cow. 111; *Matthews v. Chicopee, etc., Co.*, 3 Robt. 712; *President, etc., of Bank v. Messenger*, 9 Cow. 37; *Bonney v. Bonney*, 29 Iowa, 448; *Parmelee v. Lawrence*, 44 Ill. 405; *Smith v. Gayle*, 58 Ala. 600; *Austin v. Hall*, 13 John. 286; *Decker v. Livingston*, 15 John. 479; *Myrick v. Dame*, 9 Cush. 248; *Kimball v. Wilson*, 3 N. H. 96; *Yandes v. Lefavour*, 2 Blackf. 371; *Gregg v. James*, 1 Ill. 143; *White v. Jones*, 14 La. Ann. 681; *Vanderburgh v. Bassett*, 4 Minn. 242; *Salmon v. Davis*, 4 Binney (Pa.), 375; *Noyes v. New Haven R. Co.*, 30 Conn. 1; *Doremus v. McCormick*, 7 Gill, 49.

² *Heavenrich v. Steele*, 57 Minn. 221; 58 N. W. Rep. 982.

³ *Galvin v. O'Brien* (1893), 96 Mich. 483; *Pangborn v. Continental Insurance Co.*, 67 Mich. 683; *Crippen v. Hope*, 38 Mich. 344; *Headley v. Hackley*, 50 Mich. 43; *Walsh v. Sisson*, 49 Mich. 423; *Jewett v. Petit*, 4 Mich. 508.

fully executed, the party receiving money from the other can not rescind on the ground of fraud, or of his own mental incompetency to make a binding contract, without refunding, or offering to refund, the money which was the fruit of the accord and satisfaction. If any exception to this general rule results from inability, by reason of poverty, to restore the money, it is only where the fraud is not discovered, or the mental disability continues, as the case may be, until after the money has been expended, or otherwise put beyond the power and control of the plaintiff. To use and appropriate the money, with knowledge of the imposition, would be a ratification of the settlement.¹

§ 455. Pleading.—Accord and satisfaction can not be proved unless it is pleaded;² and in a suit for an accounting, where the court finds that there has been an accord and satisfaction, but allows it to be opened for the purpose of showing errors, the pleadings should be amended so as to specify what errors are relied on.³ In an action for the value of property alleged

¹ *Strodder v. Stone, etc., Granite Co.* (Ga. 1894), 19 S. E. Rep. 1022.

² *Niggli v. Foehry* (1894), 31 N. Y. Supl. 931; *George v. Chicago, etc., R. Co.*, 85 Iowa, 590; 52 N. W. Rep. 512.

³ *Hoyt v. Clarkson*, 23 Ore. 51; 31 Pac. Rep. 198. See also, for question of practice, *St. Louis, etc., R. Co. v. Clark*, 10 U. S. App. 66; *Lesson v. Mass. Assn.*, 23 N. Y. Supl. 294; *Harris v. Harris*, 89 Va. 762; 17 S. E. Rep. 871; *Larned v. City*, 86 Iowa, 166; 53 N. W. Rep. 105; *Hyland v. Anderson*, 20 N. Y. Supl. 707; *George v. Chicago, etc., Co.*, 85 Iowa, 590; 52 N. W. Rep. 512; *Hogan v. Burns (Cal.)*, 33 Pac. Rep. 631; *Hoyt v. Clarkson*, 23 Ore. 51; 31 Pac. Rep. 198; *Stuber v. McEntee*, 19 N. Y. Supl. 900; *Burnham v. Rosenberger*, 110 Mo. 468; 19 S. W. Rep. 732; *Sewell v. Mead*, 85 Iowa, 343; 52 N. W. Rep. 227; *Sieber v. Amunson*, 78 Wis. 679; 47 N. W. Rep. 1126; *City, etc., Bank v. Stevens*, 15 N. Y. Supl. 139; *Renihan v. Wright*,

125 Ind. 536; *Armijo v. Abeytia*, 25 Pac. Rep. 777; *Thurber v. Sprague*, 17 R. I. 634; 24 Atl. Rep. 48; *Martin v. White*, 40 Ill. App. 281; *Patterson v. Graham*, 140 Ill. 531; 30 N. E. Rep. 460; *Hayes v. Fenn*, 89 Ga. 264; 15 S. E. Rep. 361; *Deuser v. Walkup*, 43 Mo. App. 625; *Cobb v. Malone*, 86 Ala. 571; *Wheeler v. Timpson*, 59 Hun, 625; 13 N. Y. Supl. 640; *Parker v. Collins*, 32 N. Y. S. R. 1107; 57 Hun, 590; *Lister, etc., Works v. Pender*, 74 Md. 15; 21 Atl. Rep. 686; *Duluth Chamber of Commerce v. Knowlton*, 42 Minn. 229; 44 N. W. Rep. 2; *Rosenfeld v. New*, 10 N. Y. Supl. 232; *Stengel v. Preston*, 89 Ky. 616; 13 S. W. Rep. 839; *Wright v. Syracuse, etc., R. Co.*, 49 Hun, 445; *Weeks v. Zimmerman*, 4 N. Y. Supl. 609; *McNamara v. McEntee*, 4 N. Y. Supl. 620; *Mortlock v. Williams*, 76 Mich. 568; *Springfield, etc., Co. v. Van Brunt*, 77 Iowa, 82; *Hills v. Sommer*, 6 N. Y. Supl. 469; *Roberts v. Ellwood*, 116

to have been converted by the defendant where the answer was that the defendant had a full and complete settlement, and a full and complete arbitration and settlement, of all matters and things in dispute, which settlement and arbitration included all matters and things in controversy between plaintiff and the defendant at the time, and more especially the matter referred to in the petition, it was held to present the issue of settlement as a distinct and separate defense, and that the defendant is not confined to proof of the arbitration alleged.¹ A replication of accord and satisfaction to a plea of set-off is defective which does not allege the giving and accepting of anything in satisfaction of the causes of action set up in the plea.²

N. Y. 651; *Parr v. Village of Greenbush*, 112 N. Y. 246; *Savage v. Blanchard*, 148 Mass. 348; *Tiddy v. Harris*, 101 N. C. 589; *Dana v. Taylor*, 150 Mass. 25; 22 N. E. Rep. 65; *McNamara v. Babcock*, 50 Hun, 602; 3 N. Y. Supl. 700; *Taylor v. Blackman* (Miss.), 12 So. Rep. 458; *Butler v. Richmond*, etc., R. Co., 88 Ga. 594; *Knoxville v. Acuff*, 92 Tenn. 26; 20 S. W. Rep. 348; *Ball v. McGeoch*, 81 Wis. 160; 51 N. W. Rep. 443.

¹ *Forbes v. Petty* (1893), 37 Neb. 899; 56 N. W. Rep. 730.

² *Heath v. Doyle*, 18 R. I. 252; 27 Atl. Rep. 333, per Matteson, C. J.: "If this

was intended as a replication of an accord and satisfaction, it is defective, because it does not aver the giving and acceptance of anything in satisfaction of the causes of action, etc., specified in the plea. If it was intended merely as a replication of a stated account, it should aver that the account as stated was just and true. Case 24, 3 Atk. 70. It should also set forth that the account was in writing, and what was the balance of account, *Burk v. Brown*, 2 Atk. 397, and also that the balance was agreed on by the parties, and a promise to pay such balance. 3 Chitty on Pleading, 926."

CHAPTER XIII.

RELEASE.

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|---|---|
| § 456. Release defined. | § 480. The same subject continued— |
| 457. Consideration of release. | Illustrations. |
| 458. Who may release — Limitations. | 481. Contingent release. |
| 459. Release under seal. | 482. Covenant not to sue. |
| 460. What words make a release. | 483. Covenant not to sue for a definite time. |
| 461. The same subject continued. | 484. Release of sureties. |
| 462. Effect at law. | 485. Where extension to debtor does not release surety. |
| 463. Effect in equity. | 486. Release of a co-debtor. |
| 464. Release in equity. | 487. Release of joint and several debtors. |
| 465. Indorsements and entries operating as releases. | 488. Release of a co-tort-feasor. |
| 466. Receipts and written memoranda sufficient to constitute a release. | 489. Further of joint tort-feasors—Of partners. |
| 467. When written release not controlled by parol evidence. | 490. Statutory provisions. |
| 468. Destruction of the obligation. | 491. Express reservation of remedy against co-debtor. |
| 469. Delivery of the obligation. | 492. Covenant not to sue a co-debtor. |
| 470. Voluntary declarations. | 493. Release by a co-creditor. |
| 471. The same subject continued—Illustrations. | 494. Fraud and mistake. |
| 472. Release of bills and notes. | 495. Release obtained by fraud—Illustrations. |
| 473. Release of actions. | 496. Legal effect of a release obtained by fraud. |
| 474. Release of debts. | 497. Release procured by undue influence. |
| 475. Release of dower—Between executors. | 498. Release by railroad employes' relief department. |
| 476. Release of all demands. | 499. The same subject continued. |
| 477. Accessory and consequential matters. | 500. Deed-poll or indenture. |
| 478. What a general release does not cover. | 501. Pleading. |
| 479. Recitals and object of release qualifying it. | |

§ 456. Release defined.—A release is an act or writing by which some claim or interest is surrendered to another person.¹
“The term release applies to the discharge of the claim or

¹ Anderson's Law Dictionary, tit. Release.

right of action arising from a breach of contract by the formal consent or dispensation of the promisee. It does not, strictly speaking, apply to the discharge of a contract before breach by the agreement of the parties to that effect; which is more correctly described as a rescission of the contract, or a discharge by a new or substituted agreement.”¹

§ 457. Consideration of release.—The consideration mentioned in a written release, reciting the receipt of a specified sum, and that the defendant shall be released from all further liability, is not contractual, and parol evidence is admissible that such release was not supported by any consideration.² Where an employe, in consideration of an agreement on the part of the employer to give him work as long as he is able to perform it, releases a claim for damages said to have been caused by the employer’s negligence, the agreement is not void because lacking mutuality. By releasing his claim the employe has paid in advance for an optional contract, and he has the right to have it remain optional.³ Under the

¹ Leake on Contracts, 922.

² *Stewart v. Chicago R. Co.*, 141 Ind. 55; 40 N. E. Rep. 67. In *Chicago, etc., R. Co. v. Bell*, 44 Neb. 44; 62 N. W. Rep. 314, the contract signed by an employe of said railroad company, on becoming a member of said relief department, to the effect that, if he should be injured and receive moneys from the relief fund of said relief department on account thereof, the acceptance of such relief funds should operate as a release of such employe’s claim against said railroad company for damages because of such injury, was construed, and it was held that such contract of an employe did not lack consideration to support it; that such contract was not contrary to public policy; that the effect of such contract was not to enable the railroad company to exonerate itself by contract from liability for the negligence of itself or servants; that the employe did not waive his right of ac-

tion against the railroad company, in case he should be injured by its negligence, by the execution of the contract; that it is not the execution of the contract that estops the injured employe, but his acceptance of moneys from the relief department on account of his injury, after his cause of action against the railroad on account thereof arises.

³ *Smith v. St. Paul R. Co.* (Minn. 1895), 62 N. W. Rep. 392, Collins, J. “There can be no sufficient objection to the contract as proven, on the ground that it lacks mutuality, because the plaintiff was not bound, by its terms, to continue in defendant’s service, but could cease work at his pleasure. The consideration for defendant’s agreement to employ was paid by the release of plaintiff’s claim for damages quite as much and as effectually as if plaintiff had actually paid cash. By releasing his claim for damages, the plaintiff paid in advance

Michigan statute providing that a seal is only presumptive evidence of consideration a sealed release given without consideration does not bar the releasor from bringing an action for damages for injury to the person.¹ Where one consents to pay in full a bill the correctness of which he in good faith disputes only on condition that certain other demands against him shall be released, such payment constitutes a good consideration for the release.²

§ 458. Who may release—Limitations.—A man might, by the common law, release a sum of money owing to his wife while sole.³ But since the general passage of statutes limiting a wife's estate to her separate use, all control, so far as alienation is concerned, is denied the husband.⁴ Hence it follows that the husband has in general no power to release any rights of his wife. A partner has the power to release firm debts of every description, and all claims whether founded in tort or contract.⁵ Upon similar grounds one of several executors or

for the privilege or option of working for the defendant; and, having done this, he had the right to have it remain optional with him how long he would continue to work for the company, while it remained obligatory upon the latter to furnish the opportunity so long as he chose to work, and was able to properly perform the same. The plaintiff had parted with value for the optional contract, and there was owing to him a reciprocal duty and obligation on the part of the company. *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109; 32 N. E. Rep. 802."

¹ *Wabash Western R. Co. v. Brow* (1895), 65 Fed. Rep. 941, Taft, J.: "With reference to the release, we are very clear that the court was right in charging the jury to disregard it. All the evidence in the case showed that no money was paid, and no employment tendered or received, to fulfill the recited consideration of the release. In the absence of any consideration, the release could not, of

course, constitute a bar to the action. It is true that a seal imports consideration, but by section 7520 of Howell's Annotated Statutes of Michigan it is only presumptive evidence, and may be rebutted. *Green v. Langdon*, 28 Mich. 221 225. As the evidence here conclusively established that there was no consideration, the seal had no effect."

² *Lehigh Val., etc., Co. v. Miller* (1893), 59 Fed. Rep. 483; *Boffinger v. Tuyes*, 120 U. S. 198; *United States v. Child*, 12 Wall. 232.

³ *Woodward v. Darcy*, Plow. 184; *Miles v. Williams*, 1 P. Wms. 249.

⁴ See the article on "Married Women" in *Am. and Eng. Encyc. of Law*, where many cases are collected.

⁵ *Bates on Partnership*, § 383, citing *Hawkshaw v. Parkins*, 2 Swanst. 539; *Arton v. Booth*, 4 J. B. Moore, 192; *Furnival v. Weston*, 7 J. B. Moore, 356; *Metcalf v. Rycroft*, 6 M. & S. 75; *Wallace v. Kelsall*, 7 M. & W. 264; *Phillips v. Clagett*, 11 M. & W. 84;

administrators may release a debt due to the decedent.¹ But the lessor of the plaintiff, in an action of ejectment, can not release the action.²

§ 459. Release under seal.—A release is an executed contract, and in New York must be under seal, to be valid as a release. A release not under seal is what is called an accord and satisfaction. In the one case the release is effected by virtue of its form, in the other by virtue of its having all the elements making a good accord and satisfaction.³ A release

Nottidge *v.* Prichard, 2 Cl. & Fin. 379; Dyer *v.* Sutherland, 75 Ill. 583; Emerson *v.* Knowber, 8 Pick. 63; Bulkley *v.* Dayton, 14 John. 387. Mr. Bates is of the opinion that all claims can be released either before or after dissolution; but *quære*.

¹ Woerner on Administration, § 346, citing Shaw *v.* Berry, 35 Maine, 279; Gilman *v.* Healy, 55 Maine, 120; Hoke *v.* Fleming, 10 Ired. L. 263; Bryan *v.* Thompson, 7 J. J. Marsh. 586; Herald *v.* Harper, 8 Blackf. 170; Hyatt *v.* McBurney, 18 S. C. 199. The unity of estate which co-executors and co-administrators have is thus neatly summed up by the learned author: "The interest and estate of each of several executors or administrators of the same testator or intestate in all his effects and chattels is joint and entire, and incapable of being severed. Executors and administrators stand on the same ground in this respect. We have already seen, that if one or more of the number die, resign, or be removed, the estate passes to and vests in those remaining or surviving. They are considered in law as one person, hence the act of one is deemed to be the act of all, although they respectively administer on different parts of the estate." § 346, citing Douglass *v.* Satterlee, 11 John. 16; Grinstead *v.* Fonte, 32 Miss. 120; Barry *v.* Lambert, 98 N. Y. 300; Quinn

v. Stockton, 2 Lit. 343; Simon *v.* Albright, 12 S. & R. 429; Gullidge *v.* Berry, 31 Miss. 346; Devling *v.* Little, 26 Pa. St. 502; George *v.* Baker, 3 Allen, 326, note; Stuyvesant *v.* Hall, 2 Barb. Ch. 151; Weir *v.* Mosher, 19 Wis. 311; Rick *v.* Gilson, 1 Pa. St. 54; Dwight *v.* Newell, 15 Ill. 333; Wheeler *v.* Wheeler, 9 Cow. 34; Mackay *v.* St. Mary's Church, 15 R. I. 121; Wood's Appeal, 92 Pa. St. 379; Lank *v.* Kinder, 4 Harr. (Del.) 457. See Hudson *v.* Hudson, 5 Bac. Ab. 700, where Lord Hardwicke thought otherwise. See also, Willand *v.* Fenn, Selwyn N. P. 784, note; Jacobcomb *v.* Harwood, 2 Ves. Sen. 265; Stanley *v.* Barnes, 1 Hagg. 221.

² Doe *v.* Brewer, 4 M. & S. 300.

³ Seymour *v.* Minturn, 17 John. 169; a case well illustrating the difference: The plaintiff lent the defendant his promissory note, payable to the defendant or order, who indorsed it, and procured it to be discounted at a bank. The note was protested for non-payment; and the defendant being insolvent, the plaintiff signed a written agreement discharging him from all debts and demands. It was held that this agreement, for want of a seal, could not operate as a release; and the consideration, being merely nominal, could not operate as an accord and satisfaction. See the chapter on Accord and Satisfaction, *supra*.

needs no consideration to support it;¹ but a deed *inter partes* can not operate as a release to strangers.² It was an old maxim of the common law that an obligor could only be released by an instrument of as high a nature as that by which he was bound—being obligated by a seal, he could be released only by an instrument under seal. Technically, this may be the rule of modern times, but practically it is not enforced.³

§ 460. What words make a release.—The proper words of a release are *remise, release, quitclaim, renounce* and *acquit*. Any expressions, however, which denote the intention of the one party to discharge the other, are sufficient;⁴ and words of

¹ *Davis v. Bowker*, 1 Nev. 487; *Maness v. Henry*, 96 Ala. 454; 11 So. Rep. 410; *Richmond R. Co. v. Walker*, 92 Ga. 485; 17 S. E. Rep. 604; *Dillingham v. Estill*, 3 Dana (Ky.), 21; *Pennsylvania R. Co. v. Dolan*, 6 Ind. App. 109; 32 N. E. Rep. 802.

² *Storer v. Gordon*, 3 M. & S. 308, holding that a charter-party between A. & B., in consideration of a former charter-party between A. & C., which former charter-party, in consideration of the freight B. was to pay, was thereby declared null and void, A. agreeing to cancel the first in consideration of the second, and C. was thereby acquitted of all claims which A. might have against him in virtue of the first charter-party, was held not to operate as a release from A. to C. of the first charter-party.

³ *White v. Walker*, 31 Ill. 422; *Pratt v. Morrow*, 45 Mo. 404; *Farmer's Bank v. Blair*, 44 Barb. 641; *Union Bank v. Call*, 5 Fla. 409; *Illinois R. Co. v. Read*, 37 Ill. 484, holding that a release of a debt secured by mortgage need not be under seal, nor need it be under seal when prospective damages are released. *Benjamin v. McConnell*, 9 Ill. 536, holding that a release

of contract, not under seal, but made part of a decree of court, is valid. *Leviston v. Junction R. Co.*, 7 Ind. 597, to the effect that even if a release is supported by a consideration, it must be under seal to convey an easement. *Smithwick v. Ward*, 7 Jones' Law, 64; *Thomason v. Dill*, 30 Ala. 444; *First National Bank v. Marshall*, 73 Maine, 79. See chapter on Accord and Satisfaction.

⁴ *Coke on Littleton*, 264 b; *Hickmott's Case*, 9 Rep. 52 b; *Lock v. Etherington*, 1 Sid. 265. The following is an approved form of a general release: This indenture, made the — day of —, between A. B. of, etc., of the one part, and C. D. of, etc., of the other part, witnesseth, that each of them, the said A. B. and C. D., hereby releases the other of them, his heirs, executors, administrators and assigns, and his and their estates and effects, from all sums of money, accounts, actions, proceedings, claims and demands whatsoever, for or by reason or in respect of any act, cause, matter, or thing, whatsoever, up to the day of the date of these presents 6 Bythewood and Jarman's Conveyancing (4th ed.), 52.

inheritance are not necessary in a release, although it be a release of dower.¹

§ 461. **The same subject continued.**—The following instrument signed by creditors of a debtor was construed as a release of the original debts: "For value received of S., the receipt of which we hereby acknowledge, we agree with S. that upon payment to us respectively, on or before February 1, 1863, of a sum equal to twenty-five per cent. of our respective claims against the defendants, we will sell to S. free of all incumbrance, all our respective claims against the defendants."² A bill of sale made by the payee of a promissory note to the maker which bargains and sells, among other property, "all debts, notes and accounts of whatever nature due me," is not evidence of the payment of the note but is a release.³ A paper, by which the person executing the same, for and in consideration of a mortgage given to him by another to secure the payment of a sum of money, exonerates the latter from all notes or papers that he holds against him, operates as a release, and extinguishes the debt due upon a note of the releasee, held by the releasor at the time.⁴ Where legal terms are employed in a release, it must be presumed that the parties fully understood the legal import of the words, and the court will give

¹ *Gray v. McCune*, 23 Pa. St. 447, where an instrument of writing was executed in 1835 by a widow under seal and having two witnesses, addressed "to all to whom these presents shall come," in which it was recited that, under the will of her husband, dated in 1834, provision was made for her in lieu of her right of dower, whereby she agreed to take under the provisions of the will and accept of the bequests therein to her, in lieu and full satisfaction of right of dower at common law. It was held that this instrument was not limited to lands of which the husband died seized, but operated as a release of her right of dower in lands conveyed

by her husband to his son, in the conveyance of which she had not joined; and that, the son, though not a party to it, yet being in possession of the property conveyed to him and interested in the estate or property received and enjoyed by the widow under will, was not a stranger to the release and could plead it in bar of her claim of dower in the lands so conveyed to him.

² *Bowen v. Holly*, 38 Vt. 574; but it appeared that S. referred to in the instrument was acting as an agent for the debtor, unknown to the creditors.

³ *Morrill v. Morrill*, 26 Cal. 288.

⁴ *Strong v. Dean*, 55 Barb. 337.

effect to that understanding.¹ The construction of a release is accordingly a question of law to be determined by the court.²

§ 462. Effect at law.—At common law releases are conclusive; no evidence is admissible to contradict them and the parties are estopped by their recitals;³ but in admiralty releases are not conclusive, especially when executed by seamen.⁴

¹ *Knott v. Burleson*, 2 Greene (Iowa), 600, where a release purporting to release damages for a certain "riot" was held not to release claims for the asportation of horses and assault and battery. In the opinion Greene, J., said: "The parties to the release in this case employed legal terms in reference to proceedings at law, and it must be presumed that they fully understood the legal import of the words used, and such should consequently be the construction placed upon them by the court. The language used is unequivocal; it admits of but one interpretation. It extends only to 'a certain riot and false imprisonment' then pending against Burleson and others in the district court. It would pervert not only the technical, but the ordinary and plain signification of the release, to apply it to any other action than that of riot or false imprisonment. There is no latitude even implied in the instrument, which can justify its extension to any other cause. It has no reference to the action of trespass set forth by the declaration in the present case. Had the release been intended for the proceedings at bar, the reference could have been readily made by taking from the declaration or writ at least the name of the suit. There being no such reference, no connection or agreement between the release and the declaration, we must conclude that the parties intended it as a discharge from some other suit, more clearly adapted to the expressed object of the release."

² *Knott v. Burleson*, 2 Greene (Iowa), 600.

³ *Wallace v. Chicago R. Co.*, 67 Iowa, 547, where a party had the capacity to read the release signed by him, and had an opportunity to do so, and no fraud was practiced on him to prevent him from reading it, but he chose to rely upon what another said about it, he was held estopped by his own negligence from claiming that it was not binding upon him. *Perkins v. Fourniquet*, 14 How. 313; *Sherburne v. Goodwin*, 44 N. H. 271; *Stearns v. Tappin*, 5 Duer, 294, holding that a statutory provision, permitting an inquiry into the consideration of a sealed instrument, did not alter the rule of the common law, that a release under seal, although reciting only a nominal consideration, extinguishes the debt to which it relates. That parol evidence, to contradict the terms or legal effect of such a release, is inadmissible, and evidence to show that it was founded upon any other consideration than that which it states must be rejected. *Sawyer v. Haley*, 6 Gray, 243; *Langworthy v. Woodworth*, 13 Iowa, 530; *Baker v. Dewey*, 1 B. & C. 704; *Rownetree v. Jacob*, 2 Taunt. 141.

⁴ *The David Pratt*, 1 Ware, 509, "A receipt or release of a seaman, I hold to be no bar in the admiralty to a suit for his wages, with whatever parade of seals and attesting witnesses it may be surrounded, provided it is proved that they have not been paid or otherwise satisfied."

Releases by guardians, however, are effectual and binding on the ward.¹ A deed of release may be explained by recitals, or other matter, contained in the same deed; but no extraneous evidence is admissible to explain or contradict it, unless also under seal.²

§ 463. Effect in equity.—A court of equity, on the other hand, is not restrained by the conclusiveness of a release. It will look into the consideration, and if it were obtained by fraud or imposition, or by taking undue advantage of the situation of the party executing it, the release will either be set aside altogether or the use of it will be restrained.³ The delivery to the obligor of a bond is a release in equity.⁴ And where a creditor, by a letter or other writing, plainly admits that he has released his debtor from the payment of a particular debt, the writing may furnish sufficient evidence of a release to justify a court of equity in holding that the debt is discharged, although no formal release is produced.⁵ When a release is similar to a receipt the supreme court of Indiana applies the rules of evidence applicable to a receipt, and allows it to be explained, qualified or contradicted by parol evidence, and the circumstances under and the purposes for which it was executed may be shown.⁶ A party to a deed is not estopped in equity from averring against or offering evidence to controvert a recital therein contrary to the fact, which has been introduced into the deed by mistake of fact.⁷ Where a contractor filed a lien for materials furnished for thirty houses, he released fifteen houses upon being paid the full value of the materials which went into those houses, the court held that in equity his lien upon the remaining fifteen houses for the balance of his account was not affected by the release.⁸ A court of

¹Torry v. Black, 58 N. Y. 185, a release of a claim for trespass upon the lands of the ward.

²Cocks v. Nash, 9 Bing. 341; Davey v. Prendergrass, 5 B. & Ald. 187; Countess of Rutland's Case, 5 Rep. 26; Goodlittle v. Bailey, Cowp. 597.

³Barnes v. Ward, Busbee's Eq. 93.

⁴Albert v. Ziegler, 29 Pa. St. 50.

⁵Traphagen v. Voorhees, 44 N. J. Eq. 21; Eden v. Smyth, 5 Ves. 341; Reeves v. Brymer, 6 Ves. 516.

⁶Scott v. Scott, 105 Ind. 584; Hight v. Taylor, 97 Ind. 392; Lash v. Rendell, 72 Ind. 475.

⁷Brooke v. Haymes, L. R. 6 Eq. Cas. 25.

⁸Hall v. Sheehan, 69 N. Y. 618.

equity will grant relief and set aside a release where there is a mistake of a plain, well-settled principle of law, and under such a mistake one parts with a right of which he is wholly ignorant to one not acting in good faith.¹ But when a court of equity sets aside a release it requires a rescission *in toto*, the returning of the consideration and the restoring the *status quo* of the parties.²

§ 464. Release in equity.—The general rule is that where there is no release at law, there is none in equity; there may, however, be considerations which would prevent the debt from being enforced in equity, although subsisting at law. And where a parol release is upheld by a valuable consideration equity will grant relief and enjoin proceedings at law.³ But equity will not treat a mere waiver as tantamount to a release. A waiver is nothing; unless it amount to a release. It is by a release, or something equivalent, only, that an equitable de-

¹ *Mellon v. Webster*, 5 Mo. App. 449, a case of lawyer dealing with a client.

² *McMichael v. Kilmer*, 76 N. Y. 36; *Bisbee v. Ham*, 47 Maine, 543; *Hogan v. Weyer*, 5 Hill, 389; *Degraw v. Elmore*, 50 N. Y. 1; *Pullman v. Alley*, 53 N. Y. 637; *Lester v. Union Manufacturing Co.*, 1 Hun, 288; *Bedell v. Bedell*, 3 Hun, 580; *Luddington v. Miller*, 38 N. Y. Super. Ct. 478; *Bull v. Bull*, 43 Conn. 455; *McGlynn v. Brooklyn, etc., R. Co.*, 93 N. Y. 655; *Cleary v. Municipal Co.*, 19 N. Y. Supl. 951; *Kirchner v. Home Co.*, 135 N. Y. 182.

³ *Taylor v. Manners*, L. R. 1 Ch. App. 48. The residuary estate of a testatrix consisted in part of a debt secured by a policy of assurance on the life of the debtor. The residuary legatees gave up the policy to the debtor and signified their intention of releasing the debt on condition of his paying the probate and legacy duty on the debt. It was held that the payment of the probate and legacy duty formed a good consideration for

the release of the debt, and that the debt was released, "which was said in the course of the argument before us upon other points; upon the one side, that there could be no release of the debt in equity unless there was a release of it at law; and on the other side, that there was in this case a perfect release of the debt by the policy having been given up. But I do not think it necessary to enter into these points, and I give no opinion upon them. It may be right, however, for me to say that I am not satisfied that where the intention is clear to release a debt, and a security is given up, which covers the whole debt, as I think, upon the true construction of the agreement, the policy in this case did, the debt would not be released at law; nor assuming that there can be no release of a debt in equity unless it be released at law, am I satisfied that there may not be considerations which would in this court prevent the debt from being enforced, although it might be subsisting at law." *Per Turner, L. J.*

mand can be given away.¹ Any declaration made by the creditor to his debtor of his release of the debt, which the debtor acts upon to the material alteration of his position, would operate as a release.²

§ 465. Indorsements and entries operating as releases.—

Unless there be a consideration, or some other equitable ground of distinction, equity in general follows the law, so that if there is no release at law there is none in equity.³ But entries and indorsements on obligations have often been held a release in equity. "There is a series of decisions in courts of equity in England and in this country which have established the principle that when a creditor has, by written or parol declarations with regard to a debt, or by conduct tantamount thereto, declared or agreed that a debt shall be relinquished or given up, or that it has been so given up or relinquished, a court of equity will consider this an equitable release, and will not permit his representatives to enforce it."⁴ Indorsements of payments made by the mortgagee in the presence of the mortgagor on the mortgage, such indorsements being in accord with a deliberate and expressed intention to make a gift or donation, are sustained as an extinguishment or for giving of the mortgage debt to the extent of the indorsements.⁵ But a writing indorsed on the execution by the judgment creditor to the effect, "I hereby discharge J. C., sheriff, from all liability whatever of the above stated execution, the defendant being dead, and no further proceeding required on the same," was held no release of the debtor.⁶ A bequest of a sum of money due on a bond from a legatee, with a direction that on payment of the balance of the bond, and whatever interest may be due thereon, the bond shall be assigned to the legatee does not, of

¹ *Stackhouse v. Barnston*, 10 Ves. Jr. 453. "A mere waiver signifies nothing more than an expression of intention not to insist upon the right; which in equity will not without consideration bar the right any more than at law accord without satisfaction would be a plea." Per Grant, M. R.

² *Yeomans v. Williams*, L. R. 1 Eq. 184.

³ *Cross v. Sprigg*, 6 Hare, 552.

⁴ *Leddel v. Starr*, 20 N. J. Eq. 274, per *Zabriskie*, Ch., 283.

⁵ *Green v. Langdon*, 28 Mich. 221.

⁶ *Batton v. Allen*, 5 N. J. Eq. 99.

itself, release the interest on the bond. But when from other directions in the will it is the evident intention of the testator to require only the balance of the principal, this is a release of the interest.¹ The words "not to be enforced" were indorsed by the holder on a note. This was held to be no discharge or release of the note.² And the making an indorsement on a bond by which the obligee forgives the obligor of the same is no discharge.³ But a writing attached to bonds by the obligee, directing their cancellation at her death, was held a release.⁴ Where a bond was indorsed, "This bond is never to appear against A, witness, C. D.," an action at law on the bond was restrained.⁵ Where a child gave a receipt for articles delivered, promising to return them if called for, and the parent wrote underneath that they were not to be exacted, but were to answer as a part of the child's portion, it was held to be an advancement.⁶

§ 466. Receipts and written memoranda sufficient to constitute a release.—Where a father holding a bond and mortgage executed by his son, with the intention of releasing to the lat-

¹ Leddell v. Starr, 20 N. J. Eq. 427.

² Peace v. Haines, 11 Hare, 151, a leading case, holding also that, "The cases in which the court has held a debtor liberated from his obligation to pay a debt which once existed, and from which he has not been discharged by any testamentary instrument, are: (1) Where the act or declaration relied on creates an immediate discharge, which the debtor might plead as a release or by way of accord and satisfaction at law, or which he might enforce in equity as against the creditor. (2) Where the discharge, though not immediate and absolute, but conditional, becomes perfect by the condition having, in the event, been performed. (3) Where the creditor intended to discharge the obligation at his death, and communicated that intention to those who would, under his own disposition, take or represent his interest upon his death,

and relied upon their fulfillment of his intention; and (4) (in strictness belonging to another class of cases) where the transaction supposed to create the debt or obligation is rather in the nature of an advancement by one in *loco parentis*, or is part of a family arrangement."

³ Tufnell v. Constable, 8 Simon, 69.

⁴ Brinckerhoff v. Lawrence, 2 Sandf. Ch. 400.

⁵ Major v. Major, 1 Drewry, 165.

⁶ Bulkeley v. Noble, 2 Pick. 337. See also, Sherwood v. Smith, 23 Conn. 516; Pennington v. Gittings, 2 Gill & J. 208; Otis v. Beckwith, 49 Ill. 121; Antrobus v. Smith, 12 Ves. 39; Meriwether v. Morrison, 78 Ky. 572, a case of a gift rather than a release; but some of the cases use the elements of a gift to determine whether an equitable release has been made. They assimilate the two.

ter a portion of the mortgage debt, executed and delivered to him a receipt therefor, containing a provision that the sum stated should be indorsed on the mortgage, it was held an equitable release.¹ But letters written by a mortgagee to the mortgagor and persons interested under him, containing the expressions "I now give this gift to become due at my death, unconnected with my will," "I hereby request my executors to cancel the mortgage deed," etc., "I again direct and promise that my executors shall comply with my former request, that is, to cancel all deeds and papers I may have chargeable on the R. estate," were held not to operate as a release.² An entry in a man's account book, that, "P. pays no interest, nor shall I take the principal unless greatly distressed," was construed a release.³ Where a mortgagee, on hearing that his son-in-law, the mortgagor, was about to sell the mortgaged property (a house occupied by the mortgagor) in order to pay off the debt, wrote that he might continue to live there without paying any rent, it was held that the mortgagor was entitled to redeem, on paying the principal, together with interest from the last day on which interest fell due, previously to the death of the mortgagor.⁴ Whether a mere written entry or memorandum can of itself constitute a release is doubtful.⁵ But while a paper writing might not of itself constitute a release it might nevertheless contain such statements as to amount to a declaration of trust in favor of the debtor. Equity would then enforce the trust.⁶

§ 467. Where written release not controlled by parol evidence.—A writing, which, besides being a receipt, contains

¹ *Carpenter v. Soule*, 88 N. Y. 251.

² *Scales v. Maude*, 6 De G., M. & G. 43.

³ *Ashton v. Pye*, 5 Ves. 350, note.

⁴ *Yeomans v. Williams*, L. R. 1 Eq. Cas. 184.

⁵ 2 Story on Equity Jurisprudence, § 706. See, *Eden v. Smyth*, 5 Ves. Jr. 341; *Jennings v. Blocker*, 25 Ala. 415; *Stallings v. Finch*, 25 Ala. 518; *Crawford v. M'Elvy*, 2 Speer, 225; *High's Appeal*, 21 Pa. St. 283; *Mallett*

v. Page, 8 Ind. 364; *Hartwell v. Rice*, 1 Gray, 587; *Oller v. Bonebrake*, 65 Pa. St. 338; *Loring v. Blake*, 106 Mass. 592; *Ellis v. Secor*, 31 Mich. 185; *Moore v. Darton*, 7 Eng. Law & Eq. Rep. 134; *Clark v. Warner*, 6 Conn. 355. The above cases are cases of advancements, and gifts, but the doctrine is analogous. See Story's Equity Jurisprudence, § 706.

⁶ *Morgan v. Malleeson*, L. R. 10 Eq. Cas. 475.

stipulations of release and discharge from all claims growing out of a collision except one, can not be disputed or controlled by parol evidence.¹

§ 468. Destruction of the obligation.—The willful destruction of the evidence of the debt, done for the purpose of releasing the obligor, works a release. Thus where the holder of certain notes destroyed them and afterwards stated that as she did not expect to live long she did not want the maker to be compelled to pay them after her death, this was construed a release.² A debt contracted by the wife was held to be discharged, as a gift, *causa mortis*, by the husband's destroying the bond, the evidence of the debt, and declaring that the

¹Lehigh Val., etc., Co. v. Miller (1893), 59 Fed. Rep. 483, Severens, J.. "It is, no doubt, well-settled law that so much of such an instrument as is in the nature of an acknowledgment of receipt, being the mere statement of a fact, and not containing terms of agreement, may, as a general rule, be explained and contradicted by parol evidence. 1 Greenleaf on Evidence, § 305; 2 Wharton on Evidence, § 1064; Weed v. Snow, 3 McLean, 265. But this instrument contained more than a mere receipt. It stated that, in consideration thereof, the owners of the Manitowoc released and forever discharged the Cayuga and her owners from all claims whatsoever on account of the injury resulting from the collision, except the claim made by the owners for the loss of the use of the barge Manitowoc. It was a release, under seal, of all claims resulting from the collision except the one saved, namely, that for the value of the use of the vessel during the time she was disabled. This agreement for release was in the nature of contract, and could no more be dis-

puted or controlled by parol evidence than any other instrument in writing witnessing an agreement of parties. 2 Wharton on Evidence, § 1063; Wood v. Young, 5 Wend. 620; Stearns v. Tappin, 5 Duer, 294; Pratt v. Castle, 91 Mich. 484; 52 N. W. Rep. 52; Cummings v. Baars, 36 Minn. 350; 31 N. W. Rep. 449; Sherburne v. Goodwin, 44 N. H. 271. A release is held to include all demands embraced by its terms, whether particularly contemplated or not; and direct parol evidence that a certain claim was not in the minds of the parties is not admissible. Deland v. Amesbury, etc., Manufacturing Co., 7 Pick. 244; Hyde v. Baldwin, 17 Pick. 303; Sherburne v. Goodwin, 44 N. H. 271. The surrounding facts and circumstances may, as in other cases, be shown in order to apply the language of the instrument to its proper subject-matter, and prevent its application to a matter not involved in the transaction. Littledale, J., in Simons v. Johnson, 3 Barn. & Adol. 175; 1 Greenleaf on Evidence, §§ 286, 288."

²Darland v. Taylor, 52 Iowa, 503.

money was hers.¹ The destruction must, however, be actual; an intention to destroy will not suffice.²

§ 469. Delivery of the obligation.—The delivery by the creditor to the debtor of the obligation, or the evidence thereof, is a release.³ So, also, the delivery or surrender of a note by the payee to the maker is *prima facie* a satisfaction or release of the debt.⁴

§ 470. Voluntary declarations.—The cases are not in accord upon the question whether voluntary declarations of release will work a release. The court of errors and appeals of New Jersey, in a very elaborate opinion, has reached the conclusion that no voluntary declaration by a creditor of an intention to release a debtor, unless accompanied by some act which

¹ Gardner v. Gardner, 22 Wend. 526. See also, Blasdel v. Locke, 52 N. H. 238; Hillebrant v. Brewer, 6 Texas, 45; Grangiac v. Arden, 10 John. 292; Burney v. Ball, 24 Geo. 505; Silvers v. Reynolds, 19 N. J. Eq. 275; Gilbert v. Wetherell, 2 Sim. & Stu. 254; Rees v. Rees, 11 Rich. Eq. 86.

² In Re Campbell's Estate, 7 Pa. St. 100; Chew v. Chew, 23 N. J. Eq. 471. See also, Nelson v. Cartmel, 6 Dana (Ky.), 7; Harley v. Harley, 57 Md. 340.

³ Lee v. Boak, 11 Gratt. 182.

⁴ Sherman v. Sherman, 3 Ind. 337, a case showing the distinctions between a release and a gift. The court said: "We shall not inquire whether the delivery of the note and mortgage in this case can be supported as a *donatio mortis causa*; nor whether the support of Benoni and wife constitutes a consideration that will uphold their surrender. There are other principles upon which, in equity, the case can be determined. 'Acts and declarations may amount to what, in the court of chancery, will be equivalent to a release of a debt.' 2 Spence on Equitable Jurisdiction, 912. A court

of equity will order the delivery up and cancellation of instruments, where they are 'clearly established by the proofs to have become *functus officio* according to the original intent and understanding of both parties;' and, also, 'where it has been fairly inferable from the acts or conduct of the party entitled to the benefit of the deed or other instrument, that he has treated it as released, or otherwise dead in point of effect.' " 2 Story on Equity Jurisprudence, 19. See also, Wekett v. Raby, 2 Bro. P. C. 16; Hurst v. Beach, 5 Madd. 351; Edwards v. Campbell, 23 Barb. 423; Vanderbeck v. Vanderbeck, 30 N. J. Eq. 265; Bridgers v. Hutchins, 11 Ired. 68. Also, see the following cases on gifts, advancements, and the facts necessary to show an executed gift: Young v. Young, 80 N. Y. 422; Doty v. Willson, 47 N. Y. 580; Grangiac v. Arden, 10 John. 295; Davis v. Davis, 1 Nott & McCord, 224; Trow v. Shannon, 78 N. Y. 446; Pitts v. Mangum, 2 Bailey, 588; Vass v. Hicks, 3 Murphy (N. C.) 493; Sutton's Ex. v. Hollowell, 2 Dev. 185; Lance v. Lance, 5 Jones L. 413.

amounts to a release at law, will work an equitable release.¹ This is also the rule in Pennsylvania,² Indiana,³ Kentucky,⁴ Mississippi,⁵ Connecticut,⁶ and Vermont.⁷ In New York the courts also recognize the rule that a debt can not be released or transformed into a gift by a mere parol declaration subsequent to its creation, but the distinction is drawn that where money is delivered by one person to another, under circumstances rendering it uncertain as to whether it was intended as a loan or gift, a distinct declaration made afterward by the one who delivered the money may have the effect of determining which it was.⁸

§ 471. The same subject continued.—Illustrations.—It is always competent to show by parol declarations of the creditor that the so-called debt was only an advancement. Thus, declarations of the intestate that he had given his son something handsome, and, if he did well for him, should give him more; that he had held a writing against him, not a note, but had made him a present of it; and that he had had claims against him, but had none then, in the absence of any proof that he

¹ *Irwin v. Johnson*, 36 N. J. Eq. 347 (overruling *Leddel v. Starr*, 20 N. J. Eq. 274), where the court said: "The recognition of a doctrine which permits a mortgage to be extinguished by a verbal declaration of the debtor that he did not intend to insist upon its payment, would seem to break down not only the rule already mentioned, but that which forbids the revocation of an instrument by an act less solemn than the act creating it. Here there is neither a payment nor an agreement for a good consideration to discharge, nor a technical release under seal. There is in the doctrine an encroachment upon the field designed to be covered by the statute of wills, because it permits a person by parol to give a direction to his property after his decease variant from the course it would take by the direction of the instrument executed

in conformity with the requirements of the statute. The doctrine has been accepted in a few cases, but it seems to have arisen from a desire to alleviate the supposed hardship of special cases, and from a mistaken view of what was ruled in a case decided in the high court of parliament as early as the year 1724."

² *McNutt v. Loney*, 153 Pa. St. 281, where it was a promise to release. *Kreider v. Boyer*, 10 Watts, 54.

³ *Denman v. McMahon*, 37 Ind. 241.

⁴ *Clarke v. Clarke*, 17 B. Mon. 698.

⁵ *Wheatley v. Abbott*, 32 Miss. 343.

⁶ *Johnson v. Belden*, 20 Conn. 322.

⁷ *Carpenter v. Dodge*, 20 Vt. 595.

⁸ *Doty v. Willson*, 47 N. Y. 580. See also, *Haverstock v. Sarbach*, 1 Watts & Searg. 390; *McGuire v. Adams*, 8 Pa. St. 286; *Bradley v. Long*, 2 Strobh. 160; *Chew v. Chew*, 23 N. J. Eq. 471.

had given his son anything else, or had held any other paper or claim against him, are evidence tending to show the surrender by the intestate of a receipt evidencing an advancement to the son.¹

§ 472. Release of bills and notes.—It seems to be settled in England that a bill or note is discharged when the holder at or after maturity absolutely and unconditionally renounces his rights against the acceptor or maker. And the liabilities of any party to a bill may in like manner be released by the holder verbally and without consideration either before or after its maturity.² But it is doubtful if this is law in America. Senator Daniel states the rule that if there is not a technical release under seal, no agreement can operate as a release, unless it is upon a sufficient consideration.³ The New York court of appeals has decided that where the holder of a note volun-

¹ *Wheeler v. Wheeler*, 47 Vt. 637, the illustration in the text shows that an advancement may be converted into an absolute gift by the intestate surrendering the evidence thereof to be canceled, but it likewise would support, by inference, the ground that a matter was intended as an advancement instead of a debt. See also, *Peabody v. Peabody*, 59 Ind. 556, a case directly in point; *Harris v. Harris*, 69 Ind. 181; *Fitzhugh v. Fitzhugh*, 11 Gratt. 210; *Brooks v. Rogers*, 101 Ala. 111; 13 So. Rep. 386; *Williams v. Chicago R. Co.*, 112 Mo. 463; *Union Stone Works v. Breidenstein*, 50 Kan. 53; *Smith v. Ijams*, 70 Hun, 155; 24 N. Y. Supl. 202; *Deering v. Porter*, 42 Ill. App. 120; *Bluefields, etc., Co. v. Wollfe* (Tex. App.), 22 S. W. Rep. 269; *Landon v. Hutton*, 50 N. J. Eq. 500; 25 Atl. Rep. 953; *Davidson v. Burke*, 143 Ill. 139; 32 N. E. Rep. 514; *Tuckerman v. Newhall*, 17 Mass. 581; *Strong v. Bird*, L. R. 18 Eq. Cas. 315; *Flower v. Marten*, 2 M. & C. 459; *Aston v. Aston*, Ves. Sen. (Belt) 134; *Wekett v. Raby*, 3 Bro. P.

C. 16, the following language held to work a discharge: "I have R.'s bond, which I keep. I don't deliver it up, for I may live to want it more than he, but when I die he shall have it. He shall not be asked for it."

² *Benjamin's Chalmer's Bills, Notes and Checks*, art. 239, citing *Foster v. Dawber*, 6 Ex. 839; *Cook v. Lister*, 32 L. J. C. P. 121; *Abrey v. Crux*, L. R. 5 C. P. 37. The following illustrations are given: "The holder of a bill at maturity tells the acceptor that he renounces all claims against him and gives up the bill to him. The bill is discharged." 2. "The holder of a bill before it matures writes to the first indorser that he renounces all claim against him. The first and subsequent indorsers are (probably) discharged as regards such holder. The drawer and acceptor are not." See *Whatley v. Tricker*, 1 Camp. 35.

³ *Daniel on Negotiable Instruments*, (3d ed.) § 1290, citing *Keeler v. Bartine*, 12 Wend. 110; *Carter v. Zenblin*, 68 Ind. 436.

tarily cancels the same, and surrenders it to the maker, this operates as a release, although no consideration was paid.¹

§ 473. Release of actions.—By a release of all actions, actions real, personal or mixed, are discharged; and so are all causes of action.² But the real parties alone are competent to release the action; and those are the real parties who are parties upon record.³ A release of all actions is no bar to an execution, “which is not an action, but begins when the action ends.”⁴ But a release of all suits will extend to an execution, because an execution can not be had without application to the court, which is the “suit” of the party.⁵ A release of all “quarrels” discharges all actions and causes of action.⁶ A man may enter into land, or take goods, notwithstanding a release of all actions;⁷ and a release of all actions to the sheriff, who had seized partnership property, and sold it in execution for the debt of an individual partner, is no bar in trover, brought by the other partners, against the purchaser.⁸ A release of personal actions discharges mixed also; and, likewise, a release of real actions discharges mixed.⁹ A release of all actions and causes of action against a partner is not a release of a cause of action against the firm.¹⁰

§ 474. Release of debts.—The word “debt” is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. To distinguish between the two, we say of the former that it is a debt *owing*, and of

¹ Larkin *v.* Hardenbrook, 90 N. Y. 333. See also, Albert *v.* Ziegler, 29 Pa. St. 50; Beach *v.* Endress, 51 Barb. 570; Doty *v.* Wilson, 5 Lans. 7; Kent *v.* Reynolds, 8 Hun, 559; Vanderbeck *v.* Vanderbeck, 30 N. J. Eq. 265; Booth *v.* Succession of Smith, 3 Wood’s C. C. 19; Adams *v.* Hull, 2 Denio, 306; Wheeler *v.* Billings, 38 N. Y. 263; Barker *v.* Bradley, 42 N. Y. 316. And see the following cases cited in Benjamin’s Chalmers’s Bills, Notes and Checks, 246, to the contrary: Crawford *v.* Millspaugh, 13 Johns. 87; Harrison *v.* Close, 2 Johns. 448; Kidder *v.* Kid-

der, 33 Pa. St. 268; Smith *v.* Bartholomew, 1 Metc. (Mass.) 276.

² Comyn’s Digest, tit. Release.

³ 4 M. & S. 300.

⁴ Coke on Littleton, 291 a.

⁵ 8 Rep. 153 b., but *quere*, where an execution issues as a matter of course without an application to the court.

⁶ Coke on Littleton, 292 a.

⁷ Littleton, §§ 496, 497, 498.

⁸ Wilson *v.* Reed, 3 John. 175.

⁹ Littleton, §§ 492, 493. Coke on Littleton, 285.

¹⁰ Reading Railroad *v.* Johnson, 7 Watts & S. 317.

the latter that it is a debt *due*. In other words debts are of two kinds: *solvendum in præsentī* and *solvendum in futuro*. Whether a claim or demand is a debt or not is in no respect determined by a reference to the time of payment. A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt, and does not become a debt until the contingency has happened.¹ Therefore, by a release of all debts, are discharged and released all debts whether owing or to become owing at a certain fixed future time. But debts due on a contingency, which may never happen, are not released.² By releasing the debt, the security for the debt is released; and, therefore, where by a composition deed a creditor released his debtor from all debts, accounts, actions, claims, etc., it was held, that he had thereby discharged his lien upon an indenture of lease which had been deposited with him by the debtor as a security for his debt, so that the subsequent giving up of that deed formed no consideration for a new promise.³

§ 475. Release of dower—Between executors.—A contract by a wife releasing her dower to her husband is valid if not procured by fraud or duress.⁴ Where an executor and executrix who were legatees under the will executed an instrument stating that their accounts were settled “as between themselves, and as between themselves and said estate,” and mutually releasing each other from every liability “by reason of anything relating to the estate or the doings or proceedings

¹ *People v. Arguello*, 37 Cal. 524; *Meeker*, 37 N. J. Law, 382; *Appeal of City of Erie*, 91 Pa. St. 398.

471; *Wood v. Partridge*, 11 Mass. 488; *Davis v. Ham*, 3 Mass. 33; *Sheppard's Touchstone of Common Assurances*, 342.

Frothingham v. Haley, 3 Mass. 68; *McElfresh v. Kirkendall*, 36 Iowa, 224; 3 *Blackstone's Commentaries*, 154; *Kimpton v. Bronson*, 45 Barb. 618; *United States v. Colt*, 1 Pet. C. C. 145; *New Haven, etc., Co. v. Fowler*, 28 Conn. 103; *Mayor, etc., of Baltimore v. Gill*, 31 Md. 375; *Frazer v. Tunis*, 1 Binn. 254; *New Jersey Ins. Co. v.*

³ *Cowper v. Green*, 7 M. & W. 633; *Cragoe v. Jones*, L. R. 8 Ex. 81; *Ward v. National Bank*, L. R. 8 App. Cas. 755.

⁴ *Chittoch v. Chittoch*, 101 Mich. 367; 59 N. W. Rep. 655, following *Dakin v. Dakin* (1893), 97 Mich. 284; 56 N. W. Rep. 562.

of either of them as executrix or executor of said will," it was held that the release was a bar to proceedings instituted by the executor before the surrogate to compel the executrix to account.¹

§ 476. Release of all demands.—The most beneficial release a man can have is a release of all demands.² By such a release, all actions, real, personal and mixed, and all actions of appeal, and also all executions are discharged.³ So are all covenants, personal or real; as, warranty, bonds and contracts;⁴ and all conditions before breach, or performance, or after;⁵ also a right or title to land.⁶ Where a rent does not attend the reversion, but is in gross, such release discharges all arrears, and all which may afterward accrue.⁷

§ 477. Accessory and consequential matters.—In a release of the principal the accessory is included; a release of a fraud or breach of trust will debar the releasor from his remedy against parties secondarily liable.⁸ So a release of covenants would operate to discharge a bond given for the performance of those covenants.⁹ Where a release of all demands is given this puts an end to all claims for the detention of the debt; also, all collateral matters growing out of the transaction are closed up and satisfied.¹⁰

§ 478. What a general release does not cover.—Where a thing is not payable directly by the contract, and is not yet due, a release of all demands does not discharge it; as, if upon a submission to an award by bond, money is awarded to be paid at a day after the release;¹¹ likewise such release does not discharge rent incident to a reversion, not due,¹² nor a collateral covenant to be formed *in futuro*.¹³ A release of all demands to

¹ Matter of Pruyn (1894), 141 N. Y. 544.

² Littleton, § 508.

³ Littleton, § 508.

⁴ Coke on Littleton, 291 b.

⁵ Coke on Littleton, 291 b.

⁶ Littleton, § 509.

⁷ Croke's Elizabeth, 606; 2 Croke, 487; 2 Rolle, 408, 1, 15; 1 Siderfin, 141.

⁸ Thompson v. Harrison, 2 Bro. C. C. 164; Blackwood v. Borrowes, 2 Con. & L. 478.

⁹ Reade v. Bullocke, Dyer, 56 b.

¹⁰ Tetley v. Wanless, L. R. 2 Ex. 275.

¹¹ 2 Croke, 300.

¹² 2 Rolle's Abridgment, 408; Croke's Elizabeth, 606; 2 Croke, 487

¹³ 2 Croke, 170.

the bail, before judgment against the principal, does not discharge the recognizance by the bail.¹ Likewise a release of all demands, in general words, is restrained to the particular occasion; and is often construed as qualified by the recitals.²

§ 479. Recitals and object of release qualifying it.—Where a release is general in its terms and there is no limitation by way of recital or otherwise, the releasor may not prove an exception by parol; the instrument itself is the only competent evidence of the agreement of the parties, unless avoided for fraud, mistake, duress or some like cause. So also, if the words of a release fairly import a general discharge, their effect may not be limited so as to exclude a demand simply upon proof that at the time of its execution the releasor had no knowledge of the existence of the demand;³ but it is now a general rule in construing releases, especially where the same instrument is to be executed by various persons, standing in various relations, and having various kinds of claims and demands against the releasee, that general words, though the most broad and comprehensive, are to be limited to particular demands, where it manifestly appears, by the consideration, by the recitals, by the nature and circumstances of the several demands, to one or more of which it is proposed to apply the release, that it was so intended to be limited by the parties, and for the purpose of ascertaining that intent, every part of the instrument is to be considered. The general words in a

¹ 2 Croke, 170.

² *Cole v. Knight*, 3 Mod. Rep. 277; *Coke on Littleton*, 254 b.

³ *Whiting v. Plumas Co.*, 64 Cal. 65; *Hitchcock v. Davis*, 87 Mich. 629; *Fidelity Trust Co. v. People's Co.*, 150 Pa. St. 8; *Robinson v. McFaul*, 19 Mo. 549; *Kirchner v. New Home Co.*, 16 N. Y. Supl. 761; *Frost v. Brigham*, 139 Mass. 43; *Cowan v. Abbott*, 92 Cal. 100; *Hart v. Taylor*, 70 Miss. 665; 12 So. Rep. 553; *Loth v. Friedrich*, 95 Mich. 598; 55 N. W. Rep. 369; *Battle v. McArthur*, 49 Fed. Rep. 715; *Lambert v. Alcorn*, 144 Ill. 313; 33 N. E. Rep. 53; *Taylor v. Horst*, 52 Minn. 300; 54 N. W. Rep. 734; *Henas v. Henas*, 5 Ind. App. 100; 31 N. E. Rep. 832; *Ohio & Mississippi R. Co. v. Crumbo*, 4 Ind. App. 456; 30 N. E. Rep. 434; *Pierce v. Sweet*, 33 Pa. St. 151, holding a release of the personal liability of a debtor will not, unless so intended, discharge a lien for the same claim. *Pratt v. Castle*, 91 Mich. 484; 52 N. W. Rep. 52; *Richards v. Angell*, 21 N. Y. Supl. 646; *In re Naglee's Estate*, 10 Pa. Co. Ct. Rep. 525; *Currier v. Bilger*, 24 Atl. Rep. 168; *Murphy v. Kastner*, 24 Atl. Rep. 564; *In re Reynolds*, 21 N. Y. Supl. 592.

release are limited always to that thing or those things which were especially in the contemplation of the parties at the time when the release was given;¹ but a dispute that had not emerged, or a question which had not at all arisen, can not be considered as bound and concluded by the anticipatory words of a general release,² as where general words of release are immediately connected with a proviso, restraining their operation.³ So a release of all demands, then existing, or which should thereafter arise, was held not to extend to a particular bond, which was considered not to be within the recital and consideration of the assignment, and not within the intent of the parties.⁴ So where it is recited, that various controversies are subsisting between the parties, and actions pending, and that it had been agreed that one should pay the other a certain sum of money, and that they should mutually release all actions and causes of action, and thereupon such releases were executed, it was held that, though general in terms, the releases were qualified by the recital and limited to actions pending.⁵ So it has been held in Massachusetts, that where, upon the receipt of a proportionate share of a legacy given to another, the person executed a release of all demands under the will, it was held not to apply to another and distinct legacy to the person himself.⁶

§ 480. The same subject continued—Illustrations.—Where a mortgagee, who also had another debt against the mortgagor, together with other creditors executed a release to the mortgagor, by which they released him “from all and singular

¹ *Kirchner v. The New Home Co.*, 135 N. Y. 182; *Jackson v. Stackhouse*, 1 Cow. 122; *Pierson v. Hooker*, 3 Johns. 68. *Cf. Lyman v. Clarke*, 9 Mass. 235; *Farewell v. Coker*, 2 Merr. 353, note; *Post v. Ætna, etc., Ins. Co.*, 43 Barb. 251; *Butcher v. Butcher*, 4 B. & P. 113; *Wright v. Russel*, 3 Wills. 530; *Cole v. Knight*, 3 Mod. 277; *Barclay v. Lucas*, 1 T. R. 291, note; *Miller v. Craig*, 6 Beav. 433; *Lindo v. Lindo*, 1 Beav. 496; *Turner v. Turner*, L. R. 14 Ch. D. 829; *Mum-*

ford v. Murray, 6 Johns. Ch. 452; *Parsons v. Hughes*, 9 Paige, 591.

² *Turner v. Turner*, L. R. 14 Ch. Div. 829, per Malins, V. C., 835; *Rich v. Lord*, 18 Pick. 322.

³ *Solly v. Forbes*, 2 Brod. & Bing. 38.

⁴ *Payler v. Homersham*, 4 Maule & Sel. 423.

⁵ *Simons v. Johnson*, 3 Barn. & Adolph. 175; *Jackson v. Stackhouse*, 1 Cow. 126.

⁶ *Lyman v. Clark*, 9 Mass. 235.

their several claims and demands against him, of every name and nature," it was held that the mortgage was not thereby released.¹ A debt due from an individual is a totally distinct thing from a debt due from a firm, society or partnership of persons of which that individual happens to be a member; and a release of a debt by a creditor is to be taken as a release of the private debt of a partner rather than a partnership debt, if the words of the release are satisfied by the private debt.² A deed of release is not avoided by a blank being left in the schedule showing how much the debt is. The question is left open to proof to show which debt is meant.³ A deed containing a general release of all debts recited that the releasee had previously agreed to pay to the releasor the sum of £40 for the possession of certain premises, and that, in "consideration of the said sum of £40 being now so paid as hereinbefore is mentioned," the receipt of which money he did acknowledge, did release, etc. The releasor brought an action to recover the £40 due for the release; it was held he was not estopped to show that the £40 had not in fact been paid.⁴

§ 481. Contingent release.—A release may be contingent; that is, it may take effect upon the happening of some uncertain future event, or it may cease to be a release upon some uncertain future event. In other words, it may be conditional.⁵ Thus, where a debtor made a deed with his creditors, which recited that, inasmuch as it was essential to the interests of the creditors that the debtor should not be harassed,

¹ *Rich v. Lord*, 18 Pick. 322.

² *Ex parte Kirk*, L. R. 5 Ch. D. 800.

³ *Fazakerly v. McKnight*, 6 El. & Blackf. 794, 807; *Harrhy v. Wall*, 1 B. & Ald. 103.

⁴ *Lampon v. Corke*, 5 B. & Ald. 606.

⁵ *Gibbons v. Vouillon*, 8 C. B. 483.

"The plaintiff's counsel, on the other hand, argues with much ingenuity, that if we hold it to be a release, we must hold it to be a release from the moment of its execution; and that is manifestly contrary to the intention of the parties. To extinguish the debt would manifestly be to defeat

the whole intention of the deed. But, upon what assumption is that ground taken? Upon the assumption that every release, to have any operation at all, must operate from the moment at which it is given, I must confess I do not assent to that proposition. I do not see why parties may not agree that a certain instrument shall operate as a release, from the happening of such an event. The passage in Coke on Littleton, referred to by my brother Maule, seems to show that they may."

therefore the creditors agreed that, if any creditor should, while the agreement was in force, commence an action in respect of his debt, the deed should operate as a release; it was held that the bringing of suit before the time limited by the deed worked a release.¹ Likewise, an example of a release becoming null and void upon condition subsequent, is where a composition is made by a debtor with his creditors in which the creditors release the debtor from his debts upon certain payments, with a proviso that, on default in payment, the release is to become void. A failure to make the stipulated payments avoids the release.²

§ 482. **Covenant not to sue.**—A bond or covenant not to sue is equivalent to a release.³ At common law such a covenant was only available to the covenantee personally; that is, could only be pleaded as a release where sued alone. If sued jointly with another, or if the creditor jointly sues with another, the covenant was not pleadable as a release, but the covenantee was driven to his cross-action.⁴ But by the reformed procedure a covenant not to sue one debtor is available to him as a counter-claim in an action against him and others.⁵ A covenant, however, not to sue one of two joint obligors will not discharge the other.⁶

¹ *Corner v. Sweet*, L. R. 1 C. P. 456.

² *Hall v. Levy*, L. R. 10 C. P. 154. See also, *Blakemore v. Jones*, 5 Tex. Civ. App. 516; 22 S.W. Rep. 779; *Johnson v. Philadelphia*, 2 Pa. Dist. Rep. 229; *Shepherd v. Busch*, 154 Pa. St. 149; *Newington v. Levy*, L. R. 6 C. P. 180; *Walker v. Nevill*, 3 H. & C. 403; *Belshaw v. Bush*, 11 C. B. 190.

³ *Cuyler v. Cuyler*, 2 Johns. 186; *Jackson v. Stackhouse*, 1 Cow. 122; *Ford v. Beech*, 11 Q. B. 852, where Parke, B., said: "The only case in which a covenant or promise not to sue is held to be pleadable as a bar, or to operate as a bar or suspension, and by consequence a release or extinguishment of the right of action, is where the covenant or promise not to sue is general, not to

sue at any time. In such cases, in order to avoid circuitry of action, the covenants may be pleaded in bar as a release." *Fowell v. Forrest*, 2 Saunders, 48; *Smith v. Mapleback*, 1 T. R. 441; *Deux v. Jefferies*, Cro. Eliz. 352.

⁴ *Couch v. Mills*, 21 Wend. 424; *Dean v. Newhall*, 8 T. R. 168; *Hutton v. Eyre*, 6 Taunt. 289; *Walmesley v. Cooper*, 11 A. & E. 216; *Webb v. Spicer*, 13 Q. B. 886; *Thompson v. Lack*, 3 M. G. & S. 540; *Crane v. Alling*, 15 N. Y. L. 423; *Bowne v. Mount Holy Bank*, 45 N. J. Law, 360.

⁵ *Pomeroy on Code Remedies* (3d ed.), 755, *et seq.*

⁶ *Cuyler v. Cuyler*, 2 John. 186; *Miller v. Fenton*, 11 Paige, 18; *Butchers' Bank v. Brown*, 1 N. Y. Leg. Obs. 149; *Frink v. Green*, 5 Barb. 455;

§ 483. Covenant not to sue for a definite time.—A covenant not to sue upon a simple contract debt for a limited time is not pleadable in bar of an action for such debt. At least it was so held at common law.¹ But now by the reformed procedure the covenantee may recoup damages in the same action in which he is sued.²

§ 484. Release of sureties.—If the person guarantied does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged.³ Where the mortgagor of a house executed a

Bank of Chenango v. Osgood, 4 Wend. 607; Phelps v. Johnson, 8 John. 54; Miller v. Fenton, 11 Paige, 18; Lysaght v. Phillips, 5 Duer, 106.

¹Thimbleby v. Barron, 3 M. & W. 210; Deux v. Jefferies, Cro. Eliz. 352; Lacy v. Kynaston, 2 Salk. 575; Smith v. Mapleback, 1 T. R. 441; Burgh v. Preston, 8 T. R. 483; Dean v. Newhall, 8 T. R. 168.

²See the cases cited in the note to the preceding section and also the argument of Barrister Cresswell in Thimbleby v. Barron, 3 M. & W. 210.

³Watts v. Shuttleworth, 5 Hurl. & N. 233. In Benson v. Phipps, 87 Texas, 578; 29 S. W. Rep. 1061, Gaines, C. J., said: "It is the right of the surety, at any time after the maturity of the debt, to pay it, and to proceed against the principal for indemnity. This right is impaired if the creditor enter into a valid contract with the principal for an extension of the time of payment. The obligation of the surety is strictly limited to the terms of his contract, and any valid agreement between the creditor and the principal, by which his position is changed for the worse, discharges his liability. For this reason it is universally held that a contract between the two, which is binding in law, by which the principal secures an ex-

tension of time, releases the surety, provided the surety has not become party to the transaction by consenting thereto." In Gallagher v. St. Patrick's Church, 45 Neb. 535; 63 N. W. Rep. 864, the contract provided: (a) That the building should be completed by the 31st of December, 1890; (b) that, if the building should not be completed by that time, the contractors should forfeit to the church the sum of \$10 for each day that the building remained unfinished thereafter; (c) that, if the contractors should neglect or refuse to comply "with any of the articles of this agreement," the church might take possession of the premises, after giving three days' notice in writing, complete the building, and charge the costs thereof to the contractors; (d) that the architect should make estimates on the last days of August, September, October, and November, of the value of the material and labor furnished by the contractors; and the church at said dates should pay to the contractors three-fourths of the amount of such estimates; (e) that the church should protect by insurance to cover its interest in the property when payments had been made to the contractors. To secure the performance of their agreements the contractors executed a bond

bond with sureties to the mortgagee that he would rebuild the house if it should be destroyed by fire, and the mortgagee assigned the mortgage and debt secured thereby, but did not formally assign the bond to rebuild the house, it was held that the bond was a part of the security for the debt, and passed to the assignee with the debt; and, further, that such change in the ownership of the debt and security did not release the sureties on the bond.¹

to the church signed by themselves as principals and a number of other parties as sureties. The building was not completed by the 31st of December, 1890, and the contractors were proceeding with its construction on the 18th of February, 1891, when it was totally destroyed by fire. Prior to the 31st of December, 1890, the church had paid to the contractors for labor and material the sum of \$12,440; prior to the day of the destruction of the building the church had paid to the contractors \$11,489.59. The church took out insurance on the property in the sum of \$10,000, and no more. The church sued the contractors and the sureties on their bond to recover the money paid to the contractors under the contract. It was held (1) That the failure of the church to keep the building insured to the extent of its interest therein was a complete defense for the sureties on the bond of the contractors; (2) the object of the provision in the contract requiring the church to insure its interest in the property was to lessen the risks taken by the sureties; (3) that the sureties were under no obligation to make inquiries from time to time to ascertain if the church had complied with its contract to insure its interest in the property; (4) that the sureties had a right to suppose that the church would comply with its contract in that respect, and that if the building should be destroyed before its acceptance by the church, and they were called upon

to and did make good the loss, they would be entitled by subrogation or otherwise to the benefit of the insurance effected on the property by the church; (5) that the question as to whether the destruction of the building was the result of the negligence of the contractors was an immaterial issue; (6) that the church could not excuse its failure to comply with its part of the contract on the ground that its performance would have been of no value to the sureties, because the loss of the building through the negligence of their principals would defeat a recovery of the insurance, if it had been effected; (7) that its duty was to insure the property, and, when the loss sued for occurred and was paid by the sureties, to transfer to them the insurance contracts, and leave the sureties and the insurance companies to litigate the question of the latter's liability; (8) that the fact that the church was unable to procure responsible insurance companies to write insurance on the building to the extent of its interest therein did not relieve it from the performance of its agreement to insure the property to the extent of its interest.

¹ Longfellow v. McGregor (Minn. 1895), 63 N. W. Rep. 1032, following Longfellow v. McGregor (1894), 56 Minn. 312, where Gilfillan, C. J., said: "In accordance with the well-known general rule that an assignment of a debt takes with it, and vests in the assignee, the right to all se-

§ 485. When extension to debtor does not release surety.—

An agreement to give time to the debtor, which reserves a right to sue at the request of the sureties, does not release the latter.¹ So also, where, during the whole period covered by a guaranty, the principal was unable to pay the debt, the mere delay of the creditor in demanding payment of the principal will not discharge the guarantor.² And an agreement between

sureties for the debt, the bond passed to plaintiff; and, where the security is a bond with sureties, change in the ownership of the debt and security does not affect the contract of the sureties, so as to release them."

¹ *Exchange Bldg. Co. v. Bayless* (Va. 1895), 21 S. E. Rep. 279. "There is no principle of law better settled than the one contended for by the appellant, viz., that any change of the contract by the principal, however slight, without the consent of the surety, releases the latter from all further liability. Extension of time for payment is the most frequent form in which the creditor so deals with the principal as to discharge the surety; and, whenever such indulgence is granted in pursuance of a binding legal contract, the surety is at once released from his obligations. 2 Daniel on Negotiable Instruments, § 1312. The same author says: 'But this principle on which sureties are released is not a mere shadow without substance. It is founded on the restriction of the rights of the sureties by which they are supposed to be injured. Therefore, when there is a legal impossibility of injury, the principle does not apply.' Hence it is equally well settled that if, in a contract between the creditor and the principal debtor for an extension of time, all the rights and remedies of the surety are reserved unimpaired, the surety is not discharged. 2 Brandt on Suretyship, § 376. Daniel, in his work on Negotiable Instruments, in

giving the elements or circumstances that must unite in order to constitute an indulgence which will discharge the surety, states the fifth to be as follows: 'The indulgence must be without reservation of remedy, against the surety, for that would reserve the surety's recourse on the principal.' See also, *Harris v. Brooks*, 2 Am. L. C. 425, where it is said: 'It follows from this reasoning that an agreement to give time to the debtor, which reserves a right to sue at the request of the surety, will not be effectual as a defense in an action brought against the latter.'"

² *Hooper v. Hooper*, 81 Md. 155; 31 Atl. Rep. 508, *McSherry, J.*: "Under these conditions, a mere delay in making a demand upon him could not have resulted in an injury to the guarantors, because they were placed by such delay in no worse position than if demand had been made earlier. Mere prolongation of the time of payment will not discharge a surety or a guarantor (*Benjamin v. Hillard*, 23 How. 149), because, as concisely stated by the late Mr. Justice Mathews in *Davis v. Wells, Fargo & Co.*, 104 U. S. 159, 'both the laches of the plaintiff and the loss of the defendant must occur to constitute a defense.' It is therefore incumbent on the party relying on this defense to establish the facts which compose it; and hence he must not only show that there has been an unreasonable delay, but, further, that an injury or

a creditor and the principal debtor for an extension of the time of payment will not operate to release the surety, where there is no consideration for the agreement. So, also, the mere voluntary forbearance on the part of the creditor, enlarging the time of payment, without consideration, or the mere failure to institute an action against the principal when the debt becomes due, will not alone discharge the surety.¹

§ 486. Release of a co-debtor.—The release of one joint or joint and several promisor is, generally speaking, a release of all.² But the release of an infant who is a co-debtor for a debt upon which he is not liable is no release of the other debtors.³ And a mere agreement to release a co-debtor, which is not valid as to him because of lack of consideration, will not release the

loss consequent thereon has been sustained by him. Not only has that not been done, but the record contains evidence to the effect that at no time since his assignment, in 1886, has William J. Hooper been in a condition to pay his creditors all that he owed."

¹Smith v. Mason, 44 Neb. 610; 63 N. W. Rep. 41, Norval, C. J. "In order that an agreement to extend the time of payment made by the creditor with the principal debtor may operate to release the surety, it must be for a sufficient consideration, and without the surety's consent. Burr v. Boyer, 2 Neb. 265; Dillon v. Russell, 5 Neb. 484. If the consideration for such extension be proved, and there can be no doubt of it, it must also be pleaded. In the next place it does not appear from the record that there was any agreement entered into for an extension of the time of payment of the original note, but the evidence shows the contrary to be true. The note matured August 1, 1890, and was not taken up until a year later, but this fact alone did not discharge

the sureties. There was but merely a voluntary forbearance on the part of the payees to enforce the collection of the note, without any consideration for the same. The mere failure to bring an action upon the note when it matured did not have the effect to release the sureties. Dillon v. Russell, 5 Neb. 484; Sheldon v. Williams, 11 Neb. 272; 9 N. W. Rep. 86."

²Maslin v. Hiett, 37 W. Va. 15; Vandever v. Clark, 16 Ark. 331; Tuckerman v. Newhall, 17 Mass. 581; Rowley v. Stoddard, 7 John. 207; Brown v. Marsh, 7 Vt. 320; Dudley v. Bland, 83 N. C. 220; Gould v. Gould, 4 N. H. 173; Elliott v. Holbrook, 33 Ala. 659, holding a release of one partner only *prima facie* a release of all. The United States v. Thompson, Gilpin (U. S.) 614; Campbell v. Brown, 20 Ga. 415; Crawford v. Roberts, 8 Ore. 324; Irwin v. Scribner, 15 La. Ann. 583; Ayer v. Ashmead, 31 Conn. 447; Taylor v. Galland, 3 Greene (Iowa), 1; Benjamin v. McConnel, 9 Ill. 536; Booth v. Campbell, 15 Md. 569.

³Young v. Currier, 63 N. H. 419.

others.¹ So also, the agreement to wait on a joint debtor for his part of a debt is no release of the others.²

§ 487. Release of joint and several debtors.—It is, as we have seen, ordinarily true that a release of one of several joint and several obligors or debtors, or a release by a part of the joint obligees, is a release of all.³ But where one is liable in contract to two persons jointly, and settles with one of them individually, so that the latter has no longer any real interest in the matter, the debtor is still liable to the other of the two creditors.⁴ A release of one joint debtor, or one joint and several debtor, may be such as to release all; but a release may be given to one of several debtors, and, if the rights are reserved, against the others, the debt can still be collected of them.⁵ Nothing short of a technical release under seal, however, can operate as a discharge of two joint and several debtors, where a part only of the debt is paid by one.⁶

¹ *Clifton v. Foster* (Texas App.), 20 S. W. Rep. 1005; *Bridges v. Phillips*, 17 Texas, 128; *McIlhenny v. Blum*, 68 Texas, 197; *Small v. Older*, 57 Iowa, 326; *Coonley v. Wood*, 36 Hun, 559; *Tryon v. Hart*, 2 Conn. 120; *American Bank v. Doolittle*, 14 Pick. 123; *Smith v. Bartholomew*, 1 Metc. 276; *McLellan v. Cumberland Bank*, 24 Maine, 566; *Ward v. Johnson*, 13 Mass. 148; *McNeal v. Blackburn*, 7 Dana (Ky.), 170; *Alexander v. Alexander*, 3 Pa. St. 56; *Whitaker v. Salisbury*, 15 Pick. 534.

² *Pinney v. Bugbee*, 13 Vt. 623.

³ *Tuckerman v. Newhall*, 17 Mass. 581; *Hale v. Spaulding*, 145 Mass. 482; 14 N. E. Rep. 534; 7 Wait's Actions and Defenses, 460, and cases there cited; *Houston v. Darling*, 16 Maine, 413; *Hall v. Gray*, 54 Maine, 230.

⁴ *Crafts v. Sweeney* 18 R. I. 730; 30 Atl. Rep. 658; *Boston, etc., R. Co. v. Portland, etc., R. Co.*, 119 Mass. 498; See also, *Hale v. Spaulding*, 145 Mass. 482; 14 N. E. Rep. 534; *Clapp v. Paw-*

tucket Institution, 15 R. I. 489; 8 Atl. Rep. 697.

⁵ *First Nat. Bank v. Marshall*, 73 Maine, 79; *Benton v. Mullen*, 61 N. H. 125, and cases cited; *McAllester v. Sprague*, 34 Maine, 296-298; *Sohier v. Loring*, 6 Cush. 537; *Potter v. Green*, 6 Allen, 442; *Dickinson v. Metacomet, etc., Bank*, 130 Mass. 132.

⁶ *Bradford v. Prescott* (1893), 85 Maine, 482; 27 Atl. Rep. 461, *Foster, J.*: "This matter has been settled too long, and ratified too often, to admit of any question in this state. It was first declared in *Walker v. McCulloch*, 4 Maine, 421, and reaffirmed in *McAllester v. Sprague*, 34 Maine, 296; *Drinkwater v. Jordan*, 46 Maine, 432, and in *First Nat. Bank v. Marshall*, 73 Maine, 79. Formerly a more strict and technical rule prevailed; but the weight of authority now is more liberal, and, although technical words of release are used, the intention of the parties is sought in construing the instrument as a whole, the circumstances of the case and the relations

§ 488. Release of co-tort-feasor.—Upon similar grounds, the release of one joint tort-feasor is the release of all.¹ Thus, in case of a collision of trains of two railroad companies, where a person was injured, and had a right of action against either company, it was held that, whether he could have maintained a joint action or not, a release of one discharged both.² But where joint tort-feasors have been severally sued, the receipt of money in settlement of the action against one does not discharge the others unless it was received as satisfaction for the whole injury.³

§ 489. Further of joint tort-feasors—Of partners.—A city which pollutes the water of a natural stream by discharging drainage therein, to the injury of one through whose lands the stream flows, and an owner of gas works who also discharges noxious matter from the works into the stream, although not joint tort-feasors, are jointly and severally liable in damages; and a release of such owner will not release the city from liability for damages, unless executed in full satis-

of the parties being taken into consideration; and if it is found that it was not intended as a release of the whole debt, it will be construed as only an agreement not to charge the party to whom the release is given, and will not be permitted to have the effect of a technical release. In such case it has no greater effect than an agreement or covenant to discharge, or not to sue, which is never regarded as a release, and when given to one of several joint debtors is never construed as a release to the others. *Lacy v. Kynaston*, 2 Salk. 575; *Dean v. Newhall*, 8 T. R. 168; *Bank of Catskill v. Messenger*, 9 Cow. 37; *Walker v. McCulloch*, 4 Maine, 421; *McAllester v. Sprague*, 34 Maine, 296; *Durell v. Wendell*, 8 N. H. 369, 372; *Benton v. Mullen*, 61 N. H. 125; *Shaw v. Pratt*, 22 Pick. 305; *Pond v. Williams*, 1 Gray, 630; *Burke v. Noble*, 48 Pa. St. 168; *Bonney v. Bonney*, 29 Iowa, 448; *Parmelee v. Lawrence*, 44 Ill. 405,

410-413; 1 Parsons on Contracts, *28. And the remedy of the party to whom such an agreement is given, if afterwards molested on account of the debt, is by a special action founded upon such agreement. It can not be pleaded in bar of an action against all, or set up in defense. *Drinkwater v. Jordan*, 46 Maine, 432; *Walker v. McCulloch*, 4 Maine, 421; *McAllester v. Sprague*, 34 Maine, 296; *Berry v. Gillis*, 17 N. H. 9; *Benton v. Mullen*, 61 N. H. 125, 128."

¹ *Long v. Long*, 57 Iowa, 497; *Barratt v. Third Ave. R. Co.*, 45 N. Y. 628; *Knickerbacker v. Colver*, 8 Cow. 111; *Livingston v. Bishop*, 1 John. 290; *Ruble v. Turner*, 2 Hen. & Munf. 38.

² *Chapin v. Chicago, etc., R. Co.*, 18 Ill. App. 47; *Gunther v. Lee*, 45 Md. 60; *Bronson v. Fitzhugh*, 1 Hill, 185.

³ *Pogel v. Meilke*, 60 Wis. 248; *Comstock v. Hopkins*, 61 Hun, 189; *Sharpe v. Williams*, 41 Kan. 56.

faction of all the injury sustained by reason of the nuisance.¹ If the person injured by a joint tort accept full satisfaction from one of the tort-feasors, he can not sue the other.² A release by a creditor, reciting that, whereas, a certain named partnership is indebted to him by "virtue of a judgment" recovered against the firm, and whereas he has agreed to compound "said indebtedness" to him of said firm, therefore he releases the "members of the said late firm," other than a certain member from all liability for the "said indebtedness," and that the release shall operate to discharge all and every person other than such member from all liability growing out of the "indebtedness aforesaid," is a release of the original indebtedness, and not merely of the judgment, and releases a dormant partner of whose existence the creditor was unaware.³

¹ *City of Valparaiso v. Moffit*, 12 Ind. App. 250; 39 N. E. Rep. 909, Lotz, J.. "The case made by the plaintiffs' complaint in this action is that of a public nuisance, and all persons who created or continued it are jointly and severally liable for all the damages resulting therefrom, although they are not joint tort-feasors. The release of Stratton did not release the city, unless it appears that it was in full satisfaction of all the injury sustained by reason of the nuisance. It further appears by the complaint and the answers that the nuisance has been continued since the release was given on July 1, 1892. Every continuance of a nuisance makes a fresh one, and he who continues a nuisance is liable to successive suits, each continuance being a new one, in which there is a fresh injury and a fresh damage. *Stein v. City of La Fayette*, 6 Ind. App. 214; *Prentiss v. Wood*, 132 Mass. 486; *Staple v. Spring*, 10 Mass. 72; *Holmes v. Wilson*, 10 Adol. & E. 503. One recovery does not bar subsequent actions where the nuisance is continued." In *Horsley v. Moss*, 5 Texas Civ. App. 341; 23 S. W. Rep. 1115, it was held that where cotton is delivered to a public ginner

to prepare for market with notice of H.'s interest, and instructions not to deliver to T., he becomes a bailer for hire for both H. and T.; and if the cotton is delivered to T., and by him converted, the ginner is jointly liable with him for H.'s interest. Such liability is not removed by the fact that T. accounted for, and H. accepted, part of the proceeds of the cotton first taken away, this not being a satisfaction of the conversion.

² *Spurr v. North Hudson R. Co.*, 56 N. J. Law, 346; 28 Atl. Rep. 582, Beasley, C. J.: "It was admitted upon the argument on the legal issue thus presented that, in the language of the brief of the counsel of the defendant, 'while separate suits may be brought against several defendants for a joint trespass, and while there may be a recovery against each, yet there can be but one satisfaction.' For this doctrine, which is not disputable, the case among others, of *Livingston v. Bishop*, 1 Johns. 290, was cited."

³ *Harbeck v. Pupin* (1895), 145 N. Y. 70; 39 N. E. Rep. 722, Finch, J.: "Authorities are cited to the purport that where one deals with a known member of a firm, so as to discharge him, the release does not operate to

§ 490. Statutory provisions.—Some of the states have enacted laws authorizing one or more of several joint debtors to compound or compromise for their joint indebtedness in discharge of their liability and without affecting the liability of the other joint debtors. These statutes are liberally construed, and all joint debtors seem to be within their meaning; inasmuch as it is held that a creditor of a partnership may release one member without discharging the others.¹

§ 491. Express reservation of remedy against co-debtors.—By an express provision to that effect a creditor may release one co-debtor and reserve his rights against others.² But in Illinois the courts have rejected this rule, and the reservation is held void.³ A release of one of several joint tort-feasors, reserving the right to proceed against the others, will not discharge the latter.⁴ The reservation must be in the deed of release; oral evidence of an express parol reservation is not sufficient.⁵ A distinction should be noted between a release of a co-tort-feasor and the receiving of satisfaction for the injury. If the tort is satisfied all the tort-feasors are released, although the

set free an unknown and dormant partner. The case specifically relied on is that of *Robinson v. Wilkinson*, 3 Price, 538. What it holds is applicable only to a case where no release actually discharging the dormant partner has been executed, but his discharge is claimed under the common-law rule that a discharge of one is a discharge of all. That was the legal inference from the act, and, possibly, was not invariably drawn in behalf of a dormant or unknown partner. But here the discharge comes not from a legal inference, which may be restrained or modified, but from an express covenant to release the dormant partner. The question is not one of inference from ambiguous acts, but of an actual contract for a discharge."

¹ *Grant v. Holmes*, 75 Mo. 109; *Bolen v. Crosby*, 49 N. Y. 183; *Northern Ins. Co. v. Potter*, 63 Cal. 157; *Starr v. Stiles (Ariz.)*, 19 Pac. Rep. 225.

² *Greenwald v. Kaster*, 86 Pa. St. 45; *Burke v. Noble*, 48 Pa. St. 168; *Northern Ins. Co. v. Potter*, 63 Cal. 157; *North v. Wakefield*, 13 Q. B. 536: "The reason why a release to one debtor releases all jointly liable is because, unless it was held to do so, the co-debtor, after paying the debt, might sue him who was released for contribution, and so, in effect, he would not be released; but that reason does not apply where the debtor released agrees to such a qualification of the release as will leave him liable to any rights of the co-debtor."

³ *Rice v. Webster*, 18 Ill. 331; *Parmelee v. Lawrence*, 44 Ill. 405.

⁴ *Matthews v. Chicopee Manufacturing Co.*, 3 Rob. 711; *Irvine v. Milbank*, 15 Abb. Pr. (N. S.) 378; *Bloss v. Plymale*, 3 W. Va. 393.

⁵ *Hale v. Spaulding*, 145 Mass. 482.

release expressly reserves the right to proceed against the others.¹

§ 492. Covenant not to sue a co-debtor.—A covenant not to sue one co-debtor or one co-tort-feasor does not discharge the others. Thus the dismissal of an action against one of two joint tort-feasors, and the giving him a covenant not to sue, although supported by a consideration, is no release of the other tort-feasor.²

§ 493. Release by a co-creditor.—A release by a co-creditor binds all the creditors.³ Thus one partner of a firm may sign a deed of composition and release a debt due the firm.⁴ But in Ohio the courts reject the rule that the action of a creditor binds his co-creditors, and in that state all a co-creditor can release is his own aliquot share.⁵

§ 494. Fraud and mistake.—A release may be set aside on the ground of fraud or mistake; but the party must first return the amount received for the release.⁶ The federal courts draw a distinction between the equitable and legal remedies for fraud. As for instance whether a release is void on the ground that the creditor was of unsound mind as known to the

¹ *Seither v. Philadelphia Co.*, 125 Pa. St. 397; *Tompkins v. Clay Street R. Co.*, 66 Cal. 163. Both of these cases were where a person was riding in a street car and was injured by a collision with those of another company. One company, although not guilty of negligence, paid for a release, and it was held that, having thus satisfied the tort, the party could not afterward proceed against the company guilty of negligence. See also, *Benton v. Mullen*, 61 N. H. 125; *Seligman v. Pinet*, 78 Mich. 50; *Gray v. Brown*, 22 Ala. 262; *Pettigrew Machine Co. v. Harmon*, 45 Ark. 290; *Mitchell v. Allen*, 25 Hun, 543, a very satisfactory case pointing out the distinction between

a release of one and receiving satisfaction for the tort.

² *City of Chicago v. Babcock*, 143 Ill. 358; 32 N. E. Rep. 271; *Rawley v. Stoddard*, 7 John. 206; *Duck v. Mayen*, L. R. (1892), 2 Q. B. 511.

³ *Austin v. Hall*, 13 John. 286.

⁴ *Bruen v. Marquand*, 17 John. 58; *Kimball v. Wilson*, 3 N. H. 96; *Piereson v. Hooker*, 3 John. 68; *Eisenhart v. Slaymaker*, 14 S. & R. 153; *Fitch v. Forman*, 14 John. 172; *Morse v. Bel-lows*, 7 N. H. 549; *Wells v. Evans*, 20 Wend. 251; *Myrick v. Dame*, 9 Cush. 248.

⁵ *Upjohn v. Ewing*, 2 Ohio St. 13.

⁶ *Mullen v. Old Colony R. Co.*, 127 Mass. 86; *Johnson v. Merry Mount Granite Co.*, 53 Fed. 569.

law; or whether the creditor was of weak intellect, and was imposed on. The former may be set up in an action at law as a replication to the plea of release, but the only remedy for the latter is a suit in equity.¹

§ 495. Release obtained by fraud—Illustrations.—A release is not binding as a defense to an action at law if obtained in circumstances amounting to a fraud on the signer, whereby he was led into giving formal assent to a paper different from his understanding as to the scope of the agreement which he intended actually to make thereby.² Where, in an action for damages for personal injuries, defendant, by answer, set up an alleged agreement in the nature of a release or discharge of the

¹Johnson v. Mount Merry Granite Co., 53 Fed. 569, where the court said: "There are only two questions: First, whether the release is void or voidable on the ground that the plaintiff was of unsound mind as known to the law; and, second, whether it is voidable on the ground that the plaintiff was of weak intellect, enfeebled by the injuries which he received, and was imposed on, or by any improper methods induced to make an adjustment for an inadequate consideration. So far as the former is concerned, it must be shown that the plaintiff was *non compos mentis*—that is, unsound in some one of the phases known to the law; and also that his unsoundness was of a character which prevented him from understanding the nature of the transaction resulting in the release. If this mental condition existed with the qualifications stated, it seems to be the law of Massachusetts that it can be set up as a defense to the release, without either tendering or returning the consideration. * * * I think the latter issue can not be made in this district in a suit at common law; and that, if the state of facts is as claimed by plaintiff, plaintiff's only remedy is by a bill in equity to set aside the release.

* * * However, it must be admitted that, on account of want of care-

ful discrimination in the various directions which I have suggested, late text-writers, and even courts of common law, have not always distinguished between the remedy in equity and that at common law, when fraud is alleged as an answer to a release under seal or other deed." See also, *Allore v. Jewell*, 94 U. S. 506; *Conley v. Nailor*, 118 U. S. 127; *Trambly v. Ricard*, 130 Mass. 259; *Larrabee v. Sewall*, 66 Maine, 376; *Flummerfelt v. Flummerfelt*, 51 N. J. Eq. 432; 26 Atl. Rep. 857; *Cleary v. Electric Light Co.*, 19 N. Y. Supl. 951; *Haviland v. Willetts*, 21 N. Y. Supl. 1112; *Fist v. Fist*, 3 Col. App. 273; 32 Pac. Rep. 719; *Sheanon v. Pacific*, etc., Co., 83 Wis. 507; *Pederson v. Seattle*, etc., Co., 33 Pac. Rep. 351; 34 Pac. Rep. 665; 6 Wash. 202; *In re Rockey's Estate*, 155 Pa. St. 453; *Lesson v. Mass. Assn.*, 23 N. Y. Supl. 294; *Addyston*, etc., Co. v. *Copple*, 94 Ky. 292; 22 S. W. Rep. 323; *Brooks v. Rogers*, 101 Ala. 111; 13 So. Rep. 386; *White v. Richmond*, 110 N. C. 456; *Girard v. St. Louis Co.*, 46 Mo. App. 79; *Binney v. Delmar*, 17 N. Y. Supl. 524; *Freedley v. French*, 154 Mass. 339; *Newell v. Mayor of New York*, 61 Hun, 356; *Dobinson v. McDonald*, 92 Cal. 33.

²Union Pac. R. Co. v. *Harris* (1895), 158 U. S. 326; 15 Sup. Ct. Rep. 843.

cause of action, and to that plea plaintiff replied that the agreement had been obtained by fraud, while he was unable, because of pain and suffering caused by the injuries, to comprehend his act in signing it, and that he never assented to the agreement; it was held that the reply to the plea of a release was sufficient in an action at law, without resorting to equity to cancel that document.¹ Plaintiff, while suffering from the injuries complained of, executed a release of all claims against defendant railroad company, and accepted a fixed sum, which she afterwards tendered back to the company. Her testimony showed that she fully understood the nature and effect of the release at the time she executed it, and knew that the doctor who procured it from her was an agent

¹ *Girard v. St. Louis Car Co.* (1894), 123 Mo. 358; 27 S. W. Rep. 648, Barclay, J.: "In circumstances such as are here exhibited, a writing in the form of a release, which never acquired original validity as a contract for want of competent assent to its terms, may be disregarded by a court of law in the administration of justice, without the intervention of a court of equity. The paper in question is, in contemplation of law, nothing more than the form of a contract; and, on finding that the substance which should give life to an obligation is wanting, the court may cast aside the form, and proceed to judgment, notwithstanding the fraud which may have brought the verisimilitude of an obligation into existence. *Hartshorn v. Day* (1856), 19 How. 211; *Vanderelden v. Chicago, etc., Ry. Co.* (1894), 61 Fed. Rep. 54, opinion by Judge Shiras. A court of law, upon ascertaining such a fraud, may properly pass over it to the conclusion which it considers to be just; thus, in effect, discharging the fraud as an obstacle to the exercise of its jurisdiction. It is not thought necessary, at this day, to further argue the correctness of this proposition. It has been repeatedly asserted in earlier decisions in this state, both before and since the adoption of the reformed code of procedure in 1849. *Burrows v. Alter* (1842), 7 Mo. 424; *Wright v. McPike* (1879), 70 Mo. 175. They conform to a multitude of precedents elsewhere, many of which are cited in the briefs of counsel, to which may be added: *Thompson v. Fausat* (1815), Pet. C. C. 182, Fed. Cas. No. 13, 954; *Bliss v. New York, etc., Railroad Co.*, 160 Mass. 447; 36 N. E. Rep. 65. The case of *Blair v. Chicago, etc., Railroad Co.* (1886), 89 Mo. 383; 1 S. W. Rep. 350, which is cited as having some tendency to the contrary, goes no further in that direction than to approve the practice of proceeding to first cancel the release for fraud, upon allegations stating a cause of action in equity, before trying the other cause of action at law on the merits of the plaintiff's original claim. While that course may be adopted, it is not essential where the alleged fraud goes to the integrity of the release as a legal agreement, which is the case in the present action. The *Blair* decision does not declare it necessary to go into equity to get rid of a paper executed in such circumstances as here appear."

of the company. It also tended to show that defendant's doctor had told her that she would be "up and around in ten days or two weeks," but that it was three months before she could walk as well as usual. There was no evidence that the doctor's remark was made to deceive her as to the extent of her injuries, which she admitted were properly described in the release. She also testified that the doctor had told her that "parties usually didn't get anything" when they sued the company, but offered no evidence to show the falsity of the statement. It was held that the evidence failed to establish fraud which would entitle plaintiff to avoid the release.¹ The settlement of a claim for personal injuries will not be set aside merely because it is improvident. The mere fact that a person, at the time of making a settlement for personal injuries, was still sensitive of her injuries, and had been taking medicine, is not ground for rescission; the medicine not being such as to impair her mental faculties, nor the pain such as to subvert her judgment.²

§ 496. Release obtained by fraud.—In an action against a railroad corporation for injuries occasioned to the person and clothing of the plaintiff, who gave to the corporation, shortly after the accident which caused the injuries, a receipt in full and a release, evidence that the oral agreement of settlement was for a small sum, and covered merely the injuries to the plaintiff's clothing, that the defendant's agent, who procured the plaintiff's signatures, represented to him that the receipt was only for the injuries to the clothing, and that the release was merely a form, whereas they both covered his claim for personal injuries also, that the plaintiff, who at the time was in a dazed condition, signed both papers without reading them or knowing their contents, and that his personal injuries were in fact serious, will warrant a finding that the receipt and release were procured by fraud on the part of the defendant's agent. Accordingly, where one who has sustained injuries to his clothing and also to his person by an accident has been

¹ *McFarland v. Missouri, etc., R. Co.*,
125 Mo. 253; 28 S. W. Rep. 590.

² *Barker v. Northern Pac. R. Co.*
(1895), 65 Fed. Rep. 460.

induced by fraud to execute to the railroad a receipt in full and a release for both injuries, upon being paid a small sum, which was understood by him to be compensation merely for the injuries to his clothing, he need not return the money so received before bringing an action for the personal injuries.¹ It has, however, been lately held in Missouri by a divided court that a release for damages caused by a railroad accident is a bar to an action for damages against the company until it is set aside in equity for fraud in its procurement.²

§ 497. Legal effect of a release procured by undue influence.—

A release may be set aside without proof of positive fraud where it was obtained from a person suffering great pain and mental anxiety and unable for the time being to compre-

¹ *Bliss v. New York, etc., R. Co.* (1894), 160 Mass. 447. See also, on this point, *Lee v. Lancashire, etc., Railway Co.* (1871), L. R. 6 Ch. App. 527; *Hirschfeld v. London, etc., Railway Co.* (1876), L. R. 2 Q. B. Div. 1; *Chicago, etc., Railway Co. v. Lewis* (1884), 109 Ill. 120; *O'Neil v. Lake Superior Iron Co.* (1886), 63 Mich. 690; 30 N. W. Rep. 688; *Ryan v. Gross* (1888), 68 Md. 377; 12 Atl. Rep. 115, and 16 Atl. Rep. 302; *Sobieski v. St. Paul, etc., Railroad Co.* (1889), 41 Minn. 169; 42 N. W. Rep. 863; *Butler v. Richmond, etc., Railroad Co.* (1891), 88 Ga. 594; 15 S. E. Rep. 668; *Cleary v. Municipal Electric Co.* (Sup. 1892), 19 N. Y. Supl. 951, affirmed (1893), 139 N. Y. 643; 35 N. E. Rep. 206; *Sheanon v. Pacific, etc., Insurance Co.* (1892), 83 Wis. 507; 53 N. W. Rep. 878; *Smith v. Occidental, etc., Steamship Co.* (1893), 99 Cal. 462; 34 Pac. Rep. 84; *Shaw v. Webber* (1894), 79 Hun. 307; 29 N. Y. Supl. 437.

² *Och v. Missouri R. Co.* (Mo. 1895), 31 S. W. Rep. 962. See also, *Homuth v. Metropolitan R. Co.*, 129 Mo. 629 (1895), 31 S. W. Rep. 903. In the first of these cases the court said: "As there was evidence tending to show that the money received by plaintiff was in full satisfaction of her claim against

the defendant, unless the execution of the release was obtained by fraud, she should have returned, or offered to return, the same before or at the time of bringing her suit, and incorporated in her petition a count in equity to set aside the settlement on the ground of fraud, as was done in *Blair v. Chicago, etc., Railroad Co.*, 89 Mo. 383; 1 S. W. Rep. 350; *Allen v. Logan*, 96 Mo. 591; 10 S. W. Rep. 149; *Cleary v. Electric Light Co.*, *supra*; *Sudlow v. Mead*, 109 N. Y. 643; 16 N. E. Rep. 682; *Francis v. Railway Co.*, 108 N. Y. 93; 15 N. E. Rep. 192. Or the petition might have been amended before or at the trial upon proper terms, by adding a count in equity to set aside the settlement. Until this was done, she had no cause of action; for until the settlement is set aside, if in fact there was one, it stands as an insurmountable barrier to the prosecution of this action. Upon this branch of the case, while plaintiff, in her replication to defendant's answer, alleges that the release was obtained in part by the false and fraudulent representation of the physicians of defendant company, there was no evidence tending to show that she was in any manner misled thereby, and the judgment upon that question is *res judicata*."

hend the purpose and meaning of the instrument, and where its procurement was attended with suddenness and surprise, which prevented the releasor from getting advice or consulting with friends.¹

¹Where the plaintiff, an aged negro, in less than twelve hours after the amputation of his foot, while stupid from opiates, waking only when aroused, and in pain, was induced, in the absence of his friends, by the officials of the defendant railroad company, to release his claim of damages for the loss of his foot against the company in consideration of \$300, the release is void. Plaintiff, through the defendant railroad company's fraud, released his claim of damages for injuries, and did not learn of it until two weeks afterwards. He took steps, two weeks after that, to employ counsel, and in about three weeks thought counsel had been engaged. He was confined to his bed during all said time, and spent all the money paid him for executing the release. It was held that the question whether he ratified such release was for the jury. *Jones v. Alabama R. Co.*, 72 Miss. 32; 16 So. Rep. 379. *Whitfield, J.*, said: "We are abundantly supported by authority, if any were needed, in declaring the release void, if this testimony be true. In *Evans v. Llewellyn*, 1 Cox Ch. 333, a husband who had no interest in lands, a moiety of which had belonged to his wife, claiming under a void will of the wife, believed by him to be valid, was informed by his solicitor, when offering to sell the same, that the title was in his deceased wife's brothers, who were living in London 'in very mean circumstances, as journeymen in different trades.' On August 20, 1785, the husband and his solicitor and a friend of the husband (Llewellyn) met one of these brothers by Llewellyn's appointment. The whole situation

was fully explained to him. He expressed himself perfectly satisfied, said he knew it was his sister's intention that Llewellyn should have the property, as manifested by her will, and agreed to execute a release for 200 guineas. He was urged by Llewellyn to see and consult his friends and his wife before making the agreement, but he refused to do so. On August 23 he executed the release and received the money. On September 27th the other brother and the one first dealt with, again, after full explanation, affirmed the release, the other brother executing a memorandum, and on September 30th both executed a second release. After all this—facts making a far stronger case than this—the court said: 'It has been truly argued that no facts were in this case kept back from the party, no false recitals in the deed, but that all the instruments contained a full discovery of the facts upon which the plaintiff was to make his bargain, notwithstanding which I am of the opinion that this agreement ought not to stand. I lay great stress upon the situation of the parties to it and the persons who compose the drama.' And then, after a summing up of the evidence, the court proceeded: 'I am called on for principles upon which I decide this case; but where there are many members of a case it is not always easy to lay down a principle upon which to rely. However, here I say the party was taken by surprise. He had not sufficient time to act with caution, and therefore, although there was no actual fraud, it is something like fraud, for an undue advantage was taken of his situation. The cases

§ 498. Release by railroad employes—Relief department.—

A railroad company had connected with it a relief department, composed of employes who contributed certain amounts from their wages towards an insurance fund for their relief when injured, and for the relief of beneficiaries named in case of death. The railroad company collected the funds, furnished the necessary clerical force and guarantied payment of loss. A member of this association agreed that, in consideration of the amounts paid by the company, the acceptance of benefits for injury or death should operate as a release and satisfaction of

of infants dealing with guardians, of sons with fathers, all proceed on the same general principle, and establish this: that if the party is in a situation in which he is not a free agent, and is not equal to protecting himself, this court will protect him.' Again: 'It is said he was cautioned. It is true, and so far the parties did right. But they ought to have gone further. They should not have permitted the man to have made the bargain without going to consult his friends. There was not sufficient *locus penitentiae*. There was no person present for giving advice. He was entirely in their hands, and surprised at this unexpected acquisition of fortune.' How all this fits in here. This case was decided in A. D. 1787, but the principle is immutable and eternal. And the precise point was adjudged the same way by the supreme court of North Carolina, in 1890, in *Bean v. Western, etc., R. Co.*, 107 N. C. 731, 747; 12 S. E. Rep. 600. The injuries there were inflicted November 25th, and the release was executed December 18th. The court says: 'The reply to the answer does not expressly allege that the release in question was obtained from the plaintiff by the fraud of the defendant or its agent, but it does allege that it was obtained by the defendant under such circumstances of unfairness, undue advantage, inadequacy of consideration,

suddenness, while the plaintiff was suffering great pain and mental anxiety, while he was ignorant and unable to comprehend the meaning and purpose of such an instrument, under such circumstances of mistake and surprise as that the court * * * will not allow the defendant to plead and use it to the disadvantage of the plaintiff.' And the defense was approved, and the release declared properly found void by the jury, the court saying, after a full discussion of the precise point: 'Granting that there was no positive fraud on the part of the defendant or its agents, there was evidence to prove * * * that the plaintiff, * * * by mistake, occasioned by his ignorance, physical pain, mental anxiety, and lack of capacity, under the circumstances, to understand or comprehend the nature and purpose of such release. * * * Mere ignorance, mere inadequacy of consideration, mere weakness of mind, mere mistake on the part of one party, will not entitle that party to release. But it is otherwise when there is a combination of such things to prejudice the party. In such case, in good faith and fair dealing, the adverse party ought to see and know, and must be presumed to know, that the complaining party was not fit or in such mental condition as to bind himself by contract.' "

all claims for damages against the company, arising from such injury or death, which could be made by him or his legal representatives. He was killed in an accident upon the railroad. The beneficiary named was his widow, who accepted the benefit, and, by instrument in writing, received it "in full satisfaction and discharge of all claims or demands on account of, or arising from, the death of said deceased, which I now have, or can hereafter have," against either the relief fund or the railroad company. Subsequently, as administratrix, she brought suit for damages against the railroad company on behalf of herself and children. It was held that the deceased's contract did not, of itself, waive a right of action; that neither that contract, nor the acceptance of the money or release of liability by the widow, operated to bar a right of action by the administratrix on behalf of the children; but that her voluntary acceptance of the benefit, and release of the company, did operate to bar any action for her own benefit.¹

¹ Chicago, etc., R. Co. v. Wymore, 40 Neb. 645; 58 N. W. Rep. 1120, Irvine, C.: "The deceased did not waive his right of action, but only provided in the contract that the receipt by his beneficiary of the death benefit should constitute a release; and the constitution of the association, in evidence, shows, in many places, that it was contemplated that the member might elect to maintain his action, or accept the benefit. It is true that the supreme court of Maryland has held, under a similar state of affairs, that where the mother was named as a beneficiary, and the widow recovered damages under Lord Campbell's act, a similar provision in the contract of membership was a good defense to the association in an action by the mother for the benefit. Fuller v. Baltimore, etc., Association, 67 Md. 433; 10 Atl. Rep. 237. We have two or three remarks to make, however, about that case. In the first place, it was a suit upon a contract in the nature of a contract of insurance, and the result might be justified by a strict construction of

the contract. The position of the railroad company in an action for damages might be different. In the next place, it appears from that case that the railroad company compelled all its employees to become members of the association; and we are certainly not prepared to commit ourselves to the doctrine that a master may enforce a compulsory agreement to release him from the consequences of his own negligence. We are also aware that in several cases it has been held that the release by a person injured operates as a valid release, and that the contract, in such case, is not against public policy. Graft v. Baltimore, etc., Railroad Co. (Pa. Sup.), 8 Atl. Rep. 206 (a case decided without an opinion, and not in the official reports); Owens v. Baltimore, etc., Railroad Co., 35 Fed. Rep. 715; Martin v. Baltimore, etc., Railroad Co., 41 Fed. Rep. 125. As against these federal cases, there might be set off the opinion of Judge Gresham in Roesner v. Hermann, 8 Fed. Rep. 782, declaring a contract with a master,

§ 499. The same subject continued.—Membership by railway servants in a relief fund association being voluntary,

seeking to relieve him from liability for negligence, void, as against public policy. We repeat that the broad question is not before us. If the facts exist as claimed by the plaintiff, the circumstances were such that Wymore might have maintained an action had he lived. He had not waived his right of action. He undertook to contract that the beneficiary named in the contract might waive it by accepting the benefit, but this action is not for the benefit of his estate, but for that of his widow and next of kin; and the measure of damages is not what he might have recovered, had he lived, but their pecuniary loss by reason of his death. Whether or not he could, by a compromise after the accident, before his death, deprive them of their right of action, he could not contract away their right before the injury, and without their consent. Nor could he contract that the widow might, after his death, deprive the next of kin of their remedy. The children, of whom there were eight, were not beneficiaries in the contract, and his contract, and the widow's acceptance of a sum for her benefit, did not discharge the right of action on the children's behalf. The widow in accepting her benefit acted individually, and not as an administratrix. In maintaining this action, she proceeds in her representative capacity, and is not estopped, so far as the rights of others are concerned, by her acts as an individual. We think, therefore, that the action could properly be maintained, notwithstanding the deceased's contract of membership, and the widow's acceptance of the benefit, and release of the company, so far as necessary to enforce the rights of the children. Plaintiff's position is, however, different. Disregarding the rep-

lication of duress, as not now presented to us, we must take it that, after the cause of action accrued, she voluntarily accepted a sum of money named, in discharge and satisfaction of the company's liability. A similar case was presented in the case of *State v. Baltimore & O. R. Co.*, 36 Fed. Rep. 655. The court there considered itself bound, upon the question of public policy, by the decision of the court of appeals of Maryland in the case we have cited, but added: 'It is also considered that the release pleaded as a discharge was executed by the plaintiff after the cause of action upon which she sues had arisen. The insurance upon the life of her husband did not affect her rights at all, as it was made payable to her husband's mother. She had no contractual relations with either the railroad company or the relief association, and can not complain of any contract made with her husband, as being against public policy, because she is unaffected by any such contract, except so far as she herself has chosen to respect it since his death.' The court accordingly held that the release bound her. We think this reasoning is sound. She had a right to compromise with the company after her husband's death, so far as her own rights were concerned. It is suggested that the release, in this aspect, was without consideration, but this is not true. Under the contract for the insurance, she was not absolutely entitled to it, but only became so upon releasing the company. We think that the agreement she so made with the relief department after the cause of action accrued for the benefit of the company may be enforced by the company. By the instruction referred to, the jury was directed to ascertain

the stipulation, in the application for membership, that acceptance of benefits for an injury shall release all claims for damages against the railroad, is not void as an attempt on the part of the railroad to contract against its liabilities for negligence. And the agreement for release is not bad merely because it may enable the railroad to settle some claims more cheaply than it otherwise could.¹ Where a railroad company is a member of a relief association, and has agreed to assume its obligations, an employe of the company who joins the association under an agreement that the acceptance of benefits

the damages which both plaintiff and her children had sustained. The court should have confined the jury to a consideration of the damages sustained by the children."

¹ *Lease v. Pennsylvania Co.*, 10 Ind. App. 47; 37 N. E. Rep. 423, Reinhard, J.: "The case of *State v. Baltimore & O. R. Co.*, 36 Fed. Rep. 655, was decided in the United States circuit court for the district of Maryland. In that case the widow of an employe of the railroad company, after the death of her husband, released the company from any claim she might have against it for causing his death for the purpose of enabling her husband's mother to obtain from the Baltimore and Ohio Relief Association payment of an amount of life insurance which, under its constitution, was payable only on condition that all persons entitled to sue the railroad company for the death should release such company from liability. In a suit by the widow against the railroad company for damages, it was held (Morris, J., delivering the opinion) that the release was not invalid as against public policy. The same question was before the United States circuit court of the district of West Virginia in the case of *Martin v. Baltimore & O. R. Co.*, reported in 41 Fed. Rep. 125. It was held in that case, as we learn from the syllabus, that 'where

an employe of a railroad company becomes a member of a relief association, and as a condition of membership, and in consideration of the contributions of the railroad company to said association, and of the company's guaranty of the payment of the benefits of the association in case of injury, signs a contract by which he releases the company from liability by reason of any accident that may happen to him while in the company's employ, an action will not lie against the company where, both before and after bringing action, he receives money from the association on account of the injury, and gives receipt releasing and discharging the company from all claims for damages.' The question of the validity of these contracts was also before the court of appeals of Maryland in *Fuller v. Baltimore & O., etc.*, Ass'n, 67 Md. 433; 10 Atl. Rep. 237. In *Graft v. Baltimore, etc., R. Co. (Pa.)*, 8 Atl. Rep. 206, we do not find that the court expressed any opinion upon the validity of such contracts further than to uphold instructions to find for the defendant when it appeared that the plaintiff, who had been injured through the alleged negligence of the defendant was a member of the relief association, and had accepted benefits and signed a release."

from the relief fund for an injury caused by the operation of the railroad shall release all claims for damages against the company, and that he will execute such further instrument as may be necessary to evidence the acquittance of the company, is, by the acceptance of benefits after an injury, precluded from recovering damages from the railroad company, though he has never executed a formal release of damages.¹

§ 500. Deed-poll or indenture—Instructions for drafting.—

A simple release may be made either by deed-poll or indenture, but if the instrument is to contain a covenant for indemnity, or other covenants or provisos, the release will generally be made by indenture. Where a release is made by indenture, as a general rule, all persons who can give or receive a release, or who are to enter into any obligations, or take any benefit under any of the covenants or provisions of the instrument, should be made parties. In the case of a deed-poll the releasee must be expressly named.²

§ 501. Pleading.—A release, like all other defenses, must be pleaded.³ But in case a release is procured by fraud the re-

¹ *Ringle v. Pennsylvania R. Co.*, 164 Pa. St. 529; 30 Atl. Rep. 492, per Mitchell, J.: "This case is ruled by *Johnson v. R. Co.*, 163 Pa. St. 127; 29 Atl. 854. The essential principle therein established is that a contract between employer and employe which preserves to the latter all his rights of action in case of negligence until after the facts have occurred and are known to him is not against public policy. 'There is no waiver of any right of action that the person injured may thereafter be entitled to. It is not the signing of the contract, but the acceptance of benefits after the accident, that constitutes the release. The injured party, therefore, is not stipulating for the future, but settling for the past. He is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby.' 163

Pa. St. 134; 29 Atl. 854. The facts of that case and this are not materially different. In both the agreement is that the acceptance of benefits (of course, after the accident) shall operate as a release. In the present case there is an additional agreement that the plaintiff shall 'execute such further instrument as may be necessary formally to evidence such acquittance;' and it is argued that no such release has been executed by plaintiff. But it is not necessary that it should be. The acceptance of benefits is the substance of the release, and the agreement for a further instrument is by its express terms a mere formality for convenience of evidence."

² 6 Bythewood & Jarman's Conveyancing, 50.

³ *Meka v. Brown*, 84 Iowa, 711; 50 N. W. Rep. 46; *Doty v. Chicago R. Co.*, 49 Minn. 499; 52 N. W. Rep. 135; *Spitze*

leasor need not go into equity to annul the release; he may sue on his original cause of action and if the release is pleaded he may then reply the fraud.¹ And under the code, a party may, in the same action, by means of different counts in the same complaint, sue to have the release set aside and also on the original cause of action.² But if the releasor asks to have the release set aside this makes it a question for the court, while a mere replication of fraud is for the jury.³

v. Baltimore, 75 Md. 162; 23 Atl. Rep. 307; *Freedley v. French*, 154 Mass. 339; *Tucker v. Baldwin*, 13 Conn. 136; *Maness v. Henry*, 96 Ala. 454; 11 So. Rep. 410.

¹ *Girard v. St. Louis Car-Wheel Co.*, 46 Mo. App. 79.

² *Blair v. Chicago, etc., Railroad*, 89 Mo. 334.

³ *Girard v. St. Louis Car-Wheel Co.*, 46 Mo. App. 91. See also, *Wild v. Williams*, 6 M. & W. 490; *Webb v.*

Steele, 13 N. H. 230; *Hoitt v. Holcomb*, 23 N. H. 535; *Chicago R. Co. v. Lewis*, 109 Ill. 120; *Bussian v. Milwaukee, etc., R. Co.*, 56 Wis. 325; *Dixon v. Brooklyn City Railroad*, 100 N. Y. 170; *Vautrain v. St. Louis, etc., Railroad*, 8 Mo. App. 538; *O'Donnell v. Clinton*, 145 Mass. 461; *Peterson v. Chicago, etc., Railroad*, 38 Minn. 511; *Lusted v. Chicago, etc., Railroad*, 71 Wis. 391; *Ryan v. Gross*, 68 Md. 377; 12 Atl. Rep. 115.

CHAPTER XIV.

THE STATUTE OF FRAUDS.

- § 502. Its origin and purpose.
503. Its effect on verbal contracts.
504. Promises by executors and administrators.
505. Promises to answer for the debt, default or miscarriage of another.
506. Oral agreements to answer for the debt of another.
507. To whom the promise must be made.
508. Original and collateral promises.
509. Original undertakings—Promisor's interest.
510. The same subject continued.
511. The doctrine of the Supreme Court of the United States.
512. The rule in New York and Pennsylvania.
513. The same subject continued.
514. Further illustrations.
515. Illustrations of original agreements.
516. Where the promisor holds the debtor's funds, or where the old debt is extinguished.
517. Relinquishment of lien—The modern rule.
518. Independent promise releasing another.
519. *Del credere* commission.
520. As to contracts of indemnity.
521. Oral promise to indemnify guarantor not within the statute.
522. The same subject continued.
523. Agreements in consideration of marriage.
- § 524. The same subject continued—Antenuptial contracts.
525. Antenuptial parol agreements reduced to writing after marriage.
526. Contracts relating to lands.
527. Invalid verbal contracts as to land.
528. Cases not within the statute—Constructive trusts.
529. What not an interest in land—Mortgagee's interest.
530. Part performance.
531. Parol contract for sale of land and possession transferred.
532. Parol contract for sale of land—Purchaser's possession.
533. Parol sales of land in North Carolina.
534. Executed oral lease—Statute to be pleaded.
535. Executed parol contract for exchange of land not within the statute.
536. Fixtures.
537. Cases not within the statute—Illustrations.
538. *Fructus industriales*.
539. Parol sale of perennial crops.
540. Contracts for the sale of grass and growing trees.
541. The same subject continued—Intention of the parties.
542. Licenses to enter on lands.
543. Easements.
544. Rule as to sale of buildings.
545. Partnerships to deal in lands.
546. The same subject continued.
547. Agreements not to be performed within a year.

- § 548. The same subject continued.
- 549. The Texas doctrine.
- 550. Illustrations—Cases within the statute.
- 551. Illustrations—Cases not within the statute.
- 552. Further illustrations — Cases not within the statute.
- 553. Performance on one side within a year.
- 554. Contracts for the sale of goods, wares and merchandise — Executory sales.
- 555. Contracts for sale of goods distinguished from contracts for work and labor.
- 556. The English rule.
- 557. The rule in New York.
- 558. Shares in corporations and choses in action.
- 559. Receipt and acceptance.
- 560. The same subject continued.
- 561. Further illustrations.
- 562. Constructive delivery and acceptance.
- 563. Delivery to a carrier.
- 564. Delivery which takes contract out of the statute.
- 565. Question for the jury.
- 566. Earnest or part payment.
- § 567. Auctioneer's sales.
- 568. Judicial sales.
- 569. Form of the memorandum.
- 570. The contents of the memorandum.
- 571. The same subject continued.
- 572. Sale of realty in Texas and Kentucky—The memorandum.
- 573. What is a sufficient memorandum in other states.
- 574. Whether the memorandum must show the consideration.
- 575. Correspondence as evidence of the contract.
- 576. Bought and sold notes—"Slip contracts."
- 577. Insufficient writings to take contract out of statute.
- 578. The signature.
- 579. Oral variation of written agreement.
- 580. Parol discharge of written agreement.
- 581. When parol evidence may be resorted to.
- 582. Remedy for services rendered under voidable contract.
- 583. As to pleading the statute.

§ 502. Its origin and purpose.—The statute of frauds, so called, requiring in many cases written evidence of a contract, was passed in the twenty-ninth year of the reign of Charles II, being A. D. 1677. It is very generally in force in this country, but the statutes of the different states, while agreeing substantially with the English statute, do not copy its provisions exactly.¹

¹ The authorship of this celebrated enactment is mainly ascribed to Sir Matthew Hale, but it was without doubt the product of several minds, Lord Nottingham and others bearing a part in framing it. *Cf.* Reed on Statute of Frauds, § 1; 18 American Law Reg. 442; Lord Mansfield in *Wyndham v. Chetwynd* (1757), 1 Burr. 414; Lord Ellenborough in *Wain v.*

Walters (1804), 5 East, 10. The statutes of the different states are published in the appendix to Reed on Statute of Frauds and Browne on Statute of Frauds, and Wood on Frauds. See, introduction to Throop on Verbal Agreements. The statute, says Lord Kenyon in *Chaplin v. Rogers*, 1 East, 192, "is one of the wisest laws on our statute book."

The object of the statute was that contracts of an important character, as well as those which were not to be executed within a prescribed period, should be supported by more satisfactory evidence than could be afforded by verbal testimony only. The risk of mistakes, arising from the defective and imperfect recollection of witnesses, and the temptation to commit fraud by perjury, were the evils against which the statute was directed.¹ The provisions bearing especially on contracts are contained in the fourth and seventeenth sections. The fourth section is as follows: "No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant, upon any special promise, to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."² The seventeenth

¹ *Marcy v. Marcy*, 9 Allen, 8; Justice Holroyd in *Saunders v. Wakefield*, 4 Barn. & Ald. 595; *Norman v. Mallett*, 8 Ala. 546; *Townsend v. Hargraves*, 118 Mass. 325.

² The words "contract or sale of lands," etc., were probably at first misprinted for "contract for the sale of lands." *Boyd v. Stone*, 11 Mass. 342. The English statute, known as Lord Tenterden's Act (1829), Stat. 9 Geo. IV, C. 14, has been substantially adopted in many states, in which it is provided that no action shall be brought to charge any person upon or by reason of any representation or assurance made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such

representation or assurance be made in writing and signed by the party to be charged thereby, or by those persons by him thereto lawfully authorized. The provisions of the statute are applicable only to cases where the intent and purpose of the party making the representation is to enable a third person to obtain credit, goods or money by means of it. He who means to rely upon such representations as are referred to in the statute, respecting the character, credit or responsibility of another, as a ground of maintaining an action to recover compensation in case of loss if they should prove to be false, must take care that they are reduced to writing and signed by the party ultimately to

section is as follows: "No contract for the sale of any goods, wares and merchandises for the price of £10 sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same or give something in earnest to bind the bargain, or in part payment, or some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."¹

§ 503. Its effect on verbal contracts.—The statute does not prohibit the making of an oral agreement, but bars the legal remedies by which it might otherwise have been enforced. A new rule of evidence is introduced and a new defense created by requiring that the agreement shall be proved by a writing.² A contract within the statute is not illegal unless put in writing, but only not capable of being enforced, an immunity which the defendant on the trial may waive.³ If the parties choose to perform it, the contract remains in full force notwithstanding the statute, so far as relates to the legal effect and consequences of what has been done under it.⁴ The difference in the phraseology between the fourth and seventeenth sections in this, that the former says "no action shall be brought" upon the contract, and the latter says the contract shall not be "al-

be charged. *Kimball v. Comstock*, 14 Gray, 508.

¹ In the several states of this country the sum varies from \$30 to \$300. *Stimson on American Statute Law*.

² *Crane v. Powell* (1893), 139 N. Y. 379; *Lowman v. Sheets* (1890), 124 Ind. 416; *La Du-King Mfg. Co. v. La Du* (1887), 36 Minn. 473; *Kruger v. Leppel* (1889), 42 Minn. 6; *Child v. Pearl* (1870), 43 Vt. 224; *Cahill v. Bigelow*, 18 Pick. 369; *Whitney v. Cochran*, 1 Scam. (Ill.) 209; *Chicago Dock Co. v. Kinzie*, 49 Ill. 289; *Haynes v. Nice*, 100 Mass. 327; *Magee v. Blenkinship*, 95 N. C. 563; *Beach on Modern Equity Jurisprudence*, § 614 and cases cited.

³ *Adams v. Patrick*, 30 Vt. 516; *Montgomery v. Edwards*, 46 Vt. 151.

⁴ *Crane v. Gough*, 4 Md. 316. It was settled by *Leroux v. Brown* (1852), 12 C. B. 801, that the statute does not effect the validity of the contract, but only makes a particular kind of proof necessary to enable a party to bring an action upon it. "I think it is now finally settled that the true construction of the statute of frauds, both the 4th and the 17th sections, is not to render contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract," per Lord Blackburn in *Maddison v. Alderson* (1883), 8 App. Cas. 467, 488.

lowed to be good," has been commented upon in various cases, but the difference does not change the force and effect of the two sections.¹

§ 504. Promises by executors and administrators.—The clause of the statute providing that "no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate," made verbally, was enacted to prevent executors or administrators from being fraudulently held for the debts or liabilities of the estate upon which they were called to administer. The special promise referred to is any actual promise made in distinction from promises implied by law, which are held not within the statute.² Where the cause of action exists against the deceased, the executor or administrator may make himself personally liable by a written promise founded upon a sufficient consideration.³ There must be either assets in their hands or forbearance by the creditor to constitute a consideration. In case there are no assets, a promise by an executor to pay his testator's debt is *nudum pactum*.⁴ The giving a bond by an administrator to the judge of probate, to pay the debts and legacies of the testator, is held to operate as an admission of assets.⁵ This clause is closely allied to the following one in

¹ Bird v. Munroe, 66 Maine, 337; Townsend v. Hargraves, 118 Mass. 325.

"There seems to be no reason to attribute to the former phraseology any force or to draw from it any inferences, different from those which attend the construction of the latter." Browne on the Statute of Frauds, § 115; Reed on the Statute of Frauds, § 678. In New York and some other states the statutes expressly provide that certain contracts "shall be void," unless expressed in writing. A void contract confers no right and creates no obligation between the parties. Dung v. Parker, 52 N. Y. 494.

² Bellows v. Sowles, 57 Vt. 164; Sage v. Wilcox, 6 Conn. 81.

³ Davis v. French, 20 Maine, 21.

⁴ Bank of Troy v. Topping, 9 Wend. 273; Pearson v. Henry, 5 T. R. 6; Rann v. Hughes, 7 T. R. 346, note. "For such promises must be understood with reference to assets, otherwise men might be drawn in." Lord Hardwicke in Reech v. Kennegal, 1 Ves. Sen. 123. Where A., as administrator of B., deceased, gave a promissory note to C., by which he promised to pay the amount of the note for value received by B. and his heirs, it was held that there was no consideration for the promise. Ten Eyck v. Vanderpoel, 8 John. 120.

⁵ Stebbins v. Smith, 4 Pick. 97.

regard to a promise to answer for the debt of another and the undertaking contemplated by it is in the nature of a guaranty.¹

§ 505. Promises to answer for the debt, default or miscarriage of another.—To make the promise to answer for the debt, default or miscarriage of another binding, it must be in writing and founded upon a consideration.² Where a contract of guaranty is entered into concurrently with the principal obligation, a consideration which supports the principal contract supports the subsidiary one also;³ but where the promise is made subsequent thereto, there must be a distinct consideration to support it. A mere naked promise to pay the already existing debt of another without any consideration is void.⁴ The guaranty of a future liability is within the statute precisely as it would be if the liability existed when the promise was made.⁵ A promise to answer for the tort of another is within the statute.⁶

§ 506. Oral agreements to answer for the debt of another.—Where an attorney, acting for his client, requested plaintiff

¹ *Bellows v. Sowles*, 57 Vt. 169; *Harrington v. Rich*, 6 Vt. 666; *Redfield on Wills*, Vol. 2, p. 290, *et seq.*

² *Robinson v. Gilman*, 43 N. H. 485; *Dougherty v. Stone* (1892), 66 Hun, 498; *Frame v. August* (1878), 88 Ill. 424; *Nelson v. Boynton*, 3 Metc. (Mass.) 396; *Hess's Estate* (1892), 150 Pa. St. 346; *Ackley v. Parmenter* (1885), 98 N. Y. 425; *Gower v. Stuart*, 40 Mich. 747; *Eddy v. Roberts*, 17 Ill. 505; *Furbish v. Goodnow* (1867), 98 Mass. 296; *Cook v. Elliott* (1864), 34 Mo. 586; *Ware v. Adams*, 24 Maine, 177; *Gilligan v. Boardman*, 29 Maine, 79.

³ *Erie Co. Savings Bank v. Coit* (1887), 104 N. Y. 532; *McNaught v. McClaughry*, 42 N. Y. 22; *Simons v. Steele*, 36 N. H. 73; *Brandt on Suretyship*, §§ 6, 7.

⁴ *Bebee v. Moore*, 3 McLean, 387; *Leonard v. Vredenburg*, 8 John. 29; *Davis v. Tift* (1883), 70 Ga. 52; *Starr v. Earle*, 43 Ind. 478. Damage to the promisee constitutes as good a con-

sideration as benefit to the promisor. *Townsend v. Sumrall*, 2 Pet. 169; *Killian v. Ashley* (releasing a lien), 24 Ark. 511. Consideration in the nature of forbearance: *Martin v. Black's Executors*, 20 Ala. 309; *Sage v. Wilcox*, 6 Conn. 81; *Stewart v. Campbell*, 58 Maine, 439; *Breed v. Hillhouse*, 7 Conn. 523; *McCelvy v. Noble*, 13 Rich (S. C.), 330; *Rann v. Hughes*, 7 T. R. 350; *Philpot v. Briant*, 4 Bing. 717. See §§ 129 *et seq.*, *supra*.

⁵ *Mead v. Watson* (1885), 57 Vt. 426.

⁶ *Kirkham v. Marter*, 2 B. & Ald. 613, where one person, without the license of another, had ridden such other's horse, and thereby caused its death; it was held that a promise by a third person to answer the damage caused thereby, in consideration that the owner of the horse would not bring an action against the person causing its death, was within the statute.

to render services for the client, and subsequently promised to pay for the same whenever the client furnished him money for that purpose, it was held that, although the money was furnished, his promise was within the statute of frauds.¹ It is not necessary that the written memorandum of a "special promise to answer for the debt of another" should expressly state the consideration for the promise: It is sufficient if, from the whole writing, it appears with reasonable clearness what the consideration was; as, for example, to procure credit for a third party from the promisee.² Accordingly the contract of a minor to pay the principal and interest of money loaned him to carry on business not being void, the promise of another to answer for such debt is within the statute of frauds,³ and an oral agreement by the owner of a building to pay a subcontractor, on the abandonment of the contract by the original contractor, an amount already due him from the latter, and an additional sum for extras if he would complete the work, is not void as being a promise to

¹ Walker v. Irwin (Iowa, 1895), 62 N. W. Rep. 785, Deemer, J.. "The lower court ruled that all the promises made by the defendant were within the statute of frauds, and that the promise contained within the letter, if any such there be, was without consideration. It appears to us this is correct. The testimony tends strongly, if not conclusively, to show that plaintiffs looked upon Matheson as the principal debtor, and that defendant's promise, if any, was contingent and collateral,—contingent upon his receiving the money on the assignment, and collateral to Matheson's obligation to pay. This being true, it was clearly within the statute of frauds. Sternburg v. Callanan, 14 Iowa, 251; Beerkle v. Edwards, 55 Iowa, 750; 8 N. W. Rep. 341; Benbow v. Soothsmith, 76 Iowa, 154; 40 N. W. Rep. 693; Browne on Statute of Frauds, § 197. The happening of the contingency of defendant's re-

ceiving the money on the assignment did not make his promise an original one. The agreement was to step into the place of Matheson, and pay his liabilities, upon certain conditions. It is no less collateral than if the contingencies had not happened. Kauffman v. Harstock, 31 Iowa, 472." And see, Lewis v. Lewis Lumber Co. (1893), 156 Pa. St. 217.

² Straight v. Wight (Minn. 1895), 63 N. W. Rep. 105.

³ Brown v. Farmers', etc., Bank (Texas, 1895), 31 S. W. Rep. 285, Denman, J.: "In the case of Dexter v. Blanchard, 11 Allen, 365, the supreme court of Massachusetts decided the very question before us, holding that the debt due from the minor was not void, but voidable, at his election, and that, therefore, the verbal promise of the father to pay same was within the statute, and could not be enforced."

answer for the debt of the contractor.¹ A Michigan statute provides that no action shall be brought to charge one upon a representation as to the character, credit, or trade of another person unless such representation is in writing, and signed by the person to be charged. In construing this statute it has been held that representations by one that he was the owner of certain corporate stock, and that the corporation was paying large dividends, which representations were made for his own benefit to induce plaintiff to purchase, are not within the statute.² An oral acceptance of an order is not within the statute of frauds, as a promise to pay another's debt.³

§ 507. To whom the promise must be made.—To bring a promise within the statute it must be made to the person entitled to enforce the liability assumed by the promisor.⁴ A

¹ *McLaughlin v. Austin* (Mich. 1895), 62 N. W. Rep. 719, Hooker, J.: "It is contended that this contract, if proved, was void under the statute of frauds, inasmuch as it was not in writing. It is urged that, at the time it was made, Jones owed the plaintiff \$20 or \$30 for work already done, and was under a legal obligation to pay the remainder of the claim when the work should be finished; that there was no agreement to release Jones from his liability, and therefore, as his liability continued, the promise of the defendant was a promise to answer for the debt of another. It is possible for one to make a valid oral promise to pay the debt of another without releasing the original debtor, although it is not where the consideration moves to the original debtor alone. This seems to be the point upon which the rule turns. *Leonard v. Vredenburg*, 8 Johns. 27; *Nelson v. Boynton*, 3 Metc. (Mass.) 396; *Mallory v. Gillett*, 21 N. Y. 412; *White v. Rintoul*, 108 N. Y. 222; 15 N. E. Rep. 318; *Corkins v. Collins*, 16 Mich. 477; *Calkins v. Chandler*, 36 Mich. 320; *Bice v. Marquette*, etc., Building Co., 96 Mich. 24, 30; 55 N. W. Rep. 382."

² *Hubbard v. Long* (Mich. 1895), 63 N. W. Rep. 644.

³ *Lavell v. Frost*, 16 Mont. 93; 40 Pac. Rep. 146, DeWitt, J.: "Appellant claims that, as the acceptance of the order by Frost was not in writing, it can not be relied upon by respondents, because it was a promise to answer for the debt, default, or miscarriage of another. Comp. St., p. 652, § 223. But the acceptance of the order was not the promise to pay the debt of another. As far as Frost's acceptance was concerned, if there were any, it was simply to pay his own debt, if anything."

⁴ *Tighe v. Morrison* (1889), 116 N. Y. 263; *Harrison v. Sawtel*, 10 John. 242; *Chapin v. Merrill*, 4 Wend. 657; *Barry v. Ransom*, 12 N. Y. 462; *Sanders v. Gillespie*, 59 N. Y. 250; *McCraith v. National*, etc., Bank, 104 N. Y. 414; *Smith v. Sayward*, 5 Maine, 504; *Jones v. Shorter*, 1 Ga. 294; *Thomas v. Cook*, 8 Barn. & Cres. 728; *Reader v. Kingham*, 13 C. B. (N. S.) 344; *Birkmyr v. Darnell*, 1 Salk. 27; *Fitzgerald v. Dressler*, 5 C. B. (N. S.) 885; *Batson v. King*, 4 H. & N. 739; *Wildes v. Dudlow* (1874), L. R. 19 Eq. 198. *Green v. Cresswell*, 10 Ad. & E. 453, per contra, no longer regarded as

promise to the debtor to pay his debt and thereby relieve him from the payment of it himself is not within the statute.¹ If the debt of another, which a man promises to pay, is also his own debt, the statute has no application.² The statute contemplates the mere promise of one man to be responsible for another, and can not be interposed as a cover and shield against the actual obligations of the debtor himself. The common case of the holder of a third person's note assigning for value with a guaranty, seems to be clearly referable to this principle. The assignor owes the assignee and that particular mode of paying him is adopted; he guarantees in substance his own debt.³

law in the county where it was decided. *Throop on Verbal Agreements*, § 361. "The statute applies only to promises made to the persons to whom another is already or is to become answerable." *Hargreaves v. Parsons*, 13 M. & W. 560. "I think that to bring a promise within the statute the debt for which the defendant has promised to answer must be a debt due to the person to whom the promise is made, and that the promise must be made to a person who could bring an action for the debt." *Bowen, L. J., Hoyle v. Hoyle*, L. R. (1893), 1 Ch. 84.

¹ *Eastwood v. Kenyon*, 11 Ad. & E. 438, a leading case. There the plaintiff was liable to one Blackburn, on a promissory note; and the defendant for a consideration promised the plaintiff to pay that note. Lord Denman said: "If the promise had been made to Blackburn, doubtless the statute would have applied; it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is that it is not less the debt of another because the promise is made to that other, viz., the debtor, and not to the creditor, the statute not having in terms stated to whom the promise contemplated by it is to

be made; but upon consideration we are of opinion that the statute applies only to promises made to the person to whom another is answerable." *Beaman v. Russell*, 20 Vt. 205; *Alger v. Scoville*, 1 Gray, 391; *Fish v. Thomas*, 5 Gray, 45; *Townsley v. Sumrall*, 2 Pet. 170; *Nelson v. First Nat. Bank*, 48 Ill. 36; *Goetz v. Foos*, 14 Minn. 265; *Perkins v. Littlefield*, 5 Allen, 370; *Barker v. Bucklin*, 2 Denio, 45, 60; *Shook v. Vanmater*, 22 Wis. 532; *Aldrich v. Ames* (1857), 9 Gray, 76; *Chapin v. Lapham*, 20 Pick. 467; *Mersereau v. Lewis*, 25 Wend. 243; *Brown v. Strait*, 19 Ill. 88; *Rahbermann v. Wiskamp*, 54 Ill. 179; *Meyer v. Hartman*, 72 Ill. 442. A partner in a firm agreed to indemnify the firm against certain debts owing to the firm; held not to be an agreement to answer for the debt of another. *Hoyle v. Hoyle* (1893), 2 The Reports, 145, L. R. (1893); 1 Ch. 84.

² *Robinson v. Gilman*, 43 N. H. 485; *Nelson v. Boynton*, 3 Metc. (Mass.) 396; *Chamberlin v. Ingalls*, 38 Iowa, 300; *Putney v. Farnham* (1870), 27 Wis. 187; *Goodman v. Cohen* (1892), 132 N. Y. 205; *Snell v. Rogers* (1893), 70 Hun, 462; *Lester v. Bowman*, 39 Iowa, 611; *Stondt v. Hine*, 45 Pa. St. 30; *Besshears v. Rowe*, 46 Mo. 501.

³ *Malone v. Keener*, 44 Pa. St. 107.

§ 508. **Original and collateral promises.**—There is much difficulty in determining what are original and what are collateral agreements. The cases upon this point are much in conflict. The English cases have not been at all harmonious.¹ A large class of cases is found which fall within the general language of the statute, but which have been decided to be exceptions.² It is difficult, if not impossible, to formulate a rule by which to determine in every case whether a promise relating to the debt or liability of a third person is or is not within the statute.³ The test question is whether it is a promise to pay the debt of another, for which that other remains liable.⁴ When no action will lie against the party for whom the undertaking is made it is an original promise.⁵ There can be no suretyship unless there be a principal debtor, existing at the time, or constituted by matters *ex post facto*. “Nor can a man guarantee anybody else’s debt unless there be a debt of some other person to be guaranteed.”⁶

¹ *Anderson v. Spence* (1880), 72 Ind. 315: The terms “original” and “collateral” promises do not occur in the statute and have been introduced by courts to explain its objects and expound its true interpretation. *D’Wolf v. Rabaud*, 1 Pet. 476.

² It is competent for the court to establish exceptions to statutes expressed in general and sweeping terms, where cases are found to come within the letter of the enactment, but do not fall within the reason and apparent purpose of the law. *Robinson v. Gilman*, 43 N. H. 485.

³ *Nugent v. Wolfe* (1886), 111 Pa. St. 471; *Cross v. Richardson*, 30 Vt. 641. It is often difficult from the words in which a promise is made to determine whether any credit was given to a third person, and the undertaking therefore collateral, or whether it was a wholly independent and original undertaking. In such cases courts must rely upon the circumstances of each particular case in order to ascertain the intention of the parties. *Reed*

v. Holcomb, 31 Conn. (1863) 360. In the case of *Dillaby v. Wilcox* (1891), 60 Conn. 71, the court says in regard to this clause: “An immense amount of litigation has arisen over its construction. It is impossible to reconcile the decisions which have been made under it. * * * The most careful text-writers have acknowledged their inability to find anything like uniform rules of construction in the conflicting decisions which have been rendered.”

⁴ *Hetfield v. Dow* (1859), 27 N. J. Law, 440; *Birkmyr v. Darnell*, Salk. 27 (leading case); *Forth v. Stanton*, 1 Wms. Saunders, 210, 211, note 2.

⁵ *Mease v. Wagner*, 1 McCord (S.C.) 395..

⁶ *Lakeman v. Mountstephen*, L. R. 7 H. L. 17, per Lord Selbourne. The test to be applied is whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of the default of a third person. *Brown v. Weber*, 38 N. Y. 187; *Booth v. Eighmie* (1875), 60 N. Y. 238; *Swart*

§ 509. Original undertakings — Promisor's interest. — A promise to indemnify one for becoming a surety on the replevin bond of another, made by one interested as the latter's mortgagee in the goods replevied, is not a promise to answer for the debt, default, or miscarriage of another, within the statute.¹ Where deceased, being indebted to plaintiff, assigned

v. Colleton (1893), 96 Mich. 391. When the contract is not distinct or consistent in its different parts it should be submitted to the jury under proper instructions to determine whether it is collateral or direct: *Perkins v. Hinsdale*, 97 Mass. 157.

¹*Boyer v. Soules* (Mich. 1895), 62 N. W. Rep. 1000, Long, J.: "Aside from the consideration of the security which Soules had, the promise was not a collateral one, and therefore not within the statute of frauds. It was an original undertaking to save the plaintiff harmless. A promise by one person to indemnify another for becoming a guaranty for a third is not within the statute of frauds. Such promise need not be in writing, and the assumption of the responsibility is a sufficient consideration for the promise. *Chapin v. Merrill*, 4 Wend. 657. It is settled that if B. agrees with C. that, if he will execute an instrument as co-security for A., he (B.) will indemnify him from loss, such agreement, in a suit by B. against C. for contribution, will be enforced and held valid. *Barry v. Ransom*, 12 N. Y. 462; *Mallory v. Gillett*, 21 N. Y. 412; *Taylor v. Savage*, 12 Mass. 98; *Story on Equity Jurisprudence*, § 498; *Cutter v. Emery*, 37 N. H. 567; *Ross v. Espy*, 66 Pa. St. 481; *Cresswell v. Wood*, 10 Adol. & El. 460; *Fennell v. Mulcahy*, 8 Irish Law Rep. 434. The statute enacts that 'every special promise to answer for the debt, default or misdoings of another person' shall be void unless actually signed, etc. The undertaking in the present case was not to pay a debt of

Crane's, but, if plaintiff would sign the bond or undertaking with Crane, Soules would save him harmless if plaintiff was called upon to pay anything thereunder. Such a case is fully discussed in *Wildes v. Dudlow*, L. R. 19 Eq. C. 198; 11 Moak Eng. Rep. 788, decided in 1874; and *Sir R. Malins, V. C.*, there remarks: 'If one man could induce another to alter his line of conduct in that way and then meet him with the statute of frauds, that statute, instead of being a protection against fraud, would be the direct means of fraud;' citing *Thomas v. Cook*, 8 Barn. & C. 728, where the case is fully discussed by Justices Bagley and Parke. The present case need not, however, rest solely upon the naked promise of the defendant to save the plaintiff harmless. Here it is proved without contradiction that the defendant had an interest in the property replevied. He had a mortgage upon it for more than half its value, and assured the plaintiff that he had ample security in his hands to protect him. Relying upon this, the plaintiff signed the bond. The case in this view falls within the rule of *Calkins v. Chandler*, 36 Mich. 323, which follows the rule of *Nelson v. Boynton*, 3 Metc. (Mass.) 396, which is that 'cases are not considered as coming within the statute when the party promising has for his object a benefit which he did not before enjoy accruing immediately to himself.' This rule was followed in *Bice v. Marquette, etc., Bldg. Co.*, 96 Mich. 24; 55 N. W. Rep. 382." In *Amort v. Christofferson*, 57 Minn. 234; 59 N.

to him a note and mortgage under the false representation that the mortgage was good, although he knew that it was of no value, and the amount of the mortgage plaintiff credited on deceased's debt to him, and when plaintiff found that the mortgage was worthless, he asked deceased to make it good, and deceased told him to sue on the note and that he would pay the expense of the suit, and, if the note was not collected by suit, he would pay the amount thereof, and plaintiff sued the maker, but was unable to collect the judgment, it was held that the right of action on the promise of deceased to pay the note and the expense of suit survived his death; and that the promise by deceased was not an undertaking to answer for the debt of another, within the statute of frauds.¹

W. Rep. 304, Collins, J., said: "Kieley applied to plaintiff for seed, but the latter refused to give him credit, and thereupon, according to the testimony, defendant told plaintiff to let Kieley have the seed, and 'I will see you paid for it.' This assurance, construed with reference to the connection in which the words were used, and the facts surrounding their utterance, can not be distinguished from that considered in *Grant v. Wolf*, 34 Minn. 32; 24 S. W. Rep. 289; and the words are fairly susceptible of the construction that the responsibility assumed by defendant was original, and not collateral to the agreement of another; hence not within the statute of frauds. The words, 'I will see you paid' for the seed-grain, amounted, under the circumstances, to an agreement by defendant to pay for it himself. It was shown that, when the plaintiff delivered the grain to Kieley, he took a seed-grain note from him for the amount of the purchase price, and from this it might be argued that defendant's promise was unquestionably collateral. But the plaintiff testified (and the jury had the right to believe him) that defendant told him,

when becoming responsible for the grain, that he must take a seed-grain note from Kieley, and, further, that he (defendant) would sign it also. The note was taken, and afterwards presented to defendant for his signature, which was refused. The explanation offered by plaintiff as to the taking of the note is such that it can not be said to have been conclusively shown that any credit was given to Kieley. See *Cole v. Hutchinson*, 34 Minn. 410; 26 N. W. Rep. 319."

¹ *Bryant v. Rich* (Mich. 1895), 62 N. W. Rep. 146, Long, J.: "The claim is not made that the deceased promised to pay the Miller note and mortgage if the claimant failed to collect of Miller, but it is that he (the deceased) would pay the amount to settle the fraud if the claimant failed to collect of Miller. It is claimed, however, that the claimant could not have the judgment against Miller, and at the same time have a claim against Mr. Rich. It was held in *Calkins v. Chandler*, 36 Mich. 320, that, 'where the third party himself is to receive the benefit for which his promise is exchanged, it is not usually material whether the original debtor remains

§ 510. **The same subject continued.**—The general rule is that if the promise is in the nature of an original undertaking to pay a debt to a third party, and is founded on a valuable consideration received by the promisor himself, it is not within the provisions of the statute, and need not be in writing to make it valid and binding.¹ The terms original and collateral promise are used to distinguish between the cases, where the direct and leading object of the promise is to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is to promote some interest or purpose of his own. The former, whether made before or after, or at the same time with the promise of the principal, is not valid unless in writing. The latter, if made a good consideration, is binding, although by parol. The following illustration is given: In case one says to another, "Deliver goods to A. and I will pay you," it is an original promise, and the promisor is liable without putting it in writing; but if he says, "I will see you paid," or "I will pay, if he does not," or uses equivalent words, showing that the debt is in the first instance the debt of A., the undertaking is collateral, and not valid unless in writing.² The form of expression, "I will be personally responsible; I will see you paid," imports a collateral promise, but the real character of a promise does not depend alto-

liable or not.' In *Nelson v. Boynton*, 3 Metc. (Mass.) 396, it was said: 'The true rule to be derived from the cases seems to be this: That cases are not considered as coming within the statute when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of person or property of the debtor, or other forbearance or benefit to him, it is within the statute.' This case was cited with approval in *Bice v. Marquette, etc., Building Co.*, 96 Mich. 24; 55 N. W. Rep. 382. Here the promise was not made for the benefit of Miller. It was for the ben-

efit of the deceased. It was made to settle a matter of his own, and clearly is not within the statute of frauds. In fact, the original debt against Rich was never extinguished, by reason of this fraud. *Huntington v. Wellington*, 12 Mich. 10." And see *Watson v. Poezel* (1893), 158 Pa. St. 513.

¹ *Wilson v. Bevans* (1871), 58 Ill. 232; *Meyer v. Hartman* (1874), 72 Ill. 442; *Watkins v. Sands* (1879), 4 Ill. App. 207.

² *Nelson v. Boynton*, 3 Metc. 396; *Matson v. Wharam*, 2 T. R. 80; *Anderson v. Hayman*, 1 H. B. 120; *Farley v. Cleveland*, 4 Cow. 432; *Chapin v. Lapham*, 20 Pick. 467; *Langdon v. Richardson* (1882), 58 Iowa, 610.

gether upon the form of expression, but largely upon the situation of the parties, and the question always is what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise.¹ The substance and not the form should control.²

§ 511. The doctrine of the Supreme Court of the United States.—The United States Supreme Court has stated the doctrine that whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.³

§ 512. The rule in New York and Pennsylvania.—The doctrine which serves to distinguish between original and collateral promises has been stated by the Court of Appeals of New York thus: that where the primary debt subsists, and was antecedently contracted, the promise to pay it is original when

¹ *Davis v. Patrick* (1891), 141 U. S. 479.

² The expression "would see that they had their pay" implies a collateral promise, but if this form of expression was intended and understood as a promise to pay directly, and not conditionally it would be so treated. *Greene v. Burton* (1887), 59 Vt. 423. A promise to an employee of another in these words "Keep on at work just as you have been, we will see you paid," held, to be a collateral undertaking. *Lewis v. Lewis Lumber Co.* (1893), 156 Pa. St. 217.

³ *Emerson v. Slater* (1859), 22 How. 28; *Davis v. Patrick* (1891), 141 U. S. 479; *Johnson v. Knapp* (1873), 36 Iowa, 616; *Board of Commissioners v. Cin. Steam Heating Co.* (1890), 128 Ind. 213. It was held in *Furbish v. Goodnow* (1867), 98 Mass. 296, that if the

principal and immediate object of the transaction is to benefit the promisor, not to secure the debt of another person, the promise is considered not as collateral to the debt of another, but as creating an original debt from the promisor, which is not within the statute, although one effect of its payment may be to discharge the debt of another. The court, per Gray, J., said: "When the original debtor remains liable, yet if the creditor, in consideration of the new promise, releases some interest or advantage relating to or affecting the original debt, and insuring to the benefit of the new promisor, his promise is considered as a promise to answer for his own debt, and the case is not within the statute." *Amer. Lead Pencil Co. v. Wolfe* (1892), 30 Fla. 360.

it is founded on a new consideration moving to the promisor, and beneficial to him, and such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor.¹ In Pennsylvania and some other states it has been held that, except in certain cases in which the contract shows an intention of the parties that the new promisor shall become the principal debtor, and the old debtor become but secondarily liable, while the old debt

¹ *White v. Rintoul* (1888), 108 N. Y. 222, per Finch, J., distinguishing *Leonard v. Vredenburg*, 8 John. 29; *Mallory v. Gillett*, 21 N. Y. 412; *Brown v. Weber*, 38 N. Y. 187, and *Ackley v. Parmenter* (1885), 98 N. Y. 425. The facts in the case of *Rintoul v. White* were as follows: The defendant was a creditor of a firm, and was secured by a chattel mortgage. The plaintiff was the holder of notes of the firm which were nearly matured. The defendant disclosed the fact that he held the mortgage, and promised, if the plaintiff would forbear for a time, to pay the notes. It was held that the promise was within the statute. Rule in *White v. Rintoul* criticised in *Dillaby v. Wilcox* (1891), 60 Conn. 71. In the case of *Leonard v. Vredenburg*, 8 John. 29, one of very high authority and a leading case in New York on the subject, Chief Justice Kent divided the cases under this clause into three classes, as follows: (1) Where the promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the original credit. (2) Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, although the subsisting liability is the ground of the promise. "Here," the chief justice observed, "there must be some further consideration shown, having an immediate respect to such liability, for the consideration of the original

debt will not attach to this subsequent promise." (3) Cases where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. "The two first classes," he further observed, "are within the statute of frauds, but the last is not." In *Farley v. Cleveland*, 4 Cow. 432, the principal was laid down that where a promise to pay the debt of a third person arises out of some new consideration of benefit to the promisor, or harm to the promisee, moving to the promisor, either from the promisee or the original debtor, such promise is not within the statute, although the original debt still subsists and remains entirely unaffected by the new agreement. The subject was very fully and ably discussed by Chief Justice Comstock in *Mallory v. Gillett* (1860), 21 N. Y. 412, and while he in the main approved of the views of the court in *Leonard v. Vredenburg*, he held it necessary to the completeness of the definition of cases coming within the third class before mentioned that the new or original consideration move to the promisor. Many cases were cited and commented upon, English and American. The principle was reaffirmed in *Becker v. Torrance* (1864), 31 N. Y. 631; *Pfeiffer v. Adler* (1867), 37 N. Y. 164; *Brown v. Weber* 1868), 38 N. Y. 187; *White v. Rintoul* (1888), 108 N. Y. 222; *Tighe v. Morrison* (1889), 116 263.

remains the new promise is regarded as collateral and within the statute.¹

§ 513. **The same subject continued.**—The Pennsylvania doctrine is that a promise to answer for the debt or default of another is not within the statute, unless it be collateral to a continued liability of the original debtor. If it be a substitute, an arrangement by which the debt of the other is extinguished, as where the creditor gives up his claim on his original debtor, and accepts the new promise in lieu thereof, it need not be in writing. And, as the cases show it may be unaffected by the statute, though the original debt remains, if the promisor has received a fund pledged, set apart, or held for the payment of the debt. But except in such cases, and others, perhaps, of a kindred nature, in which the contract shows an intention of the parties that the new promisor shall become the principal debtor, and the old debtor become but secondarily liable, the rule is that, while the old debt remains, the new must be regarded as not an original undertaking, and is therefore within the statute.² Where one creditor agrees with another

¹ *Maule v. Bucknell* (1865), 50 Pa. St. 39, in which Strong, J., says in regard to the third class of Chief Justice Kent, before mentioned (note to preceding section) that the proposition is accurate, and practically denies all effect to the statute. "The general rule is, that as long as the debt of the person, for whom the promise is made, remains the promise is collateral." *Steward v. Campbell* (1870), 58 Maine, 439. In *Dillaby v. Wilcox* (1891), 60 Conn. 71, the new promise was held to be collateral "so long as the original debt still subsists as the principal debt." It is stated in the text of the Am. and Eng. Encyc. of Law, *in loco*, that, in a large and increasing number of the states of the Union, the promise, although made upon a new consideration of benefit to the promisor, is held to be collateral, whatever the intent of the parties, if the original liability remains,

and the following authorities are cited in surport of the proposition: *Mitchell v. Griffin*, 58 Ind. 559; *Palmer v. Blain*, 55 Ind. 11; *Krutz v. Stewart*, 54 Ind. 178; *Vaughn v. Smith*, 65 Iowa, 579; *Gill v. Herrick*, 111 Mass. 501; *Dows v. Swett*, 134 Mass. 140; *Ruppe v. Peterson* (1887), 67 Mich. 437; *Ackly v. Parmenter*, 98 N. Y. 425; *Hooker v. Russell*, 67 Wis. 257; *Willard v. Bosshard* (1887), 68 Wis. 454. In California and some other states the law expressly provides when a promise to pay the debt of another is deemed original. "The wisdom of incorporating these exceptions into the statute is not doubtful, as they are mainly such as have been adopted by the courts." Wood on the Statute of Frauds, § 124.

² *Nugent v. Wolfe*, 111 Pa. St. 471; *Maule v. Bucknell*, 50 Pa. St. 39. In *Daugherty v. Bach*, 167 Pa. 429; 31 Atl. Rep. 729, Green, J., said: "In

and with the debtor to pay the debt due such other creditor, in consideration of the transfer of the debtor's property to the

Williams's Saunders, p. 211e, note 1, it is said: 'The question whether each particular case comes within the clause of the statute or not depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.' The doctrine of this note is supported by very many cases, and it is in harmony with the words of the statute. It is incumbent, then, upon him who would enforce a mere verbal promise of one to answer for the debt or default of another, if the original debt remains, to show that his case is one of those that are recognized as exceptional. And it will be found after examination that in nearly all the decisions in which it has been held that such a promise is not within the statute there was some liability of the promisor, or his property independent of his express promise, or that he had become the actual debtor, so that as between him and the original debtor the superior liability was his. The case of *Mallet v. Bateman*, L. R. 1 C. P. 163, comes nearer to this in its facts than any other we have met with. In fact, it is entirely similar in its leading features. Pollock, C. B., delivering the opinion, said: 'The real question here is whether the contract declared upon is not substantially a contract that if Calvert & Co., the buyers of the goods, do not pay for them at the expiration of the month's credit, the defendant will indemnify the plaintiff against their default. In consideration of a discount of three per cent., the defendant undertakes to hold the bill without recourse to the plaintiff. That is, in substance, an engagement by which the buyers

of the goods are not to be exonerated, but the defendant is to indemnify the seller against their default. That is clearly a contract within the statute of frauds.' This case was an appeal from the common pleas to the exchequer chamber, and both courts concurred in the ruling. The learned counsel for the plaintiffs claims that this decision is in conflict with our own cases of *Arnold v. Stedman*, 45 Pa. St. 186; *Taylor v. Preston*, 79 Pa. St. 436, and *Townsend v. Long*, 77 Pa. St. 143; but an examination of those cases fails to disclose any hostility to *Mallet v. Bateman*, but shows that they were all cases which were taken out of the operation of the statute by the exceptional circumstances previously indicated. *Arnold v. Stedman* was decided upon the express ground that Arnold's verbal promise was to pay a debt which was a mechanic's lien upon his own property, and in which he was interested to have the proceedings on the lien suspended. In *Taylor v. Preston* the promise was by the assignee of a vendee under articles to pay unpaid purchase-money named in the articles; and we held that the promisor was bound to pay it, because it was his own debt. So also, in *Townsend v. Long* the promisor bought out an entire partnership stock, and agreed to pay, as part consideration of the purchase, all the debts of the firm, one of which was due to a former partner, who had sold his interest to the other members for \$700, and this debt was also specially named in the transfer. We held the promisor liable on this promise, because it was his own debt which he had agreed to pay, in consideration of the property sold to him. We made the same ruling in *Wynn v. Wood*, 97 Pa. St. 216. We have not been re-

promisor, the promise rests on a consideration of such character as to make the promise original, and take it out of the statute of frauds.¹

§ 514. Further illustrations.—The Alabama rule is that, where any credit is extended to the party to whom the consideration moves—where he is looked to at all for payment, although the other party may be in much greater degree relied on—the debt is his, and the other party's obligation is that of guarantor, which, to be binding, must be in writing.² Where a lumber dealer had an arrangement to furnish lumber to his landlord in payment of the rent, and the landlord ordered a certain kind of lumber of the tenant, who, not having it, gave the order to another lumber dealer, and the latter refused to send

ferred to any case, nor have we met with any, in which a transaction like the present has been held to be clear of the statute. We are of opinion that the promise of the defendant, Bash, was in reality a promise to pay the debt of another, without any acquisition of property as a consideration therefor, and without the presence of any of the exceptional circumstances which prevent the application of the statute. Being only a verbal promise, it is void, under the statute."

¹ *First Nat. Bank v. Chalmers* (1895), 144 N. Y. 432; 39 N. E. Rep. 331, per Finch, J.: "What constitutes an original promise, upon which the statute of frauds does not operate, and which, therefore, may be valid and effectual without a writing, is fairly settled in one direction at least. Wherever the facts show that the debtor has transferred or delivered to the promisor, for his own use and benefit, money or property in consideration of the latter's agreement to assume and pay the outstanding debt, and he thereupon has promised the creditor to pay, that promise is original, upon the ground that, by the acceptance of the fund or property

under an agreement to assume and pay the debt, the promisor has made that debt his own, has become primarily liable for its discharge, and has assumed an independent duty of payment, irrespective of the liability of the principal debtor. *Ackley v. Parmenter*, 98 N. Y. 425; *White v. Rintoul*, 108 N. Y. 222; 15 N. E. Rep. 318. In such a case the debt has become that of the new party promising. His promise is not to pay the debt of another, but his own. As between him and the primary debtor, the latter has become practically a surety, entitled to require the payment to be made by his transferee. The consideration of the primary debt by the transfer of the money or property into which that consideration had been in effect merged may be said to have been shifted over to the new promisor, who thereby comes under a duty of payment as obvious as if such original consideration had passed directly to him."

² 8 Am. and Eng. Encyc. of Law, 674 (note 6), 678, 679, notes; *Foster v. Napier*, 74 Ala. 393; *Boykin v. Dohlonde*, 37 Ala. 577; *Marx v. Bell*, 48 Ala. 497; *Clark v. Jones*, 87 Ala. 474; 6 So. Rep. 362.

the lumber until the tenant guarantied payment therefor, and the seller charged the lumber to the landlord, and, on failing to collect from him, sued him and the tenant, it was held that the promise of the tenant was a contract to answer the debt of another, and void, because not in writing.¹ An agreement between two creditors of a common debtor, that each will share the loss, if any, which the other sustains on his claim against such debtor, is a "promise to answer for the debt, default or miscarriage of another person," within the statute of frauds.²

§ 515. Illustrations of original agreements.—In the following cases the promise has been held binding without writing; where the debtor has put into the hands of the promisor the amount of his debt,³ or transferred to him property equivalent;⁴

¹ *Webb v. Hawkins Lumber Co.* (1893), 101 Ala. 630; 14 So. Rep. 407.

² *Spear v. Farmers', etc., Bank*, 156 Ill. 555; 41 N. E. Rep. 164, per Phillips, J.: "The principal question presented for consideration is whether the alleged agreement between Spear and the bank, as alleged in the bill, is within that provision of the statute of frauds and perjuries, 'that no action shall be brought * * * whereby to charge the defendants upon any special promise to answer for the debt, default or miscarriage of another person,' unless the promise be in writing, and signed by the person to be charged. The determination of this question is dependent on whether the agreement is an original and independent one, or whether collateral to the agreement of another person, whereby the promise is to answer for the debt or default of that other. In the first case, it is not within the statute; in the second, it is. *Eddy v. Roberts*, 17 Ill. 505; *Ressester v. Waterman*, 151 Ill. 169; 37 N. E. Rep. 875. The question whether an agreement is an original and independent one is often attended with much difficulty in its determination. In this case *Thompson & McLean* were

primarily liable, and the principal debtors, and, if the agreement was made as claimed, their liability was in no manner changed thereby. By their discharge of their indebtedness, neither party to the agreement would have had to pay any sum to the other, even if the agreement had been in writing, and a sufficient consideration for the promise of each to the other. The promise, if any was made by the bank, was a collateral promise. There was no change in the original indebtedness, the original debtors remaining liable to the original creditors, precisely the same as when the indebtedness was originally contracted."

³ *Robinson v. Gilman*, 43 N. H. 485; *Hilton v. Dinsmore*, 21 Maine, 410; *Lawrence v. Fox*, 20 N. Y. 268; *Blunt v. Boyd*, 3 Barb. 209.

⁴ *Skelton v. Brewster*, 8 John. 376 (delivered goods); *Gold v. Phillips*, 10 John. 412 (conveyed land); *Farley v. Cleveland*, 4 Cow. 432; 9 Cow. 639; *Ellwood v. Monk*, 5 Wend. 235; *Barker v. Bucklin*, 2 Denio, 45; *Pike v. Brown*, 7 Cush. 133; *Alger v. Scoville*, 1 Gray, 391; *Preble v. Baldwin*, 6 Cush. 549; *Todd v. Tobey*, 29 Maine, 219; *Dearborn v. Parks*, 5 Maine, 81;

or something of equivalent advantage to himself,¹ or where the promisee has transferred or released to the promisor some interest in the property of the debtor;² as a lien given by law to the seller for the price of goods sold, but not delivered;³ or to a landlord upon the goods of his tenant for rent;⁴ or where the promisee has released to the promisor and holder of the property an attachment, or a trustee process;⁵ or where he has released to the promisor the right to attach property of the debtor,⁶ or to bring a suit to enforce a lien.⁷ A promise to answer for a party not legally competent to contract need not be in writing. The liability of the party for whom the guaranty is given must be a legal liability to bring it within the statute,⁸ and there must be a clearly defined liability of the third person.⁹

§ 516. Where the promisor holds the debtor's funds, or where the old debt is extinguished.—Where the person promising to pay the debt receives funds or property of the debtor

Bird v. Gamman (1837), 3 Bing. N. C. 883; *Browning v. Stallard*, 5 Taunt. 450; *Wait v. Wait*, 28 Vt. 350; *Olmstead v. Greenly*, 18 John. 12 (money and property placed in hands of defendant to provide for paying the debt); *Meech v. Smith*, 7 Wend. 317; *Gardiner v. Hopkins*, 5 Wend. 23; *King v. Despard*, 5 Wend. 277; *Whitbeck v. Whitbeck*, 9 Cow. 266; *Bailey v. Bailey* (1883), 56 Vt. 398 (conveyance of property to defendant); *Merrill v. Englesby*, 28 Vt. 150; *Smith v. Est. of Rogers*, 35 Vt. 140.

¹ *Walker v. Taylor*, 6 C. & P. 752 (license to keep a public house).

² *Barrell v. Trussell*, 4 Taunt. 117; *Tomlinson v. Gill*, Ambler, 330.

³ *Fitzgerald v. Dressler*, 5 C. B. (N. S.) 885.

⁴ *Williams v. Leper*, 3 Burr. 1886; *Slingerland v. Morse*, 7 John. 463; *Thomas v. Williams*, 10 B. & C. 664; *Edwards v. Kelly*, 6 M. & S. 204; *Bampton v. Paulin*, 4 Bing. 264; *Stephens v. Pell*, 2 C. & M. 710.

⁵ *Cross v. Richardson*, 30 Vt. 641.

⁶ *Lampson v. Hobart*, 28 Vt. 697.

⁷ *Fish v. Thomas*, 5 Gray, 45.

⁸ *Harris v. Huntbach*, 1 Burr. 373; *Chapin v. Lapham*, 20 Pick. 467, where a father requested a merchant to assist his minor son in business and promised verbally to indemnify him against any loss he might incur in so doing.

⁹ In an Ohio case, the defendant, who was a stockholder, and also president of a corporation, being desirous to have the stock of the corporation taken, verbally promised the plaintiff that if he would subscribe and pay \$500 into the capital stock of the corporation, he should receive fifteen per cent. on that amount within one year. It was held that this was not a contract to answer for the debt, default, or miscarriage of another, but an original undertaking, and no dividend having been declared or earned within a year, the defendant was held liable upon his promise. *Moorehouse v. Crangle*, 36 Ohio St. 130; 38 Am. Rep. 564.

for the purpose of paying his debt, and, thus holding the debtor's funds or property, promises the creditor to pay the debt, such promise is held to be an original one and good, although not in writing, because the party promises substantially to pay his own debt, and not that of another; and, although the debtor still remains liable, his relation is not so much that of a principal in the transaction, but rather that of a surety for the party who has promised to pay his debt.¹ The cases which decide that, where a creditor holds a security for his debt, and surrenders it to a third person for his own benefit, upon his promise to be answerable for the debt, stand upon the same principle.² When, by the new promise, the old debt is extinguished, as where the creditor gives up his claim on the original debtor and accepts the new promise in lieu thereof, the promise is not within the statute; it is not then a promise to pay the debt of another, but an original contract.³ If the contract is such that, either by its terms, or by legal operation, it substantially transfers the debt to the promisor, it is not within the statute.⁴

¹ *Dillaby v. Wilcox* (1891), 60 Conn. 71; *Fullam v. Adams* (1864), 37 Vt. 391; *Mason v. Wilson* (1881), 84 N. C. 51; 37 Am. Rep. 612; *Cock v. Moore*, 18 Hun, 31; *Dock v. Boyd*, 93 Pa. 92; *Wynn's Admr. v. Wood*, 97 Pa. St. 216; *Bailey v. Bailey*, 56 Vt. 398; *Walden v. Karr*, 88 Ill. 49; *Woodruff v. Scaife* (1887), 83 Ala. 152; *Lee v. Fontaine*, 10 Ala. 755; *Maule v. Bucknell* (1865), 50 Pa. St. 39.

² The early case of *Williams v. Leper*, 3 Burr. 1886, was the starting point of this class of cases. In that case the landlord was about distraining for rent, and the defendant, a broker, who was employed to sell the goods, promised to pay the rent if the plaintiff would forbear to distrain. The object and purpose of the promise were not to pay the debt of another, but to obtain a transfer of

the plaintiff's interest in the goods. Lord Mansfield said the defendant was a trustee for all the creditors. *Castling v. Aubert* (1802), 2 East, 325 (a leading case); *Walker v. Taylor*, 6 Car. and P. 752; *Hughes v. Fisher* (1887), 10 Colo. 383; *Allen v. Thompson*, 10 N. H. 32.

³ *Curtis v. Brown*, 5 Cush. 488; *Maule v. Bucknell*, 50 Pa. St. 39; *Booth v. Eighmie* (1875), 60 N. Y. 238; *Watson v. Jacobs* (1857), 29 Vt. 169; *Walker v. Penniman*, 8 Gray, 233; *Skelton v. Brewster*, 8 John. 376; *Packer v. Benton*, 35 Conn. 343; *Mulcrone v. Amer. Lumber Co.* (1885), 55 Mich. 622; *Anderson v. Davis*, 9 Vt. 136; *Cook v. Barrett*, 15 Wis. 596; *Shaffer v. Ryan*, 84 Ind. 140; *Birkmyr v. Darnell*, 1 Salk. 27; *Smith's Leading Case* and notes.

⁴ *Cross v. Richardson*, 30 Vt. 641.

§ 517. Relinquishment of lien—The modern rule.—Where a creditor has a lien on his debtor's property, and a third person, having a subordinate lien, or other interest in the same property, promises the creditor to pay the debt in consideration of the relinquishment of the lien, which thus inures to the promisor's benefit, the statute does not apply. The old rule was that a verbal promise to pay another's debt would be supported by a mere surrender of a lien on the property of the original debtor, whether made for his benefit or that of the new promisor. The current of modern authority, however, sustains the view that the new promisor must have an interest of some kind in the property to which the lien attached, so that the surrender will inure to his benefit.¹

¹ *Westmoreland v. Porter* (1883), 75 Ala. 452; *Dexter v. Blanchard* (1865), 11 Allen (Mass.) 365; *Mallory v. Gillett* (1860), 21 N. Y. 412. In this case the plaintiff had in his possession a canal boat belonging to A., and, having a lien upon it for repairs made by him, he delivered it to A. at the defendant's request, and upon his verbal promise to pay the amount due. There was no pretence that the defendant's promise was given or accepted as a substitute for the original demand, or that such demand was in any manner extinguished. It was held that, there being no new consideration moving to the defendant, his promise was void. The following, among other cases, were referred to and commented upon: *Barker v. Birt*, 10 Mees. & W. 61; *Haigh v. Brooks*, 10 Ad. & E. 309; *Barrell v. Trussell*, 4 Taunt. 117; *Meredith v. Short*, 1 Salk. 25; *Castling v. Aubert*, 2 East, 325; *Walker v. Taylor*, 6 Cor. & P. 752; *Williams v. Leper*, 3 Burr. 1886; *Houlditch v. Milne*, 3 Esp. 86; *Bird v. Gammon*, 3 Bing. N. C. 883; *Bampton v. Paulin*, 4 Bing. 264; *Stephens v. Pell*, 2 Crompt. & Mees. 710; *Read v. Nash*, 1 Wils. 305; *Fish v. Hutchinson*, 2 Wils. 94; *Clancy v. Piggott*, 2 Ad. & E. 473; *Tomlinson v.*

Gell, 6 Ad. & E. 564. The modern doctrine upon the subject is said to derive its origin from *Nelson v. Boynton* (1841), 3 Metc. 396. The creditor in that case sued his debtor and seized his property under an attachment. The defendant promised to pay the debt in consideration of a discontinuance of the suit. The suit was discontinued accordingly, and the lien of the attachment was thereby lost, but the debt remained against the original debtor. It was held, Shaw, C.J., delivering the opinion, that the promise was void, not being in writing. He stated that "cases are not considered as coming within the statute when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but, where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute." *Wills v. Brown* (1875), 118 Mass. 137; *Burr v. Wilcox* (1866), 13 Allen (Mass.) 269; *Corkins v. Collins*, 16 Mich. 478; *Dunbar v. Smith* (1880), 66 Ala. 490 (action on bill of exchange); *Crawford v. King* (1876), 54 Ind. 6; *Scott v. White* (1874), 71 Ill. 287; *Borchsenius v. Canutson*, 100 Ill. 82; *Power v. Ran-*

§ 518. **Independent promise releasing another.**—An independent promise absolutely to pay the debt of another, and not on condition of his default, and which in fact releases him, is not a promise to pay the debt of another within the meaning of the Kentucky statute of frauds.¹ Where one of two creditors of a firm agrees with the other that he will pay the latter's debt if he will not sue the firm and garnish funds which the promisee has in his control as treasurer of a company which is indebted to such firm, and the promisee thereupon discharges such firm, the promise is not within the statute of frauds.² Where defendants contracted to build a road for a railway company, but sublet the contract to others, who assigned to defendants all money due the laborers, and defendants agreed to pay to the laborers the amount assigned, and the subcontractors abandoned the work, and gave time checks to the laborers and plaintiff bought the time-checks, and defendants promised to pay them, whereupon plaintiff, with defendants' knowledge, released the subcontractors, it was held that defendants were liable upon the promise, and that the agreement was not within the statute of frauds.³

kin, 114 Ill. 52; *Throop on Verbal Agreements*, § 594.

¹ *Fain v. Turner* (Ky. 1895), 29 S. W. Rep. 628, per Lewis, J.: "If, however, it could be regarded as a debt due from any person, still, according to uniform construction of the statute by this court, the promise by Mrs. Rolinda Turner would not be inhibited, because whoever, if any person, may have owed them, was released, and hers was an independent promise to pay absolutely, not on condition of default or misdoing of another. *Waggener v. Bells*, 4 T. B. Mon. 8; *Day v. Cloe*, 4 Bush, 563; *Myles v. Myles*, 6 Bush, 237."

² *First Nat. Bank v. Border* (Texas App. 1895), 29 S. W. Rep. 659, Kesey, J.: "As to the statute of frauds, the petition does not disclose that the promise sued on was verbal, and not in writing. But, if it had done so, it

also shows that, by the terms of the agreement, appellant became primarily and unconditionally liable, and Burns & Dillon, the original debtors, were discharged. In such a case the statute of frauds does not apply. *Warren v. Smith*, 24 Texas, 484."

³ *Gleason v. Fitzgerald* (Mich. 1895), 63 N. W. Rep. 512, Grant, J.: "The case is controlled by *Mulcrone v. American Lumber Co.*, 55 Mich. 622; 22 N. W. Rep. 67." In *Upham v. Clute* (Mich. 1895), 63 N. W. Rep. 317, an order was drawn by M. on defendant, in favor of plaintiff, and defendant at the time was indebted to M., and the amount of the order, when collected, was to be applied on the indebtedness of M. to plaintiff; but there was no novation, nor was there a previous agreement to accept the order. *Held*, that an oral acceptance thereof was within *Howell's Annotated Statutes*,

§ 519. **Del credere commission.**—It was formerly held that the contract of a factor binding him in the terms implied in a *del credere* commission was a collateral obligation and within the statute,¹ but the later cases do not so hold. The under-

§ 6185, which makes invalid the oral promise to pay the debt of another. Montgomery, J., said: "The case can not be distinguished from Pfaff v. Cummings, 67 Mich. 143; 34 N. W. Rep. 281, which is very similar in its facts. In that case it was said by Mr. Justice Campbell: 'We have two statutes of frauds which govern the suit, both on the special and on the common counts. One makes invalid the unwritten promise to pay the debt of another [citing Howell's Annotated Statutes, § 6185, subd. 2], and the other forbids action on any unwritten acceptance [citing Howell's Annotated Statutes, § 1583].' Plaintiff relies on Mitts v. McMorran, 64 Mich. 664; 31 N. W. Rep. 521. In that case there was a precedent arrangement between Boynton, the debtor, and Mitts, by which Boynton agreed to give the order, and an agreement by McMorran to accept the order. The order was then obtained, and presented to McMorran, who verbally promised to pay the same. The payment, by the terms of the order, was to be made out of means of Boynton which were to come into the hands of McMorran; the case showing that Boynton had assigned to McMorran a contract upon which a sum of money was to become due to Boynton, and that this assignment was as security for advances to be made by McMorran. The court says: 'If the testimony showed only that McMorran promised to pay Boynton's indebtedness to Mitts when he received certain moneys from Pittsburgh which belonged to himself, the promise would have been collateral, and void under the statute of frauds. But there was evi-

dence which tended to show that Boynton had placed in defendant's hands a fund or means of obtaining money belonging to Boynton, and at Boynton's request, and by the consent of Mitts, defendant promised Mitts to pay him the debt which Boynton owed him out of the money which should be received by him, belonging to Boynton. This would be an original promise, and not within the statute of frauds.' So it has been held in other cases that where the verbal promise to accept an order is in effect a promise to disburse funds held by the drawee for the purpose, or where the acceptance is conditional on having funds of the drawer on hand, such verbal promise is enforceable. Sturges v. Fourth Nat. Bank, 75 Ill. 595; Hughes v. Fisher, 10 Colo. 383; 15 Pac. Rep. 702; Comstock v. Norton, 36 Mich. 277. But no such state of facts is shown in the present record. Here we have the simple case of an order drawn by a creditor upon his debtor, and a verbal acceptance. There is no novation. There is no agreement to disburse funds belonging to the drawer, by the drawee, and we think the case clearly falls within the prohibition of the statute."

¹ Morris v. Cleasby, 1 M. & Sel. 576; Peele v. Northcote, 7 Taunt. 478. A *del credere* commission is one under which the agent, in consideration of an additional premium, engages to insure to his principal not only the solvency of the debtor, but the punctual discharge of the debt; and he is liable in the first instance, without any demand from the debtor. Bouvier's Law Dictionary, p. 497.

taking of the factor is to answer for the solvency of the buyers of the goods. He becomes liable to pay to the principal the amount of the purchase-money, if the buyers fail to pay it when it becomes due, and his engagement is held to be an original and absolute one and not within the statute.¹ Although the factor may sue the purchaser in his own name the principal has also the right to sue. This, however, does not convert an express original undertaking of the factor with his principal, absolutely to pay the debt at maturity, into a collateral and conditional agreement to pay it if the purchaser does not.²

§ 520. As to contracts of indemnity.—There is an important difference between a contract of guaranty and one of indemnity. The former is a collateral undertaking, and presupposes some contract or transaction to which it is collateral.³ A contract of indemnity is generally held to be an original one and not within the statute, although there has been much conflict of authority on the question, produced in no inconsiderable degree by the conflicting decisions of the English courts.⁴ The reason-

¹ *Bradley v. Richardson* (1851), 23 Vt. 720; *Suman v. Inman* (1878), 6 Mo. App. 384; *Wolff v. Koppel*, 5 Hill, 458; 2 Denio, 368. In this case Judge Curran said: "It may not be strictly correct to call the contract of a factor a guaranty in the ordinary sense of the word. * * * He takes an additional commission, however, and adds to his obligation that he will make no sales except to persons absolutely solvent; in legal effect, that he will be liable for the loss which his conduct may bring upon the plaintiff, without the onus of proving negligence. The merchant holds the goods and will not part with them to the factor without this extraordinary stipulation, and a commission is paid to him for entering into it. What is this, after all, but another form of selling the goods? Its consequences are the same in sub-

stance." This ruling was followed in England, in *Couturier v. Hastie*, 8 Exch. 40, where Parke, J., speaks of the decision as a very able one, and adopts the reasoning in the case. *Wickham v. Wickham*, 2 K. & J. 478; *Swan v. Nesmith*, 7 Pick. 220; *Osborne v. Baker*, 34 Minn. 307; 57 Am. Rep. 55; Story on Agency, § 215.

² *Sherwood v. Stone*, 14 N. Y. 267.

³ *Anderson v. Spence*, 72 Ind. 315; *Dole v. Young*, 24 Pick. 250; *Taylor v. Taylor*, 64 Ind. 356; Story on Promissory Notes, § 457.

⁴ *Jones v. Bacon* (1893), 72 Hun, 506; *Anderson v. Spence* (1880), 72 Ind. 315; 37 Am. Rep. 162. The old case of *Winckworth v. Mills*, 2 Esp. 484, held that a promise of indemnity was within the statute, but in *Thomas v. Cook* (1828), 8 B. & C. 728, the contrary doctrine was declared. Bayley, J., said: "A promise to indemnify

ing of the courts, which hold that the promise of indemnity is not within the statute, is not always the same. The more common one is, that the promise must be made to the creditor, to be within the statute; that a promise to the debtor to pay his debt to the creditor, or to a surety to indemnify him for becoming surety for a third person to a fourth, is an original and not a collateral undertaking when the promisee acts solely on the promise of the promisor.¹

§ 521. Oral promise to indemnify guarantor not within the statute.—An oral promise by one person to indemnify another for becoming a guarantor for a third is not within the statute of frauds, and need not be in writing, and the assumption of

does not, as it appears to me, fall either within the words or the policy of the statute of frauds.” This case was overruled in *Green v. Cresswell* (1839), 10 A. & E. 453. The doctrine of *Green v. Cresswell* was in turn overthrown in *Reader v. Kingham* (1862), 13 C. B. (N. S.) 344, and *Wildes v. Dudlow* (1874), L. R. 19 Eq. 198, and the doctrine in England is now that a promise to indemnify the promisee for becoming surety for another is not within the statute, and the same doctrine generally prevails in this country.

¹*Demeritt v. Bickford*, 58 N. H. 523, citing authorities; *Throop on Verbal Agreements*, §§ 361, 427, *et seq.*; *Reed v. Holcomb*, 31 Conn. 360; *Jones v. Shorter*, 1 Ga. 294; *Mills v. Brown*, 11 Iowa, 314 (promise to indemnify one if he will be surety for another); *Hoggatt v. Thomas* (1883), 35 La. Ann. 298 (one surety binding himself to hold a cosurety harmless); *Sanders v. Gillespie*, 59 N. Y. 250 (oral agreement to pay note); *Chapin v. Merrill*, 4 Wend. 657 (promise of defendant to indemnify the plaintiff from the consequences of his agreement to pay a mercantile firm for goods delivered to another who was the purchaser); *Ap-*

gar v. Hiler, 24 N. J. Law, 812 (promise of surety to cosurety); *Aldridge v. Ames*, 9 Gray, 76 (promise to indemnify another from his liability as bail for a third person); *Potter v. Brown*, 35 Mich. 274 (promise to pay note); *Comstock v. Morton*, 36 Mich. 277; *Beaman v. Russell*, 20 Vt. 205; *Jones v. Letcher*, 13 B. Mon. 363; *Smith v. Sayward*, 5 Greenl. (Maine) 504; *Chapin v. Lapham*, 20 Pick. 467; *Vogel v. Melms*, 31 Wis. 306. *Contra*, *Brand v. Whelan* (1885), 18 Ill. App. 186; *Ferrell v. Maxwell* (1876), 28 Ohio St. 383 (a promise of indemnity by one not a party to an obligation to induce another to become surety thereon); *May v. Williams* (1883), 61 Miss. 125; 48 Am. Rep. 80 (to indemnify a person for becoming surety on another's bail bond, citing cases); *Bissig v. Britton*, 59 Mo. 204; *Simpson v. Nance*, 1 Spears (S. C.), 4; *Macey v. Childress*, 2 Tenn. Ch. 438; *Nugent v. Wolfe*, 111 Pa. St. 471; 56 Am. Rep. 291; *Hollowbush's Estate*, 13 Phila. 217. Even in cases where *Green v. Cresswell*, 10 A. & E. 453, is upheld the doctrine that a new consideration inuring to the benefit of the promisor will take the case out of the statute is countenanced.

the responsibility is a sufficient consideration for the promise.¹ So, also, a promise to indemnify one for becoming the surety on the note of another is an original promise, and not within the statute of frauds.² A negotiable promissory note imports consideration, and, when made as collateral security, sufficiently

¹ *Jones v. Bacon* (1895), 145 N. Y. 446, per Andrews, C. J.: "The oral promise of the defendant's testator to the plaintiff was, in substance, a promise of indemnity in case the plaintiff would become indorser on the note of Kingsbury to the banking firm of McKechnie & Co. for a debt of Kingsbury to the bank. The plaintiff thereupon indorsed the note of Kingsbury to the bank, and has been compelled to pay thereon the sum of about \$16,000, Kingsbury having made default and being insolvent. This is a statement of the facts in the simplest form, and the question arises whether the oral promise by the defendant's testator to indemnify the plaintiff was void under the statute of frauds, as being a promise to 'answer for the debt, default or miscarriage of another person.' 2 Rev. St. 135, § 2, sub. 2. This is no longer an open question in this state. It was decided in *Chapin v. Merrill*, 4 Wend. 657, that a promise by one person to indemnify another for becoming a guaranty for a third is not within the statute and need not be in writing, and that the assumption of the responsibility was a sufficient consideration for the promise. The doctrine of *Chapin v. Merrill*, 4 Wend., was approved in *Mallory v. Gillett*, 12 N. Y. 412, in *Sanders v. Gillespie*, 59 N. Y. 250, and *Tighe v. Morrison*, 116 N. Y. 263, and in other cases in this court. The same doctrine now prevails in the English courts. *Thomas v. Cook*, 8 Barn. & C. 728; *Reader v. Kingham*, 13 Com. Bench N. S. 344; *Wildes v. Dudlow*, L. R. 19 Eq. Cas. 198. We do not deem it proper to reopen the discussion or to refer to

cases where a different view has prevailed."

² *George v. Hoskins* (Ky. 1895), 30 S. W. Rep. 406, per Poynter, J.: "It is an original undertaking, not within the statute of frauds, and enforceable although the promise be a verbal one. *Dunn v. West*, 5 B. Mon. 376. It is also held in *Lucas v. Chamberlain*, 8 B. Mon. 276, that a promise of indemnity to one if he will become the surety of another is an original promise, not within the statute of frauds. We might extend the discussion further, but as this court has so often in its opinions marked the distinction between a promise to answer for the debt of another and a promise made to the debtor, and has also so fully shown promises which are original undertakings and not within the statute of frauds, we deem a further discussion of the question unnecessary, except to cite, for the purpose of sustaining our views, *Jones v. Letcher*, 13 B. Mon. 363; *Williams v. Rogers*, 14 Bush, 776; *Spadone v. Reed*, 7 Bush, 455; *North v. Robinson*, 1 Duv. 71; *Brashear v. Moran*, 1 Ky. Law Rep. 417. However, we will notice the case of *Jones v. Walker*, 13 B. Mon. 356, which is relied upon by counsel for appellant as sustaining his contention that the promise, if made, was within the statute of frauds. Judge Marshall delivered the opinion of the court in that case, as he did in *Dunn v. West*, 5 B. Mon. 376, and *Lucas v. Chamberlain*, 8 B. Mon. 276, but makes no reference to either, showing he did not regard the cause as analogous, or that there was any conflict between them. *Jones v.*

expresses the consideration, so as in this respect to comply with the statute of frauds.¹

§ 522. The same subject continued.—The Nebraska doctrine is that, in this country, the weight of authority is in favor of the rule that the verbal promise of a first person to a second person, to indemnify him if he will become surety for a third person for the debt of the latter to a fourth person, is not a promise on the part of the first person to answer for the debt of the third person, and is not within the statute of frauds.²

Walker was an action on a verbal promise which a third party made to the creditor that he would pay him a debt due by another. It is distinctively an action on a verbal promise to pay the debt of another, and very properly held to be within the statute of frauds."

¹ *Nichols, etc., Co. v. Dedrick* (Minn. 1895), 63 N. W. Rep. 1110.

² *Minick v. Huff* (1894), 41 Neb. 516; 59 N. W. Rep. 795, *Ragan, C.* "The following cases, and perhaps others, sustain the rule stated. *Sanders v. Gillespie*, 59 N. Y. 250; *Yale v. Edgerton*, 14 Minn. 194 (Gil. 144); *Goetz v. Foos*, 14 Minn. 265 (Gil. 196); *Horn v. Bray*, 51 Ind. 555; *Mills v. Brown*, 11 Iowa, 314; *Garner v. Hudgins*, 46 Mo. 399; *Vogel v. Melms*, 31 Wis. 306; *Green v. Brookins*, 23 Mich. 48; *Potter v. Brown*, 35 Mich. 274; *Perley v. Spring*, 12 Mass. 297; *Chapin v. Lap- ham*, 20 Pick. 467; *Aldrich v. Ames*, 9 Gray, 76; *Apgar's Admrs. v. Hiler*, 24 N. J. Law, 812. These cases followed the doctrine of the English case. *Thomas v. Cook*, 8 Barn. & C. 728. On the other hand, such a promise is held to be within the statute in *Easter v. White*, 12 Ohio St. 219; *Kelsey v. Hibbs*, 13 Ohio St. 340; and these cases, and others like them, follow the doctrine of the English case. *Green v. Cresswell*, 10 Adol. & E. 453. We think the cases first above cited as sustaining the rule are in accord with the weight of authority, both in

this country and in England, and we cheerfully follow those cases." In *Smith v. Delaney* (1894), 64 Conn. 264; 29 Atl. Rep. 496, *Fenn, J.*, said: "The main inquiry, upon the facts found, is whether the contract therein stated is within the statute of frauds. The law upon this subject, namely, whether contracts of indemnity are special promises to answer for the default or miscarriage of another, or are original undertakings, has been correctly said (8 Am. and Eng. Encyc. of Law, p. 673), to be 'in a state of hopeless confusion, arising almost wholly from the different views taken of the scope of the statute. Where *Thomas v. Cook*, 8 Barn. & C. 728, is law, and the statute is confined to contracts of suretyship, results are reached entirely different from those obtained where *Green v. Cresswell*, 10 Adol. & E. 453, is followed, and contracts of indemnity are included in its scope.' In favor of the view of *Green v. Cresswell*, that contracts of indemnity are within the statute, the case of *Nugent v. Wolfe*, 111 Pa. St. 471; 4 Atl. Rep. 15, cited by the defendant, and in favor of the opposite view, held in *Thomas v. Cook*, 8 B. & C. 728, the case of *Davis v. Patrick*, 141 U. S. 479; 12 Sup. Ct. Rep. 58, cited by the plaintiff, may be regarded as among the leading authorities. Doubtless, in England, the latter case of *Green v. Cresswell*, 10 A. & E. 453, has been practically overruled,

§ 523. **Agreements in consideration of marriage.**—Whatever may have been the earlier decisions upon the question,¹ the law is now well settled that a promise to marry is not a promise “in consideration of marriage” so as to require it to be evidenced by writing, under the statute of frauds.² A dis-

and the authority of *Thomas v. Cook*, 8 B. & C. 728, fully restored. *Wildes v. Dudlow*, L. R. 19 Eq. 198; *Yorkshire Wagon Co. v. Maclure*, L. R. 19 Ch. Div. 478. *Thomas v. Cook*, 8 B. & C. 728, is also followed in a majority of the American states. *Browne on Statute of Frauds*, § 161c. But it is unnecessary to examine the authorities elsewhere, more at large, because the question is not now a new one in our own jurisdiction. The cases of *Stocking v. Sage*, 1 Conn. 519; *Marcy v. Crawford*, 16 Conn. 549; *Reed v. Holcomb*, 31 Conn. 360, and *Clement's Appeal*, 52 Conn. 464—all bear more or less directly upon the question before us; and, although *Reed v. Holcomb*, 31 Conn. 360, and *Clement's Appeal*, 52 Conn. 464, have been thought by various courts and text-writers to be somewhat in conflict, we do not so think, but that, from a fair examination of both, the true rule, to which both are consistent, may be discovered. In *Reed v. Holcomb*, 31 Conn. 360, where the plaintiff indorsed a note of a third party, at the request of the defendant, and upon his oral promise to see it paid, and to save him harmless if it was not paid by the makers, it was held that the statute of frauds did not apply to the case. In *Clement's Appeal*, in which no reference was made, either by counsel on either side or by the court, to *Reed v. Holcomb*, 31 Conn. 360, *Brainerd* indorsed notes for *Goodwin*, at the request of his father, and on the father's oral promise to save him harmless. It was held that this promise was void under the statute of frauds, because not in writing. The distinction between the two cases was the principle on which *Reed v.*

Holcomb was expressly stated to rest. In *Clement's Appeal*, 52 Conn. 464, although the promisor was the father of the maker of the notes, and, as such, actuated by parental affection, he had no legal or pecuniary interest whatever, so far as the record disclosed, in the transaction. In *Reed v. Holcomb*, 31 Conn. 360, the transaction was for the benefit of the defendant. Without consulting the plaintiff he had taken the note of a firm indebted to him, payable to the order of the plaintiff, doing so for the purpose of getting the plaintiff's indorsement, that he might get the note discounted at the bank.”

¹ *Philpott v. Wallet*, 3 Lev. 66; *Skin. 24*; overruled by *Cork v. Baker*, 1 Str. 34, and *Harrison v. Cage*, 1 Lord Ray. 386.

² *Short v. Stotts* (1877), 58 Ind. 29; *Clark v. Pendleton*, 20 Conn. 495; *Caylor v. Roe* (1884), 99 Ind. 1; *Wilbur v. Johnson*, 58 Mo. 600; *Ogden v. Ogden*, 1 Bland. (Md.) 284; *Morgan v. Yarborough*, 5 La. Ann. 316; *Hoitt v. Moulton*, 21 N. H. 586; *Derby v. Phelps*, 2 N. H. 515; *Withers v. Richardson*, 5 T. B. Mon. 94; 17 Am. Dec. 44; *Nichols v. Weaver*, 7 Kan. 373; *Blackburn v. Mann*, 85 Ill. 222. The reason of the provision requiring agreements in consideration of marriage to be in writing is to prevent promises thoughtlessly made or artfully procured during courtship from being perverted into deliberate and solemn engagements, conferring a right to compel performance. *Dunn v. Tharp*, 4 Ired. (N. C.) Eq. 7. In New York and many other states mutual promises to marry are in terms excepted from the statute.

inction has been made between agreements in consideration of marriage and agreements in contemplation of marriage. Where parties, contemplating marriage, agreed that certain promissory notes which were held by the woman against the man should not be extinguished by the marriage, but should remain her separate property, collectible out of his estate, if she would forbear to insist on their payment before marriage; it was held that the antenuptial promise was made in consideration of forbearance, and not in consideration of marriage, and was not within the statute.¹

§ 524. The same subject continued.—Antenuptial contracts.

—All promises or agreements made in consideration of marriage, whether between the parties to the marriage, or with a third person, must be in writing or no action can be maintained upon them, either in the way of enforcing them, or for damages for a breach of them.² Antenuptial contracts, by

¹ *Riley v. Riley*, 25 Conn. 154; *Rainbolt v. East*, 56 Ind. 538. Letters or correspondence before marriage may furnish the written evidence of the agreement required. *Peck v. Vandemark* (1885), 99 N. Y. 29; *Logan v. Wienholt*, 1 Cl. & Fin. 611; *Hammersley v. DeBiel*, 12 Cl. & Fin. 45; *Moorhouse v. Colvin*, 15 Beav. 341; *Kinnard v. Daniel*, 13 B. Mon. 496. *Wharton on Evidence*, § 872. Marriage is not such a part performance as will take the case out of the statute. *Bradley v. Saddler* (1875), 54 Ga. 681; *Henry v. Henry* (1875), 27 Ohio St. 121; *Finch v. Finch*, 10 Ohio St. 501; *Brown v. Conger*, 8 Hun, 625; *Flenner v. Flenner*, 29 Ind. 564; *Redding v. Wilkes*, 3 Brown Ch. R. 400; *Montacute v. Maxwell*, 1 P. Wms. 618; *Hammersley v. DeBiel*, 12 Cl. & F. 45; *Lassence v. Tierney*, 1 McN. & G. 551; *Caton v. Caton*, L. R. 1 Ch. Ap. 137, L. R. 2 H. L. 127; *Crane v. Gough*, 4 Md. 316; *Story's Equity*, § 768.

Flenner v. Flenner, 29 Ind. 564, where the woman promised before marriage to release a judgment recovered against the man. *Henry v. Henry*, 27 Ohio St. 121, where a woman owning lands promised a man that if he would marry her and make certain improvements on the lands, she would convey the lands to him. *Dygart v. Remer Schnider* (1865), 32 N. Y. 629 (agreement to pay debts). *Cushman v. Burritt*, 14 N. Y. Week. Dig. 59, where a man promised to pay a woman two thousand dollars if she would marry him. *In re Willoughby*, 11 Paige Ch. 257, where the wife of a lunatic applied for an allowance for support of her daughter by a former marriage on the ground of an alleged antenuptial agreement. *Ennis v. Ennis*, 48 Hun, 11; *White v. Bigelow*, 154 Mass. 593 (alleged oral agreement not sustained); *Chase v. Fitz*, 132 Mass. 359; *Lloyd v. Fulton*, 91 U. S. 479; *Deshon v. Wood* (1888), 148 Mass. 132 (oral promise; bill in equity by assignee in insolvency to recover

² *Brenner v. Brenner*, 48 Ind. 262;

which the parties agree to anticipate the general law controlling the marital relation and make a law in that regard to suit themselves, are within the statute and are not enforceable in law or equity unless in writing.¹ Where there has been no fraud and no agreement to reduce the settlement to writing there can be no departure from the statutory rule. If the wife has placed reliance solely upon the honor or promise of the husband no relief can be afforded.²

§ 525. Antenuptial parol agreements reduced to writing after marriage.—It has been held in many cases that, if there be a written agreement after marriage, in pursuance of a parol agreement before marriage, this takes the case out of the statute,³ but such subsequent written instrument, although good between the parties, is not valid against intervening creditors or innocent purchasers.⁴

certain bonds as transferred in fraud of creditors); *Ayliffe v. Tracy*, 2 P. Wms. 65; *Randall v. Morgan*, 12 Ves. Jr. 67 (construction of a letter as not amounting to an absolute agreement to give a marriage portion).

¹ *Rainbolt v. East* (1877), 56 Ind. 538; 26 Am. Rep. 40; *Mallory v. Mallory* (1891), 92 Ky. 316, criticising *Sutherland v. Sutherland*, 5 Bush, 591, which sustained an oral antenuptial contract that neither party was to interfere with the other's property, there being no creditors; *Potts v. Meritt*, 14 B. Mon. 406; *Caylor v. Roe* (1884), 99 Ind. 1; *Galbreath v. Cook*, 30 Ark. 417; *Peck v. Vandermark*, 99 N. Y. 29.

² *Hannon v. Hounihan* (1888), 85 Va. 429. The surrender and release of rights to be acquired by the intended wife by the marriage relation must be regarded with the most rigid scrutiny and courts of equity will interpose to set aside an instrument executed between parties who stand in confidential relations, when there is evidence showing fraud or undue

influence. *Pierce v. Pierce* (1877), 17 N. Y. 154.

³ *Surcome v. Pinniger*, 3 De G. M. & G. 571; *Taylor v. Beech*, 1 Ves. Sen. 297; *Montacute v. Maxwell*, 1 P. Wms. 618; 1 Str. 236; *Barkworth v. Young*, 4 Drew, 1; *Hammersley v. DeBiel*, 12 Cl. & F. 45; *Cooper v. Wormald*, 27 Beav. 266; *Argenbright v. Campbell*, 3 Hen. & M. (Va.) 144; *Ex parte Whitehead* (1885), L. R. 14 Q. B. Div. 419; *Agnew's Statute of Fraud*, 135. It was held in *McAnnulty v. McAnnulty* (1886), 120 Ill. 226, that the reduction to writing after marriage of a verbal antenuptial contract did not take it out of the statute. "Doubtless, a verbal antenuptial agreement might, under special circumstances, be enforced in equity, in order to prevent the party invoking the statute from perpetrating a fraud upon the other party," per Mulkey, J.

⁴ *Albert v. Winn*, 5 Md. 66, holding that the subsequent written instrument does not relate back so as to make the original parol contract the contract. *Wood v. Savage*, 2 Doug.

§ 526. Contracts relating to lands.—A contract relating to real estate, to be binding at law must be in writing, and signed by the party to be charged, or by some other person by him thereunto lawfully authorized;¹ and the statute is equally binding on courts of equity as courts of law.² An equity in lands is as much within the statute as the legal title, and it is no more competent to convey the one by parol than the other.³

(Mich.) 316, holding that a voluntary postnuptial settlement upon a wife, by a husband indebted at the time, is void against the existing creditors, and an alleged parol antenuptial promise can not be given in evidence to sustain it. *Reade v. Livingstone*, 3 Johns. Ch. 481 (opinion by Chancellor Kent, reviewing authorities); *Borst v. Corey*, 16 Barb. 136; *Izard v. Izard*, Bailey Eq. (S. C.) 228; *Davidson v. Graves*, Riley Eq. (S. C.) 219; *Smith v. Greer*, 3 Humph. (Tenn.) 118; *Blow v. Maynard*, 2 Leigh (Va.), 29; *Satterthwaite v. Emley*, 3 Green Ch. (N. J.) 489; *Andrews v. Jones*, 10 Ala. 400; *Warden v. Jones* (1857), 2 De G. & J. 76, disapproving *Dundas v. Dutens*, 1 Ves. Jr. 196; 2 Cox Ch. 235, which is cited as holding that a postnuptial settlement reciting the antenuptial agreement was good even against creditors. *Warden v. Jones*, 2 De G. & J. 76, was an appeal from the decision of the master of the rolls, setting aside a postnuptial settlement as fraudulent against the creditors of the settlor. Lord Chancellor Cranworth said: "Lord Thurlow decided, in *Dundas v. Dutens*, 1 Ves. Jr. 196, that such a settlement is good, and on that decision I will only remark that, if it be a correct view of the law, the whole policy of the statute is defeated. It can not be enough merely to say in writing that there was a previous parol agreement. It must be proved that there was such an agreement, and to let in such proof is precisely what the

statute meant to forbid." Story's Equity Jurisprudence, § 374.

¹ *Blood v. Hardy*, 15 Maine, 61. Where a conveyance of certain lands and personal property was made by a father to his two sons, they verbally agreeing that after their father's death they would convey the same property to a sister, or pay her three hundred dollars, it was held that the promise could not be enforced. The promise being in the alternative, to pay money or convey land, does not exempt it from the operation of the statute. *Patterson v. Cunningham*, 12 Maine, 506.

² *Purcell v. Miner* (1866), 4 Wall. 513. "Nevertheless, courts of equity have, in many instances, relaxed the rigid requirements of the statute; but it has always been done for the purpose of hindering the statute made to prevent frauds from becoming the instrument of fraud," per Grier, J. Courts of equity decree a specific performance of parol contracts relating to the sale of lands, where there has been a part performance of the contract. But the ground of relief there, in such cases, is fraud. *Lane v. Shackford*, 5 N. H. 130; *Phillips v. Thompson*, 1 John. Ch. 131; *Buckmaster v. Harrop*, 7 Vesey Jr. 341.

³ *Conner v. Tippet* (1880), 57 Miss. 594; *Scott v. McFarland*, 13 Mass. 309; *Marble v. Marble*, 5 N. H. 374; *Kelley v. Stanbery*, 13 Ohio, 408. "If there is any case that calls more than another upon the courts to insist upon

A contract for the exchange of lands stands on the same footing as a contract for their sale.¹ It seems to be clear that the statute has made it necessary that a partition of lands must be effected by writing;² but in some states a parol partition followed by possession in accordance therewith, and the exercise of acts of exclusive ownership is legal and binding.³

§ 527. Invalid verbal contracts as to land.—An unexecuted verbal agreement for the conveyance of land, without more, is invalid, and unenforceable.⁴ A sublease of a portion of a build-

the salutary provisions of this useful statute being enforced, it is in the case of the release of an equity of redemption." Chancellor Zabriskie in *VanKeuren v. McLaughlin*, 19 N. J. Eq. 187.

* ¹ *Purcell v. Miner*, 4 Wall. 513; *Conner v. Tippet*, 57 Miss. 594; *Moss v. Culver*, 64 Pa. St. 414.

² *Ballou v. Hale*, 47 N. H. 347; *Porter v. Hill*, 9 Mass. 33; *Lloyd v. Conover*, 25 N. J. Law, 47; *Medlin v. Steel*, 75 N. C. 154; *John v. Sabattis*, 69 Maine, 473; *Roberts on Frauds*, § 284.

³ *Wood v. Fleet* (1867), 36 N. Y. 499, citing cases showing an unbroken current of decisions. Verbal partitions between tenants in common are valid at law, at least for some purposes, in Illinois, Mississippi, Texas, Indiana, Pennsylvania and Wisconsin, but even in these states the partition must be followed by possession, and in most of them by such acts of occupation as would be sufficient to secure a decree for specific performance in equity. *Shepard v. Rinks*, 78 Ill. 188; *Pipes v. Buckner*, 51 Miss. 848; *Stuart v. Baker*, 17 Texas, 417; *Moore v. Kerr*, 46 Ind. 468; *Long's Appeal*, 77 Pa. St. 151; *Buzzell v. Gallagher*, 28 Wis. 678; *Wood on Frauds*, § 229.

⁴ *Cleveland v. Evans* 5 S. Dak. 53; 58 N. W. Rep. 8, *Kellam, J.*: "Such an agreement, to wit: a verbal agree-

ment for the purpose named, is by sections 3544 and 3617, Compiled Laws, declared to be invalid—that is, not binding upon the parties; not enforceable. See *Andrews' Law Dictionary*, p. 1080. In *McLaughlin v. Wheeler*, 1 S. Dak. 497; 47 N. W. Rep. 816, we held that where, in a contest between the principal and agent, evidence of verbal authority to the agent to contract concerning land was offered and received without objection, no motion being made at any time to strike it out, and on motion for new trial it was still unobjected to, there was a waiver of appellant's right to object that such oral agreement was not binding on him; that, after consenting to try the case upon that theory, and allowing judgment to be entered without any intimation that he was unwilling to be bound by his oral authority to the agent, he could not, in this court, for the first time make the point that he was not bound by such oral authority. Authorization by parol was not unlawful, and the principal might make it good against himself by thus consenting to it. But in this case respondent did object, and raised the question at the first opportunity. The demurrer admits that the parties did agree orally that appellant should give and respondent should accept the described real estate in lieu of money. The agreement was never executed.

ing, given by one holding a lease on the entire building for a term of five years, is a conveyance of an "interest in lands," within the Michigan statute, providing that no interest in lands, other than leases for one year, shall be conveyed by parol.¹ The principles of law growing out of the Alabama statute of frauds in reference to contracts for the sale of land or any interest therein have been fully discussed in the decisions of that state. It is well settled that the form of the writing required by the statute is not material. The contract may be evidenced by one writing or more. It may be shown entirely by written correspondence. Whatever form the agreement may assume, if the writing or writings, viewed as a whole, constitute, in essence or substance, upon their face, a note or memorandum in writing, subscribed by the party sought to be charged, or his agent lawfully authorized in writing, showing who the contracting parties are, the subject-matter of the sale, and the consideration, the statute is satisfied.² If the several writings, viewed in the light of the situa-

Whether the unexecuted agreement constituted a defense to an action for the money would depend, we think, upon whether, under the facts pleaded, the contract was enforceable by the appellant. Our statute, by the sections already referred to, declares that such an agreement is invalid. If invalid, it can not be enforced by or against either party to it. The rule is that where, on the face of a pleading, upon which specific performance is claimed, it appears that the agreement was oral, the pleading is demurrable. *Randall v. Howard*, 2 Black, 585; *Howard v. Brower*, 37 Ohio St. 402; *Walker v. Locke*, 5 Cush. 90; *Chambers v. Le Compte*, 9 Mo. 575; *Maxwell on Code Pleading*, 376. Judge Story says the doctrine is firmly established 'that, even where the answer confesses the parol agreement, if it insists by way of defense upon the protection of the statute, the defense must prevail as a competent bar.' 1 Story on Equitable Jurisprudence, § 757. Such oral contracts

are never enforced, unless other conditions exist which bring the case within some of the exceptions in which courts of equity relax the rule to prevent fraud and imposition." And see also, *Fergusson v. Duluth Imp. Co.* (1894), 56 Minn. 222; 57 N. W. Rep. 480.

¹ *Fratcher v. Smith* (Mich. 195), 62 N. W. Rep. 832.

² *Jenkins v. Harrison*, 66 Ala. 345; *Carter v. Shorter*, 57 Ala. 253; *Knox v. King*, 36 Ala. 367. In cases of single instruments their sufficiency is generally of easy determination. Greater difficulties arise when the required evidence of the contract is sought to be produced by the adjustment and adaptation to each other of several letters and writings containing the negotiations of the parties, and the supposed culmination of these negotiations in a binding agreement of sale. In cases of this character it is certainly not essential that the party charged should have subscribed each

tion and circumstances of the parties at the time they were written, clearly relate to, and connect themselves with, each other, and when their contents are adjusted to each other there appears to have been clearly made known the names of the contracting parties, the subject-matter of the sale, and the consideration, and if it appears that all this has received the sanction of the subscription of the party sought to be charged, or some person by him thereunto lawfully authorized in writing, the statute requirement in reference to subscription, as well as all other particulars, is met.¹

paper forming a link in the chain of evidence.

¹ *White v. Breen* (Ala. 1896), 19 So. Rep. 59, denying rehearing of decision of April 12, 1894. In this case it appeared that defendant wrote to a certain person to find a purchaser for his property in a certain city. Said person answered that he was not a real estate agent, but that he would place the property in the hands of an agent, and afterwards wrote that he had placed the property, particularly describing it, in the hands of an agent for sale. Said agent wrote to defendant that he had a customer who would, on specified terms, take the property, naming the streets upon which the same was situated. Defendant replied, conferring authority to sell. The property referred to was all that the defendant owned in said city. It was held that the correspondence with said person, with the other letters established said agent's power of attorney, and sufficiently described the land to satisfy the statute of frauds. Head, J., said: "We said the several writings must, upon their faces, clearly relate to, and connect themselves with, each other. The rule, however, does not necessarily require express mention in one document of another, or in each of all the others; and this statement, we conceive, does not modify the rule, when properly

interpreted, as it is stated in *Knox v. King*, 36 Ala. 367, viz.: 'When the memorandum in writing is itself incomplete, it can not derive aid from another writing, unless the memorandum refer to the other writing;' and that 'oral evidence can not be received to connect the two or to supply the wanting link.' This last rule is subject to the exception which obtains generally in the construction of written contracts,—that the situation and circumstances of the parties may be looked to, when necessary, to aid in arriving at the meaning of what they have written. An explanation of these rules will be found in *Jenkins v. Harrison*, 66 Ala. 345. We are of opinion that when all the writings adduced, viewed together, in the light of the situation and circumstances of the parties at the time they were written, show unmistakably that they relate to the same matter and constitute several parts of one connected transaction, so that the mind can come to no other reasonable conclusion, from the evidence, so afforded, than that they were each written with reference to those concurrent or preceding, then there is such a reference of the one to the other as satisfies the rule, although reference in express terms does not appear. The rule is one founded in reason; and when, as practical men, we look at the writings, and see, in-

§ 528. Cases not within the statute—Constructive trusts.—

Where a person, old and ignorant, under representations by the grantee, in whom he had implicit confidence, that it was the best course to pursue to avoid liability on a false claim, conveys land, receiving an oral assurance from the grantee that he will reconvey on request, the grantee having, however, no intention to reconvey, the agreement to reconvey is not within the statute of frauds; since, in such a case, the constructive trust growing out of the grantee's fraud is excepted from the operation of the statute of frauds.¹ But covenants relating to the management and sale of real estate, contained in a declaration of trust which was signed only by the trustee, can not, in case of resulting trusts, be considered as covenants or limitations of their estates, on the part of the other persons for whose benefit the trusts are declared. Nor does their acceptance of the declaration of trust, in such cases, dispense with the necessity of their signatures, under the statute of frauds,

hering in them, evidence which entirely satisfies the mind that they all relate to one general transaction, there is no reason why they should not be so considered. There is in such case a direct reference of the one to the other, within the meaning of the law. The application of the principle to the facts of this case will illustrate our meaning. The case of *Beckwith v. Talbot*, 95 U. S. 289, aptly illustrates it. These rules of law relating to the form of the agreement, and by which several papers may be considered as bearing a connection with each other, apply as well to the creation of a power of attorney to sell lands as to the requisite note or memorandum of the contract of sale; but in other respects the characteristics of the two (the power of attorney, and the note or memorandum of the contract) are essentially different, and controlled by different principles. Unlike the former, the present statute requires the authority of an agent to subscribe the note or memoran-

dum of the contract for the sale of land for his principal to be conferred in writing. No form or method of execution of the power of attorney is prescribed. It may be in any form clearly showing the agent's authority, and be executed according to any recognized common law method of executing written instruments. The power may be general, to sell any lands of the principal to any purchaser upon any terms; or it may be partly general and partly special or limited, as to sell particular land to any purchaser on any terms, or particular land to any purchaser on particular terms; or it may be entirely special, as to sell particular land to a particular purchaser on particular terms. In either case, the agent, keeping within the scope of his authority, may make the contract and execute the necessary written evidence binding his principal to its performance."

¹ *Rozell v. Vansyckle*, 11 Wash. 79; 39 Pac. Rep. 270.

when the declaration is claimed to limit, or give an interest in, their equitable estates, which arose independently of the declaration of trust.¹ Agreements between adjoining owners, establishing the boundary between their lands, is not within the statute of frauds.² Where a husband acknowledges in writing the receipt of a deed in fulfillment of the contract of sale made to his wife, such transaction was not in the nature of a parol contract, and void for the statute of frauds, but a ratification of the transfer of title to his wife.³

§ 529. What not an interest in land—Mortgagee's interest.—A parol agreement to execute a conveyance of land on payment of the amount for which the land had, by deed absolute, been taken as security, is not an agreement, within the statute of frauds, for sale of an interest in lands.⁴

¹ *Adams v. Carey* (N. J. Eq. 1895); 31 Atl. Rep. 600, Emery, V. C.: "The other owners, in accepting this declaration of trust and acting on it, if they did so, would not, it seems to me, thereby make Carey's covenant their covenant for all purposes, or supply the defect of the writings required to be signed by them under the statute of frauds, in order to give any interest in or power over their equitable estates. This is not the case where the grant of an estate is made, by the deed creating it, subject to a condition or covenant to be performed by the grantee, and where the acceptance of the estate by the deed containing the covenant of the grantee makes it his covenant, although he did not formally execute it. The covenant, therefore, in my view, was a covenant of Carey alone, and, as against the other equitable owners, can not be made to operate as a covenant or grant against them on their estates, in the absence of the writing on their part required by the statute of frauds. To the extent that the parties have acted under the declaration, they are equal-

ly bound, of course; but a court of equity should, it seems to me, on the application of any equitable owner, interested adversely to the trustee, give him the benefit of his whole equitable estate in the lands, subject only to such lawful restrictions thereon as have been authorized in writing signed by him. Under this view of his rights, the complainant has, therefore, an equitable estate in these lands, which would entitle him to a partition, and I shall so advise, without determining the further questions raised by the complainant as to the construction and validity of the provisions of Carey's covenants in the declaration of trust."

² *Ferguson v. Crick* (Ky. 1893), 23 S. W. Rep. 668; *Grigsby v. Combs* (Ky.), 21 S. W. Rep. 37.

³ *Merson v. Merson*, 101 Mich. 55; 59 N. W. Rep. 441.

⁴ *Mussey v. Bates* (1893), 65 Vt. 449; 27 Atl. Rep. 167, per Munson, J. "There is a diversity of opinion upon the question whether a mortgagee's interest is one that may be transferred or discharged by parol. In Massa-

§ 530. Part performance.—Where plaintiff's testator stated to the husband of defendant, his sister, that he intended to give her a home, and told him to build on certain land a house costing a certain sum, and he would pay for it, and the husband built a house costing more than the amount named by

chusetts and in Maine it is held that this interest is within the statute of frauds; that it will not pass by a parol assignment; and that an oral promise to relinquish it can not be enforced. *Warden v. Adams*, 15 Mass. 233; *Hunt v. Maynard*, 6 Pick. 489; *Mitchell v. Burnham*, 44 Maine, 286; *Leavitt v. Pratt*, 53 Maine, 147; *Phillips v. Leavitt*, 54 Maine, 405. On the other hand, it is held in many states that the interest of the mortgagee is not within the statute, and that it may be transferred or discharged by oral contract. *Southerin v. Mendum*, 5 N. H. 420; *Ackla v. Ackla*, 6 Pa. St. 223; *Howard v. Gresham*, 27 Ga. 347; *Green v. Hart*, 1 Johns. 580. So there is authority for holding that a mortgagee's interest may be both transferred and discharged by parol. It is said by some text-writers that the tendency of the decisions is decidedly in favor of this holding. Brown on Statute of Frauds, §65. It would doubtless be inconsistent with the views adopted in this state to hold that a parol transfer of a mortgagee's interest could avail the transferee in a suit at law. It has indeed been held, but without discussion, and in reliance upon the decision of a court whose holdings on this subject are not entirely in harmony with ours, that an oral agreement to release a portion of the mortgaged premises upon a payment of a portion of the debt secured can not be enforced because of the statute. *Merrill v. Pease*, 51 Vt. 556. But in the case under consideration the security was apportionable by the terms of the defeasance; so that the agreement to convey

that part of the property apportioned to the amount of the debt to be paid was simply an agreement to discharge a mortgage by deed upon tender of satisfaction. It thus appears that the question for decision is whether an agreement to execute a deed of the mortgaged property upon the payment of the mortgage debt is a contract for the sale of an interest in lands. It is certain that the mortgagee's interest, whatever name may be given it, is terminated by the payment of the debt secured, without action on the part of the mortgagee. When the debt is paid, the right of the mortgagee is extinguished, and the land becomes free by operation of law. No conveyance from the mortgagee is necessary to perfect the mortgagor's estate. There is nothing in the mortgagee to be reconveyed to the mortgagor. Whatever is done by way of discharge or release is done to furnish evidence of what has already been fully accomplished by the payment. The methods specially provided by statute for the discharge of mortgages are not treated as exceptions to the provision regulating the conveyance of estates in land, for they are not regarded as passing an interest in land. An unconditional deed having been given in this case, it was essential that the discharge be by deed; but the agreement to execute a deed upon payment was an agreement to give the mortgagor the proper evidence of his having extinguished the mortgagee's interest, and not an agreement for the conveyance of an interest in land."

the testator, paying the excess himself, and made other permanent improvements, to testator's knowledge, and, afterwards, when the husband was contemplating moving, testator told him that, if defendant left the house, she would forfeit her right to it, whereupon he remained, it was held that there was such part performance as took testator's agreement out of the statute, although the rental value of the premises during defendant's occupancy exceeded the amount expended by the husband.¹ A parol partition of land between coheirs, carried out and followed by actual possession in severalty of the several parcels, will be enforced, notwithstanding the statute of frauds, on the ground of part performance, when the partition is equitable, and the parties acted understandingly.²

¹ *Young v. Overbaugh* (1895), 145 N. Y. 158; 39 N. E. Rep. 712, per Gray, J.: "In *Freeman v. Freeman*, 43 N. Y. 34, which was an action of ejectment, and where the defense was a parol promise to give the land to the defendant, accompanied by an actual delivery and possession by him, Grover, J., said: 'The question, then, is whether a parol promise by one owning lands to give the same to another will be enforced in equity, when the promisee has been induced by the promise to go into possession, and, with the knowledge of the promisor, make comparatively large expenditures in permanent improvements upon the land. * * * In the case supposed there has been no part performance of the contract, strictly speaking, except the taking possession, no part of the purchase-money having been paid; and yet the cases are numerous where performance of such contracts has been decreed in equity, where possession has been taken under the contract, and large expenditures upon permanent improvements made.' Again, he says: 'Expenditures made upon permanent improvements upon land with the knowledge of the owner, induced by his promise, made to the party mak-

ing the expenditure, to give the land to such party, constitute, in equity, a consideration for the promise.' It was said by Parker, J., in *Lobdell v. Lobdell*, 36 N. Y. 327, 330: 'If the promisee, on the faith of the promise, does some act, or enters into some engagement, which the promise justified, and which a breach of the promise would make very injurious to him, this equity might regard as confirming and establishing the promise, in much the same way as a consideration for it would.' In such a case as this, to constitute a good consideration in equity, it is, of course, essential that it be substantial in the sense that the promise shall rest upon a performance by the promisee, which evidences acceptance of and reliance upon the promise, and consists in expending moneys in permanent improvements upon the land. In this case it may well have been, as found, that some of the expenditures made by the defendant upon the property were such as a householder would ordinarily make, or were trivial in their nature; but they do not influence the character of the others."

² *Whittemore v. Cope*, 11 Utah, 344; 40 Pac. Rep. 256, King, J.: "That a parol partition, carried out and fol-

§ 531. Parol contract for sale of land and possession transferred.—When a purchaser of land goes into immediate possession, and gives his vendor a note for the price, which contains a description of the land, and all essential terms of the contract, the sale is taken out of the statute of frauds, although the vendor did not execute a deed to the purchaser.¹ And where a verbal agreement for the sale of land is afterwards executed by the exchange of the deed and a note for the price, a subsequent verbal compromise relative to the amount to be paid for the land in lieu of the amount named in such note is not within the statute of frauds.² Where plaintiff agreed that, if defendant should buy at auction land owned by her and

lowed by actual possession in severalty of the several parcels, is valid, and will be enforced, notwithstanding the statute of frauds, on the theory that it has been removed from its operation by part performance.” 17 Am. & Eng. Encyc. of Law, p. 668, and cases cited; Freeman on Cotenancies, § 402; Tomlin v. Hilyard, 43 Ill. 300; Ebert v. Wood, 1 Bin. 216; Welch v. Thompson, 39 Ga. 559; McMahan v. McMahan, 13 Pa. St. 376; Ayres v. Jack, 7 Utah, 249; 26 Pac. Rep. 300. “While the legal title might not, perhaps, be considered as passing by a parol partition, unless after a possession sufficiently long to justify the presumption of a deed, yet the parol partition, followed by several possession, would leave each cotenant seized of the legal title to one-half of his allotment, and the equitable title to the other half, and, by a bill in chancery, could compel from his cotenant a conveyance of the legal title according to the terms of the partition.” Tomlin v. Hilyard, 43 Ill. 300. In the case of Ayres v. Jack, 7 Utah, 249, the oral partition of lands herein described was sustained.

¹ Reynolds v. Kirk (Ala. 1895), 17 So. Rep. 95, per Haralson, J.: “His purchase from Stephens was not void under the statute of frauds. He went into immediate possession, and has

been holding and claiming it ever since, making annual crops and erecting improvements on it. He executed and delivered his promissory note to his vendor, bearing date the 14th January, 1889, a few days after the purchase, for \$400, the purchase price of the land, payable on the 25th December following, reciting that it was in consideration of the land, on which he then lived, describing the same land that is mentioned in the bill. This was sufficient to take it out of the statute of frauds. It contains the essential terms of the contract—describes the land sold, the price to be paid, and the date of the payment—all expressed with such certainty as that they may be understood from the writing itself, which was signed by the purchaser, the complainant. It was, on the payment or tender of the purchase-money, capable of specific enforcement. Adams v. McMillan, 7 Port. (Ala.) 73; Carter v. Shorter, 57 Ala. 253; Heflin v. Milton, 69 Ala. 354; Phillips v. Adams, 70 Ala. 373; Lakeside Land Co. v. Dromgoole, 89 Ala. 505; 7 So. Rep. 444; Nelson v. Shelby, etc., Improvement Co., 96 Ala. 515; 11 So. Rep. 695.”

² Johnson v. Clarkson (Texas App. 1894), 30 S. W. Rep. 71.

her daughter, he could have plaintiff's share at a certain price, regardless of what was bid at the sale, and the land was bid in by defendant at a price greater than the agreed price; it was held, in an action for the greater price, after a deed to the land had been made, that it could not be claimed that the agreement, being by parol, was not binding on plaintiff.¹

§ 532. Parol contract for sale of land—Purchaser's possession.—In order that possession of land by the purchaser may take a parol contract for its sale and purchase out of the statute of frauds, it must appear that such possession was taken under and by virtue of the contract, and with the vendor's knowledge and consent.² Accordingly it is no defense to an action on a

¹ *Gardner v. Gardner* (Mich. 1895), 63 N. W. Rep. 988, Long, J.: "It is contended that the oral agreement was void, under the statute of frauds, and that, therefore, plaintiff was not estopped from asserting her right to the full consideration recited in her deed. The consideration recited in a deed is not conclusive, but can afterwards be inquired into. *Mowrey v. Vandling*, 9 Mich. 39; *Shotwell v. Harrison*, 22 Mich. 410. The case does not fall within the statute of frauds. The conveyance has been made. It is not a suit upon an oral contract for the sale of land, but an action for the purchase price."

² *Neal v. Neal*, 69 Ind. 419; *Barnett v. Washington Glass Co.*, 12 Ind. App. 631; 40 N. E. Rep. 1102. Defendant and others, desiring to locate a factory near C., agreed with an improvement company to purchase a number of lots at a fixed price from lands thereafter to be acquired. The improvement company contracted with plaintiff corporation for the factory, sold it land on which to build the factory, and agreed to furnish purchasers for one hundred and fifty of the lots at the prices agreed on with defendant and the other subscribers to the fund. Plaintiff platted the land, and

threw it open. Defendant went on it, selected a lot by number, and took possession of it as his choice, but did not remain in possession, or exercise any ownership over it. His choice was recorded by the secretary of the subscribers' meeting, and the lot withdrawn from selection. Plaintiff did not thereafter claim possession or exercise control over the lot, was not present at the subscribers' meeting, and had no knowledge that defendant had taken possession. The contract of purchase gave defendant no right to the lot until he settled for it and received a deed. It was held that the possession of defendant was not a sufficient part performance to take the parol contract for the purchase of the lot out of the statute of frauds. *Gavin, J.*, said: "We are of opinion that, under these findings, the possession was not taken under the contract, nor with the vendor's consent. Under such circumstances, the appellee had no right of recovery. *Swales v. Jackson*, 126 Ind. 282; 26 N. E. Rep. 62; *Johnson v. Pontious*, 118 Ind. 270; 20 N. E. Rep. 792; *Judy v. Gilbert*, 77 Ind. 96; *Rucker v. Steelman*, 73 Ind. 396; *Moore v. Higbee*, 45 Ind. 487."

duebill given for the price of a lease-hold interest sold to one who was already in possession, and thereafter remained in possession, that the contract of sale did not comply with the statute of frauds.¹

§ 533. Parol sales of land in North Carolina.—Under the North Carolina code, which requires contracts for the sale of land to be in writing, signed by “the party to be charged therewith,” a contract signed by the vendor only binds him, but not the vendee.² But where a parol contract for the sale of land is repudiated by the vendor, the vendee may recover the amount he has paid thereunder.³ A parol contract for the sale of land is void only at the instance of the party who is entitled to and who actually does plead the statute of frauds. Where the vendee in a parol contract for the sale of land repudiates the same, he can not recover money paid thereunder from the vendor, who is able and willing to perform his part of the agreement. Where the vendee in a parol contract for the sale of land repudiates the same, he can not, in an action brought twelve months thereafter, recover money paid on such contract, although the vendor has disposed of the property, and is therefore unable to convey to the vendee.⁴

§ 534. Executed oral lease—Statute to be pleaded.—Where in an action for rent due on a contract of lease defendant neither denies the contract nor pleads the statute of frauds, the

¹ *McMahon v. Jacoway* (Ala. 1895), 17 So. Rep. 39, *Coleman, J.*: “The following decisions are conclusive of the question: *Rhodes v. Storr*, 7 Ala. 346; *Worthington v. McRoberts*, 7 Ala. 814; *Gillespie v. Battle*, 15 Ala. 276; *Donaldson v. Waters*, 35 Ala. 107; *Nelson v. Shelby, etc., Improvement Co.*, 96 Ala. 515; 11 So. Rep. 695.”

² *Love v. Welch*, 97 N. C. 200; 2 S. E. Rep. 242.

³ *Wilkie v. Womble*, 90 N. C. 254.

⁴ *Durham, etc., Land Co. v. Guthrie*, 116 N. C. 381; 21 S. E. Rep. 952, per *Faircloth, C. J.*: “A parol contract for land is not void, except at the instance of the party who is al-

lowed to and does plead the statute, and neither party who repudiates the contract can take any advantage or benefit under it. The repudiator is left in the condition in which he finds himself at the time of the abandonment. The plaintiff can not recover in assumpsit, because it is admitted that it had a special contract, and, so long as it exists, it can not fall back on the common counts. The cases of *Green v. North Car., etc., Railroad*, 77 N. C. 95, and *Foust v. Shoffner*, Phil. Eq. 242, are on ‘all fours’ with the case before us. In the first case, it was agreed verbally that defendant would convey a certain tract

statute is unavailing as a defense.¹ The complete performance of the contract by one contracting party forecloses his adversary from interposing the statute of frauds as a defense.² Thus, where a lessee enters into possession of premises under an oral lease, he can not surrender the premises and defeat an action for rent subsequently accruing by reliance on the statute of frauds.³ So, also, an oral lease, under which possession is taken, and monthly rent paid for two years, is not a contract for the sale of an interest in land, within the statute of frauds.⁴

of land to the plaintiff as soon as he would deliver to defendant an agreed number of cords of wood. Plaintiff delivered a part of the wood and quit, and sued defendant for the value of so much wood as he had delivered. Defendant said: 'I am ready and able to give you a good title to the land as soon as you perform your part of the contract,' and the court held that plaintiff could not recover."

¹ *Bless v. Jenkins*, 129 Mo. 647; 31 S. W. Rep. 938, *Sherwood, J.*: "The answer does not deny the contract of renting, nor does it admit it and plead the statute of frauds as a defense. Now, the rule is well settled in this state that where, in circumstances like the present, a party would take advantage of the statute of frauds, he must either deny the contract or else admit it and plead the statute. Defendants were therefore in no position to successfully raise the invalidity of the contract by reason of its nonconformity with that statute. *Wildbahn v. Robidoux*, 11 Mo. 660; *Hook v. Turner*, 22 Mo. 333; *Allen v. Richard*, 83 Mo. 55."

² *Blanton v. Knox*, 3 Mo. 342; *Pitcher v. Wilson*, 5 Mo. 46; *Suggett v. Cason*, 26 Mo. 221; *Self v. Cordell*, 45 Mo. 345; *McConnell v. Brayner*, 63 Mo. 461.

³ *Bless v. Jenkins*, 129 Mo. 647; 31 S.

W. Rep. 938. The statute of frauds of force in South Carolina, Gen. St., c. 73, forbids the assignment, grant or surrender of a lease, unless by deed or note in writing. General Statutes, § 2018. *Charles v. Byrd*, 29 S. C. 544; 8 S. E. Rep. 1; *Davis v. Pollock*, 36 S. C. 544; 15 S. E. Rep. 718; *Sampson v. Camperdown, etc.*, *Mills* (1894), 64 Fed. Rep. 939.

⁴ *Eubank v. May, etc.*, *Hardware Co.* (Ala. 1895), 17 So. Rep. 109. *Haralson, J.* "If the plaintiffs made a parol contract with the defendant corporation by which they rented to the defendant their storehouse for a term, commencing the 10th February, 1890, and ending the 1st of October, 1894, at \$75 per month, and under this contract the defendant entered into possession and kept it until the 1st day of October, 1892, paying until that time the monthly installments of rent, and then abandoned the possession and lease, of its own accord and without the consent or fault of the plaintiffs, the contract does not fall within the influence of the statute of frauds, and is as binding on the parties as if it had been in writing. Code, § 2121, subd. 5; *Shakespeare v. Alba*, 76 Ala. 351; *Steadham v. Parrish*, 93 Ala. 465; 9 So. Rep. 358; *Dahm v. Barlow*, 93 Ala. 120; 9 So. Rep. 598."

§ 535. Executed parol contract for exchange of land not within statute.—A parol contract for the exchange of land, which is established by clear and indubitable evidence, and executed by an exchange of possession pursuant thereto, is not within the statute of frauds.¹ So equally, a contract for the transfer of an interest in land, in consideration of legal services rendered in settlement of an estate, and the signing of a bond, is not within the statute of frauds, when such consideration has been fully executed, except the taking of a formal order of court approving of the settlement.² And where the plaintiff bought land from the purchaser at a sale made under order of court, and paid part of the price, and a later order re-

¹ *Brown v. Bailey* (1893), 159 Pa. St. 121; 28 Atl. Rep. 245, Thompson, J.: "In *Moss v. Culver*, 64 Pa. St. 414, Agnew, J., said: 'An exchange necessarily has a subject on each side, which stands related to the other. One is the representative of the other; so much so that the law implies a contract of warranty by the act of exchanging. If, therefore, the evidence shows a clear, unequivocal and complete taking possession of one of the subjects of an exchange by the party owing the other subject, it strengthens the evidence of a possession taken by the opposite party of the corresponding subject. Evidence of possession that might seem weak and inconclusive in the case of a parol sale is thus made clear and convincing in the case of an exchange.' In *Johnston v. Johnston*, 6 Watts, 370, it is said by Mr. Justice Rogers: 'It is undoubtedly true that an agreement for the exchange of land is within the statute of frauds, and must be in writing. *Rice v. Peet*, 15 Johns. 503; *Coke on Littleton*, 417. But the specific execution of a parol agreement for an exchange will be decreed in equity when the agreement has been carried into effect in whole or in part. Although I do not find this point expressly adjudicated, yet it comes within the spirit of decisions

which have been made in this state.' In *Reynolds v. Hewett*, 27 Pa. St. 176, it was held that where there is a parol exchange of lands there must be a delivery of possession, but the evidence in reference to the time of possession will admit of greater latitude than in the case of a parol sale of land. Since 1874 until the present suit, brought in 1890, no question has been raised in regard to the agreement, and no attempt has been made to effect its rescission. Taxes have been paid, the ground improved by filling in, it may be at no great cost, and the municipal improvements have been paid. Under these circumstances, the appellants, in attempting to defeat the parol agreement, do not present themselves with any equity that would command consideration. It is said in *Sower's Adm'r v. Weaver*, 84 Pa. St. 262, by Mr. Justice Gordon: 'Equity is loath to undo a gift or contract at the instance of one who has neglected to move for its rescission, until the passing years have grafted new equities upon the transaction, until the donee has grown old, and has spent the vigor of his age and the prime of his manhood in the use and improvement of a property long regarded as his own.'"

² *Mitchell v. Colby* (Iowa 1895), 63 N. W. Rep. 769.

cited the sale and the transfer to plaintiff, and directed that a deed be made to plaintiff, but no such deed was ever made, and thereafter plaintiff, who had taken possession, orally agreed to transfer the land to defendant, provided defendant would pay plaintiff's debts, including the balance of the price of such land, and defendant thereafter, without plaintiff's knowledge, procured a deed of the land from the court, it was held in a suit to compel a conveyance to plaintiff, that he had an equitable title, and that the sale to such purchaser and the transfer to plaintiff, with the order of court directing a deed to be made to him, took the case out of the statute of frauds.¹ Where the owner of land had a contract written out for the sale of certain land to plaintiff, but it was not signed by either, and several months after the owner died, having made a will in which he expressed the desire that the land might be sold to plaintiff "according to the understanding" between them, in an action by plaintiff for the specific performance of the contract, it was held that the will did not refer to the unexecuted contract with sufficient certainty to entitle them to be read together and so constitute a contract within the statute of frauds.²

¹ Howard v. Howard (Ky. 1895), 29 S. W. Rep. 285.

² Darling v. Cumming (Va. 1896), 23 S. E. Rep. 880, Harrison, J.: "Our attention has been called to no case where it was attempted to make such a contract in writing as is required by the statute of frauds by reading, in connection with a man's will, an unsigned paper prepared before his death. A will is in no sense a contract. It is the voluntary, individual act of its author, and revocable at his pleasure. The weight of authority is that the signed paper, which in this case is the will, must refer to the unsigned paper in clear and distinct terms, but that it is not necessary to refer to it *eo nomine*; that parol evidence is admissible to identify it, if the reference to it is sufficiently clear to exclude the idea that any other paper can be referred to. It may well be doubted whether the ref-

erence in the will to the 'understanding' between the testator and the appellant is a sufficiently clear reference to this unsigned paper to justify the admission of parol proof of its identity, there being no internal evidence in the signed paper to connect it with the unsigned paper. In Beckwith v. Talbot, 95 U. S. 289, a case unlike this in the facts, Justice Bradley says, 'It is undoubtedly a general rule that collateral papers, adduced to supply the defect of signature of a written agreement under the statute of frauds, should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof;' and, after saying that the rule was not absolute, and that cases might arise which would require a departure from it, he says, 'If there is ground for any doubt in the matter, the general rule should be enforced.' In the view

§ 536. Fixtures.—The statute had in view to avoid such agreements relating to lands, as rested in parol, only where some interest is to be acquired in the land itself, and not such

taken of this case, however, it is unnecessary to decide whether the parol proof was admissible or not, for, with the aid of that evidence, it by no means appears, with any degree of satisfaction or certainty, that the unsigned contract of May 10, 1888, was in the testator's mind when he referred, in his will, to the 'understanding' between himself and appellant. The circumstances indicate that the contract embodied in that paper had been abandoned. Certainly no sufficient reason appears why it was not signed by the parties, in all the time intervening between its preparation and the death of Daniel Cumming, if they intended to conclude it as the final evidence of their agreement. There is nothing to show that the testator ever saw or heard of this paper after it was prepared. It is certain that appellant and himself parted with the understanding that they would not sign it then, and, so far as the record shows, it was never brought to light until appellant, to whom it had been delivered by his counsel, instituted this suit. The testator's will was written by his attending physician, during his last illness, and only a few days before his death. If in health the testator knew nothing of the disposition that had been made of this unsigned paper, it is not likely that he was referring to it in his will when he spoke of the 'understanding' between himself and appellant. From the record in this case it is impossible to say with any degree of certainty what was the 'understanding' referred to by the testator in his will. Any conclusion on the subject would be mere conjecture and speculation. The plea of the statute

of frauds would be of little avail if the evidence in this case could be held sufficient to establish the unsigned paper here produced as embodying the 'understanding' referred to in the will, and as a contract so clearly proven that its specific performance would be enforced by a court of equity. Every application for the specific performance of a contract is addressed to the sound judicial discretion of the court, regulated by established principles. The contract must be distinctly proven, and its terms clearly ascertained. It must be reasonable, certain, legal, mutual, based upon a valuable or meritorious consideration, and the party seeking performance must not have been backward in enforcing his rights, but ready, desirous, prompt, and eager. *Dunsmore v. Lyle*, 87 Va. 391; 12 S. E. Rep. 610; *Powell v. Berry* (Va.), 22 S. E. Rep. 365. The unsigned contract here sought to be enforced is claimed to have been made on the 10th of May, 1888. It provides for the sale of the land in question at \$27.50 per acre, its value at that time. It does not appear that this paper was ever mentioned to Daniel Cumming again before his death, in March, 1889. Nor does it appear that appellant ever demanded of the executor of Daniel Cumming the performance of the alleged contract until the institution of this suit in March, 1891, two years after the death of Cumming. In the meantime, the land, which is located in the vicinity of the city of Newport News, had advanced in value from \$27.50 to \$150 per acre. This delay in asserting such rights as he had, under the circumstances of this case, is fatal to the pretension of appellant."

as are collateral, and by which no kind of interest is to be gained in the land.¹ Thus an agreement for the sale of fixtures or mere improvements on lands is not within the statute.²

§ 537. Cases not within the statute—Illustrations.—It has been held that an agreement to locate and work mines is not within the statute,³ nor a contract to sell lands for another, for a certain sum, or upon a commission,⁴ nor a contract to keep up a fence,⁵ nor one to build a party wall,⁶ nor one to pay an assessment,⁷ nor one to divert a water-course,⁸ nor one to build a dam.⁹

¹ *Frear v. Hardenbergh*, 5 John. 272.

² *Benedict v. Beebee*, 11 John. 145; *Scoggin v. Slater*, 22 Ala. 687; *Cassell v. Collins*, 23 Ala. 676; *Clark v. Shultz*, 4 Mo. 235; *Lower v. Winters*, 7 Cow. 263; *Lombard v. Ruggles*, 9 Maine, 62; *Powell v. McAshan*, 28 Mo. 70; *Lee v. Gaskell*, 1 Q. B. D. 700; *Ronanye v. Sherrard*, 11 Irish Rep. (C. L.) 146; *Hallen v. Runder*, 1 Cr. M. & R. 266; *Bostwick v. Leach*, 3 Day (Conn.) 476; *Thouvenin v. Lea*, 26 Texas, 612.

³ *Murley v. Ennis*, 2 Colo. 300; *Boone v. Stover*, 66 Mo. 430. There is a great distinction between a lease of mines and a license to work mines. The former is a distinct conveyance of an actual interest or estate in lands, while the latter is only a mere incorporeal right to be exercised in the lands of others. It is a profit à prendre, and may be held apart from the possession of land. Bainbridge on Law of Mines and Minerals, p. 246.

⁴ *Lesley v. Rosson*, 39 Miss. 368; *Watson v. Brightwell*, 60 Ga. 212; *Fiero v. Fiero*, 52 Barb. 288.

⁵ *Fleming v. Ramsey*, 46 Pa. St. 253. An agreement between adjoining owners, establishing the boundary line between their lands, is not within the statute. *Ferguson v. Crick* (1893) (Ky.), 23 S. W. Rep. 668. In Grigs-

by *v. Combs* (Ky.), 21 S. W. Rep. 37, the court said that such amicable arrangements between disputing claimants of coterminous boundaries have been sanctioned by repeated adjudications.

⁶ *Rice v. Roberts*, 24 Wis. 461 (an oral agreement between owners of adjoining lots, that one should erect a party wall on both sides of the line between them, and the other should pay half of the expense); *Hayes v. Moynihan*, 60 Ill. 409 (where a person, desiring to erect a building, obtained permission of the owner of the adjoining premises to sink his foundation wall below and partly under the wall of his house).

⁷ *Remington v. Palmer*, 62 N. Y. 31; *Cair v. Dooley*, 119 Mass. 294; *McCormick v. Cheevers*, 124 Mass. 262; *Preble v. Baldwin*, 6 Cush. (Mass.) 549; *Brackett v. Evans*, 1 Cush. (Mass.) 79.

⁸ *Hamilton, etc., Co. v. Cincinnati, etc., R.* (1896), 29 Ohio St. 341; *Le Fevre v. Le Fevre*, 4 Serg. & Rawle, 241, holding that, after the execution of a deed conveying a right to lay down pipes to conduct water, the route might be altered by parol.

⁹ *Jackson v. Litch*, 62 Pa. St. 451; *Pitman v. Poor*, 38 Maine, 237. But see *Mumford v. Whitney*, 15 Wend. 380.

§ 538. **Fructus industriales.**—A contract for the sale of growing crops, produced annually by labor and the cultivation of the earth, and which are included within the meaning of the term “emblemments,” is not a contract for the sale of land, or any interest in it, or concerning it, and it is not material whether they have come to maturity or not at the time of the sale, or whether they are to be cut and taken off of the ground by the vendor or vendee. Emblemments seem to be distinct from the real estate, and subject to many of the incidents attending personal chattels. They go to the executor upon the death of the owner of the land, and not to his heirs, and they may be levied and sold upon execution like other personal chattels, and this without regard to the state of maturity to which they have arrived. It would seem to follow that the owner should have power to make sale of them by parol contract.¹

¹ *Buck v. Pickwell*, 27 Vt. 157. The decisions in the English courts have been contradictory in regard to the application of the statute to contracts for the sale of crops and all other natural products growing upon land. It is difficult to reconcile the cases. “It appears to be now settled that with respect to emblemments or *fructus industriales*, i. e., the corn and other growth of the earth which are produced, not spontaneously, but by labor and industry, a contract for the sale of them while growing, whether they are in a state of maturity or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods.” Note to *Duppa v. Mayo*, 1 William Saund. 275d. *Marshall v. Green* (1875), 1 C. P. Div. 35. In *Dunne v. Ferguson*, Hayes, 540, a verbal contract for the sale of growing turnips was held to be valid. The court in that case based its decision on the ground that at common law growing crops are held to be goods, and that the statute of frauds took things as it found them. In

Evans v. Roberts (1826), 5 B. & C. 829, the court held that an agreement to purchase potatoes was not within the statute, basing the decision on the ground that in the contemplation of the parties, the contract related to the potatoes when severed, when they were personal chattels, overruling *Emmerson v. Heelis*, 2 Taunt. 38. In *Parker v. Staniland*, 11 East, 362, the contract for the sale of potatoes was held not within the statute. Bayley, J., held that the land was “a mere warehouse for the potatoes until the defendant could remove them.” *Warwick v. Bruce* (1813) 2 M. & S. 205 (sale of potatoes growing in the soil); *Rodwell v. Phillips*, 9 M. & W. 501 (growing fruits); *Jones v. Flint* (1839), 10 A. & E. 753 (relating to certain crops of wheat, barley and potatoes, and also certain grass); *Mayfield v. Wadsley*, 3 B. & C. 357; *Knowles v. Michel*, 13 East, 249; *Earl of Falmouth v. Thomas*, 1 Crompt. & M. 89; *Sainsbury v. Matthews*, 4 M. & W. 343 (potatoes). A growing crop of peaches or other fruit requiring periodical expense, industry and attention, classed as *fructus*

§ 539. **Parol sale of perennial crops.**—A parol contract for the sale of a growing perennial crop is taken out of the statute of frauds by the purchaser's entry on the land with the owner's consent to harvest the crop.¹

§ 540. **Contracts for the sale of grass and growing trees.**—Contracts for the sale of grass and growing trees have been held to concern an interest in land. The word "land" in its legal signification embraces much more than the word literally imports. It is a comprehensive term and includes standing trees, buildings, fences, stones and waters, as well as the earth, and all pass under the general description of land in a deed. Standing trees pass to the heir as a part of the inheritance, and not to the executor as emblements or chattels. For

industriales. *Purner v. Piercy* (1874), 40 Md. 212; *Whipple v. Foot*, 2 John. 418 (wheat growing); *Newcomb v. Ramer*, 2 John. 421 n (corn); *Austin v. Sawyer*, 9 Cow. 39 (crops sold by parol); *Marshall v. Ferguson*, 23 Cal. 65; *Bryant v. Crosby* (1855), 40 Maine, 9 (oats and wheat); *Davis v. McFarlane* (1869), 37 Cal. 634 (wheat). In West Virginia a growing crop of wheat has been held realty. *Kerr v. Hill*, 27 W. Va. 576.

¹ *Mowrey v. Davis*, 12 Ind. App. 681; 40 N. E. Rep. 1108, *Gavin, J.* "The appellant is a remote grantee of the owner, who sold the hay, and claims that the sale, being by parol, was not enforceable by reason of the statute of frauds, and, operating merely as a license, was revoked by the conveyance. Passing all other questions, and conceding that the distinction between annual products of the land raised by annual labor, such as corn, oats, wheat, etc., and those produced naturally for a succession of years, although the growth of artificial planting and culture, such as timothy and clover hay, whereby the former are to be regarded as personal chattels, but the latter are to be considered real

estate (*Lindley v. Kelley*, 42 Ind. 294; *Harvey v. Million*, 67 Ind. 90; *Armstrong v. Lawson*, 73 Ind. 498; *Evans v. Hardy*, 76 Ind. 527)—conceding this distinction to be well founded, we are still of opinion that the answers are good. Even a parol contract for the sale of an interest in real estate for a valuable consideration may be validated by possession taken and given under the contract. Vide authorities cited in *Barnett v. Washington Glass Co.*, 12 Ind. App. 631; 40 N. E. Rep. 1102; *Swales v. Jackson*, 126 Ind. 282; 26 N. E. Rep. 62. Under the averments of the answers, the contract was by the vendor fully executed. The vendee was placed in full possession, and so remained, rightfully, until he had harvested the hay which he had purchased. The principles of equity will not permit one who has thus rightfully gone into possession as a purchaser to be transformed into a trespasser and wrongdoer at the will of the vendor or his privy. The possession of appellee was sufficient to charge appellant with notice of his rights. *Campbell v. Indianapolis, etc., Railway Co.*, 110 Ind. 490; 11 N. E. Rep. 482."

this reason it has been usually held that a sale of growing trees with a right at any future time, whether fixed or indefinite, to enter upon the land and remove them, conveys an interest in the land;¹ but when severed from the freehold it is settled learning that they become chattels.

¹ *Kingsley v. Holbrook*, 45 N. H. 313; 86 Am. Dec. 173; *Owens v. Lewis*, 46 Ind. 488; 15 Am. Rep. 295; *Green v. Armstrong*, 1 Denio, 550, leading case; *Sterling v. Baldwin* (1869), 42 Vt. 306. In *Anon*, 1 Lord Ray, 182, growing timber was held to be a chattel interest, a *dictum* which *Hullock, B.*, in *Scorell v. Boxall* (1827), 1 Y. & J. 396, says he had never heard referred to as authority. In that case (*Scorell v. Boxall*) it was held that the sale of growing underwood to be cut by the purchaser was a contract for an interest in land and must be in writing. In *Teal v. Auty* (1820), 2 Brod. & Bing. 99; 4 Moore, 542; it was held that a sale of growing trees for hop-poles was a contract for an interest in land. In *Smith v. Surman* (1829), 9 Barn. & Cres. 561, the standing timber was sold for so much a foot; held not to be an interest in the land. *Bayley, J.*, said: "The contract was not for the growing trees, but for the timber at so much a foot; that is, the produce of the trees when they should be cut down and severed from the freehold." *Littledale, J.*, said: "The object of the party who sells timber is not to give the vendee any interest in his land, but to pass to him an interest in the trees when they become goods and chattels. Here the vendee was to cut the trees himself. His intention clearly was not to give the vendee any property in the trees until they were cut and ceased to be part of the freehold." *Kennedy v. Robinson*, 2 Craw. & D. 113. A contract for growing grass to be cut by the purchaser was held to be within the statute in *Crosby v. Wadsworth*

(1805), 6 East, 602; *Stearns v. Washburn* (1856), 7 Gray, 187 (grass not personalty until severed); *Bank v. Crary*, 1 Barb. 542 (grass an interest in land). In New Jersey the rule was thus stated in *Slocum v. Seymour* (1873), 36 N. J. Law, 138, per *Bedle, J.*: "Trees may become personalty when actually severed, or when the property in claim has become distinct from the freehold by written transfer. There may also be valid parol contracts with the owner of the soil, with reference to their sale and delivery as chattels in contemplation of severance. Where no interest in the trees standing is intended by the bargain the same as contracts for the sale of lumber to be cut, sawed and delivered as such; but when the contract comprehends an interest in the trees standing, with a right in the vendee to sever them, the subject-matter is then an interest in land within the statute of frauds." *Lillie v. Dunbar*, 62 Wis. 198; *Daniels v. Bailey*, 43 Wis. 566; *Cool v. Peters, etc., Co.*, 87 Ind. 531; *Terrell v. Frazier*, 79 Ind. 473; *Armstrong v. Lawson*, 73 Ind. 498. In *Pierrepoint v. Barnard*, 5 Barb. 371, it was held that "trees were real estate and could not pass, except by an instrument in writing"—case reversed upon another ground. *Pierrepoint v. Barnard*, 2 Seld. 279. *Warren v. Leland*, 2 Barb. 613 (approving *Green v. Armstrong*, 1 Denio, 550). In *McGregor v. Brown*, 10 N. Y. 114, the court per *Edwards, J.*, announced the same doctrine and said that the case of *Green v. Armstrong* was the settled law of the state. *Silvernail v. Cole*, 12 Barb. 685; *Ben-*

§ 541. **The same subject continued—Intention of the parties.**—The rule now generally recognized was laid down in *Marshall v. Green*,¹ in which it was held that, if it is intended that the things sold growing on the land at the time, not being *fructus industriales*, shall remain on the land for the benefit of the purchaser, and that they are to derive benefit from so remaining, then part of the subject-matter of the contract is an interest in land, and the case comes within the statute. If, on the contrary, the things sold are to derive no benefit from the land, and are to be taken away immediately, the contract is not for an interest in land. Where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the contract is for goods.²

nett v. Scutt, 18 Barb. 347. In *Vorebeck v. Roe*, 50 Barb. 302, the court says: "It is well settled by authorities in this state (N. Y.) that trees form a part of the land, and as such are real property, and a contract for the sale of them is a contract for the sale of an interest in the land. *Bishop v. Bishop*, 11 N. Y. 123 (hop-poles part of real estate); *Yeakle v. Jacob*, 33 Pa. St. 376 (perpetual right to enter on land and cut timber); *Bowers v. Bowers*, 95 Pa. St. 477; *Jackson v. Evans*, 44 Mich. 510; *Lyle v. Shinnebarger*, 17 Mo. App. 66; *Kingsley v. Holbrook*, 45 N. H. 313; 86 Am. Dec. 173; *Howe v. Batchelder*, 49 N. H. 204; *Harrell v. Miller*, 35 Miss. 700; *Mizell v. Burnett*, 4 Jones Law (N. C.), 249; 69 Am. Dec. 744; *Buck v. Pickwell*, 27 Vt. 157; *Ellison v. Brigham*, 38 Vt. 64. A number of these cases turn upon the point that the agreement was not made with a view to immediate severance of the timber."

¹ *Marshall v. Green* (1875), L. R. 1 C. P. Div. 35.

² *Marshall v. Green* (1875), L. R. 1 C. P. Div. 35. In that case there was a parol sale of certain trees with the understanding that they were to be taken away as soon as possible. The intention of the parties was that the

title to the trees should pass at the time of sale and before severance, and the question was whether standing trees could be sold standing as goods, wares and merchandise. This decision was discussed in *Lavery v. Pursell* (1888), L. R. 39 Ch. Div. 508, and the doctrine that a standing tree could be made a chattel by the intention of the parties reluctantly adopted, although the point was not immediately involved in the case decided. The principle is stated in 1 *Greenleaf's Cruise on Real Property*, 55, § 45, note thus: "That, in contracts for the sale of things annexed to and growing upon the freehold, if the vendee is to have a right to the soil for a time for the purpose of further growth and profit of that which is the subject of sale, it is an interest in land within the meaning of the fourth section of the statute of frauds, and must be proved by writing; but where the thing is sold in prospect of separation from the soil immediately, or within reasonable and convenient time, without any stipulation for the beneficial use of the soil, but with a mere license to enter and take it away, it is to be regarded as substantially a sale of goods only, and so not within that section of the statute; although an incidental benefit

In a case decided in Maryland, it was held that, as a general rule, the question turns on the nature of the contract as shown by the intention of the parties, and that, if the products of the earth are sold specifically, and by the terms of the contract to be separately delivered, as chattels, such a sale is not a sale of any interest in the land. When such is the character of the transaction, it matters not whether the product be trees, grass or grain, vegetables or other crops, or whether the produce is fully grown or in the process of growing.¹

§ 542. Licenses to enter on lands.—A license is defined to be “an authority to do a particular act or series of acts upon another’s land, without possessing any estate therein. It is founded on personal confidence, and is not assignable, nor within the statute of frauds.”² But licenses which in their

may be derived to the vendee from the circumstance that the thing may remain for a time upon the land.”

1 Greenleaf on Evidence, § 271. In Massachusetts and some other states it has been held that a contract for the sale of standing wood or timber to be cut and severed from the freehold by the vendee does not convey any interest in the land, being in contemplation of the parties a sale of chattels only. *Drake v. Wells*, 11 Allen, 141. Such contracts are held to be at least executory contracts for the sale of chattels as they shall be thereafter severed from the real estate with a license to enter on the land for the purpose of removal. *White v. Foster* (1869), 102 Mass. 375; *Poor v. Oakman*, 104 Mass. 309; *Giles v. Simonds*, 15 Gray, 441 (license to enter on land and cut timber); *Douglas v. Shumway*, 13 Gray, 498; *Nettleton v. Sikes*, 8 Metc. 34; *Claffin v. Carpenter*, 4 Metc. 580; *Whitmarsh v. Walker*, 1 Metc. (Mass.) 313; *Cutler v. Pope*, 13 Maine, 377 (grass grown and ready to be cut); *Erskine v. Plummer*, 7 Greenl. (Maine) 447; 22 Am. Dec. 216; *Cain v. McGuire*, 13 B. Mon. 340; *Byassee v. Reese*, 4 Metc.

(Ky.) 372; 83 Am. Dec. 481; *Bostwick v. Leach*, 3 Day (Conn.), 476; *Smith v. Bryan*, 5 Md. 141; 59 Am. Dec. 104; *Green v. North Carolina R.*, 73 N. C. 524 (wood standing sold by the cord). In several of these cases the reason for holding that a sale of growing trees was a sale of chattels was that immediate separation from the land was contemplated.

¹ *Purner v. Piercy* (1874), 40 Md. 212; 1 Greenleaf’s *Cruise on Real Property*, 55, § 45 n. So, in Pennsylvania, in agreements for the sale of growing timber, whether the timber is to be regarded as personal property or an interest in real estate, depends on the nature of the contract, and the intent of the parties. *McClintock’s Appeal* (1872), 71 Pa. St. 365.

² 3 Kent’s *Commentaries*, 452; *Smart v. Jones*, 15 C. B. (N. S.) 717; *Wells v. Kingston-upon-Hull* (1875), L. R. 10 C. P. 402 (use of a lock); *Sampson v. Burnside*, 13 N. H. 264 (parol license to enter on land and lay an aqueduct to convey water from a spring); *Silsby v. Trotter*, 29 N. J. Eq. 228 (to take ore from a mine); *Johnson v. Skillman*, 29 Minn. 95.

nature amount to the granting of an estate for ever so short a time are not good unless in writing.¹ It has accordingly been held that a parol license, while it remains executory, may be revoked at pleasure; but when executed, whether it is revocable, and if so, how far and to what extent, has been a question fraught with much difficulty, and the decisions of the courts are conflicting. It has been sometimes held that a license coupled with an interest is irrevocable. The erection of improvements on the faith of parol licenses is an important element in determining their revocability in many cases.²

¹ *Mumford v. Whitney*, 15 Wend. 380, which contains an able review of many of the conflicting cases and holds that the conferring of a right to enter upon lands and to erect and maintain a dam as long as there shall be employment for the water power thus created, is more than a license; it is a transfer of an interest in land and to be valid must be in writing. *Pierrepoint v. Barnard*, 6 N. Y. 279; *Foot v. The New Haven, etc., Co.* (1854), 23 Conn. 214 (parol license to overflow land void as the grant of an easement or incorporeal hereditament); *Collins Co. v. Marcy* (1856), 25 Conn. 239 (an addition to a building erected upon the land of another); *Phillips v. Thompson*, 1 John. Ch. 131; *Moulton v. Faught* (1856), 41 Maine, 298 (parol agreement that a party may abut and erect a dam upon the land of another for a permanent purpose void); *Putney v. Day*, 6 N. H. 430; *Woodward v. Seely*, 11 Ill. 157; *Woodbury v. Parshley*, 7 N. H. 237; *McKellip v. McIlhenny*, 4 Watts (Pa.), 317; *Cook v. Stearns*, 11 Mass. 533; *Tanner v. Valentine*, 75 Ill. 624 (to flood land); *Hitchens v. Shaller*, 32 Mich. 496 (to dig ditches); *Allen v. Fiske*, 42 Vt. 462; *Druse v. Wheeler*, 22 Mich. 439 (to erect buildings); *Dempsey v. Kipp*, 62 Barb. 311 (to construct a road). A grant of a

right to shoot over land and to take away a part of the game killed held to be a profit *à prendre* and a grant of an interest in land and within the statute. *Webber v. Lee* (1882), 9 Q. B. Div. 315.

² *Hazelton v. Putnam* (1850), 3 Pinney (Wis.), 107; 54 Am. Dec. 158, cases collated in notes. "A license is not a grant but may be recalled immediately." Lord Ellenborough in *Rex v. Inhabitants of Horndon-on-the-Hill*, 4 M. & Sel. 562; *Wallis v. Harrison*, 4 Mees. & W. 538 (parol executory license countermandable at any time); *Liggins v. Inge*, 7 Bing. 682 (distinguishing between licenses which, when countermanded, leave the party *in statu quo* and licenses for the construction of buildings and works which are not revocable). In *Taylor v. Waters*, 7 Taunt. 374, it was held that a beneficial license to be exercised upon land may be granted without deed and without writing. The plaintiff was the bearer of an opera ticket which gave him admission to the opera house for twenty-one years, and was denied admission by the defendant, for which an action was brought; one ground of defense was that this was an interest in land and could not pass without a writing. Ch. J. Gibbs cited the cases of *Webb v. Paternoster*, *Palmer*, 71; *Winter v.*

§ 543. **Easements.**—At the present day the distinction between an easement and a license is well settled, although it is difficult in some of the cases to discover a substantial difference between them.¹ An easement is a liberty, privilege or advantage in land without profit, existing distinct from an ownership of the soil. It is an interest in another's land with a right to enjoy it, while a license carries no such interest.² "An easement must be an interest in or over the soil,"³ and it is well settled that it can not exist in parol.⁴

Brockwell, 8 East, 308 (skylight over area excluding light and air), and *Wood v. Lake*, Sayer, 3, and remarks. "These cases abundantly prove that a license to enjoy a beneficial privilege on land may be granted without deed, and notwithstanding the statute of frauds without writing." In *Wood v. Leadbitter* (1845), 13 M. & W. 837, where the plaintiff had purchased a ticket to the Doncaster race course, entitling him to the stand and enclosure during the races, and was turned out, and for which he brought suit, the court, in an elaborate opinion by Baron Alderson, after reviewing the decisions upon the subject of parol licenses came to the conclusion that a right to come and remain for a certain time on the land of another could be granted only by deed, and that a parol license to do so, though money be paid for it, is revocable at any time, and without paying back the money. *McCrea v. Marsh*, 12 Gray, 211 (refusal to admit a colored person to a theater, following *Wood v. Leadbitter*, 13 M. & W. 837). In *Drew v. Peer* (1880), 93 Pa. St. 234, P. and his wife, who were colored persons, purchased two tickets of admission to reserved seats in the theater of the defendant. They were forcibly ejected from the theater. The court, per Sterrett, J., said: "We incline to the opinion that as purchasers and holders of tickets for particular seats, the plaintiff

and his wife had more than a mere license. Their right was more in the nature of a lease, entitling them to peaceable ingress and egress and exclusive possession of the designated seats during the performance on that particular evening." "That which is called a license is often something more than a license; it often comprises or is connected with a grant, and then the party who has given it can not in general revoke it so as to defeat his grant to which it was incident." *Wood v. Leadbitter*, 13 M. & W. 837.

¹ *Hazelton v. Putnam*, 3 Pinney (Wis.), 107; *Wolfe v. Frost*, 4 Sanf. Ch. 72 (distinguishing between easements and licenses).

² *Pomeroy v. Mills*, 3 Vt. 279; *Angell on Water-courses*, 316; 3 Kent's Commentaries, 452; *Washburn on Easements and Servitudes*, 3d ed., 5. In Massachusetts the supreme court has defined an easement or servitude to be "a right which one proprietor has to some profit, benefit or lawful use, out of or over the estate of another proprietor." *Ritger v. Parker*, 8 Cush. 145; *Owen v. Field*, 102 Mass. 90.

³ Per Cresswell, J.; *Rowbotham v. Wilson*, 8 Ellis & B. 123, distinction between easements and *profits a prendre*. *Washburn on Easements and Servitudes*, 3d ed., p. 4; *Hill v. Lord*, 48 Maine, 83.

⁴ *Huff v. McCauley*, 53 Pa. St. 206.

§ 544. Rule as to sale of buildings.—The word “house,” in its ordinary legal meaning, signifies real property, but the meaning is not a fixed one. The sale of a building with the right of removal is not necessarily the sale of an interest in land within the meaning of the statute. The reasonable doctrine is, that where the effect of the contract between the parties is to impress upon the structure the character of personality it takes that character, whether the contract was made before or after its erection, unless the structure is inseparably annexed to the land.¹

In the case of *Hewlins v. Shippam*, 5 Barn. & C. 221, the plaintiff at considerable expense made a drain over the defendant's land, by his verbal permission. The defendant was sued for stopping up the drain. The court, upon a full re-examination of all the cases, decided that an easement in the land of another was an uncertain interest in law, and could not be acquired by a parol agreement. *Cocker v. Cowper*, 1 Crompt. M. & R. 418, was a similar case. The right in one to overflow the land of another is an easement, an incorporeal hereditament, and an interest in real estate. *Snowden v. Wilas*, 19 Ind. 10; 81 Am. Dec. 370. In *Fentiman v. Smith*, 4 East, 107, Lord Ellenborough stated that the right to have water pass over the lands of another by a tunnel could not be acquired by a parol license. *Lawrence v. Springer* (1892), 49 N. J. Eq. 289; *Pitkin v. Long Island R. Co.*, 2 Barb. Ch. 221; *Dolittle v. Eddy*, 7 Barb. 74; *Wiseman v. Lucksinger* (1881), 84 N. Y. 31 (drain through another's land); *Sweeney v. St. John* (1883), 28 Hun, 634; *Brown v. Woodworth*, 5 Barb. 550; *Babcock v. Utter*, 1 Keyes, 397; *Day v. New York, etc., R. Co.*, 31 Barb. 548; *Thompson v. Gregory*, 4 John. 81; *Miller v. Auburn, etc., R. Co.*, 6 Hill, 61; *Fitch v. Seymour*, 9 Metc. 462; *Hays v. Richardson*, 1 Gill & J. 366; *Thomas v. Sorrell*, Vaughan, 330.

¹ *Rogers v. Cox* (1884), 96 Ind. 157; 49 Am. Rep. 152; *Griffin v. Ransdell*, 71 Ind. 440; *Keyser v. District No. 8*, 35 N. H. 473; *Ham v. Kendall*, 111 Mass. 297 (ice-house); *Russell v. Richards*, 10 Maine, 429; 25 Am. Dec. 254 (saw-mill); *Shaw v. Carbre*, 13 Allen, 462; *Long v. White*, 42 Ohio St. 59. Buildings are realty or personality, according to the intention of the parties, and when the parties agree that they may be severed and moved from the realty buildings are held and treated as personality. *Long v. White* (1894), 42 Ohio, 59; *Hartwell v. Kelly*, 117 Mass. 235; *Beach v. Allen*, 7 Hun, 441 (church building severed from land and placed on rollers). “Buildings, crops and earth itself sold to be separated from the land, are not within the statute of frauds, for by reason of the understanding and agreement of the parties they have lost their character as parcel of the realty.” *Curtiss v. Hoyt*, 19 Conn. 154. In *Lavery v. Pursell* (1888), L. R. 39 Ch. Div., it was held that a contract for the sale of “the building materials” of a house, with a condition that all materials were to be taken down and cleared off the ground within two months, after which date any materials then not cleared will be deemed a trespass, and become forfeited, and the purchaser's right of access to the ground shall absolutely cease,” was a contract for the sale of an interest in

§ 545. **Partnership to deal in lands.**—It has been a mooted question whether a partnership can be created by parol for the purpose of buying and selling lands for profit. It is now quite generally accepted as the established doctrine that such an agreement is not within the statute. A partnership of this kind, like any other contract of partnership, is an agreement to share in the profit and loss of certain business transactions, and may be formed for the purpose of buying and selling land generally, or it may be limited to a speculation upon a single venture.¹ The rule laid down in *Dale v. Hamilton*,² that the existence of such a partnership can be shown by general evidence concerning land within the statute.

¹ *Speyer v. Desjardins* (1892), 144 Ill. 641; 36 Am. St. Rep. 473.

² *Dale v. Harrington* (1846), 5 Hare, 369. In that case a parol agreement had been entered into, under which a tract of land was to be purchased, in the name of one McAdam, and laid out in lots and resold, he furnishing the capital and the plaintiff the skill and labor necessary therefor, and the profits resulting from the venture were to be divided between them. The purchase was accordingly effected in the name of McAdam, but the defendants who had succeeded to McAdam, with notice of the agreement, refused to carry it out. Thereupon the plaintiff filed his bill for an accounting and sale of the land under the direction of the court, with a division of the proceeds in accordance with the terms of the agreement. The defendants resisted the suit on the ground that the agreement was not in writing. Vice-Chancellor Wigram overruled the objections and sustained the bill. While *Dale v. Hamilton*, 5 Hare, 369, is to some extent shaken by the case of *Caddick v. Skidmore*, 2 DeG. & J. 51 (1851) (an agreement to become partners in a mine), it is still recognized as authority. Lindley Law of Partnership, Chap.

IV; *Fountain v. Menard* (1893), 53 Minn. 443; 55 N. W. Rep. 601; *Bates v. Babcock* (1892), 95 Cal. 479; 29 Am. St. Rep. 133; *Gray v. Smith* (1889), 43 L. R. Ch. Div. 208; *Kilbourn v. Latta* (1886), 5 Mack (D. C.), 304; *Essex v. Essex*, 20 Beav. 442; *Holmes v. McCray*, 51 Ind. 358; 19 Am. Rep. 735; *Richards v. Grinnell*, 63 Iowa, 44; 50 Am. Rep. 727; *Chester v. Dickerson*, 54 N. Y. 1; 13 Am. Rep. 550; *Black v. Black*, 15 Ga. 445; *Fall River, etc., Co. v. Borden*, 10 Cush. 458; *Bunell v. Taintor*, 4 Conn. 568; *Pennybacker v. Leary*, 65 Iowa, 220; *Personette v. Pryme*, 34 N. J. Eq. 26; *Gibbons v. Bell*, 45 Texas, 417; *Marsh v. Davis*, 33 Kan. 326; *Bissell v. Harrington* (1879), 18 Hun, 81; *Traphagen v. Burt* (1876), 67 N. Y. 30; *Babcock v. Read*, 99 N. Y. 609. See note to *McCormick's Appeal*, 98 Am. Dec. 197. *Contra*, *Everhart's App.*, 106 Pa. St. 349; *Bird v. Morrison* (1860), 12 Wis. 138; *Walker v. Herring*, 21 Gratt. (Va.) 678. There is a *dictum* in *Gray v. Palmer*, 9 Cal. 616, to the effect that such an agreement must be in writing, for which *Story on Partnership*, § 83, is cited as authority, and in *Smith v. Burnham*, 3 Sum. 435, it was so held by that distinguished jurist. The great weight of modern authority is, however, in support of the rule as given in the text.

dence, without the necessity of a written agreement, has been generally followed, and, although there are some decisions to the contrary, it may now be said to be the prevailing rule upon that subject. The cases proceed upon the theory that the real estate of a partnership is treated and administered in equity or between partners and for all the purposes of the partnership, as personal property and partnership assets.¹ Although a partnership in land may be proved by parol evidence, yet an agreement by one of the parties to retire and to assign his share in the partnership assets is an agreement to assign an interest in land.²

§ 546. The same subject continued.—A verbal contract for the formation of a partnership to purchase standing timber is void.³ So also, an oral contract between the members of a co-partnership to convey firm realty from one to the other is void.⁴

¹ An agreement to join in the purchase of land must be in writing. *Parsons v. Phelan* (1883), 134 Mass. 109; *Morton v. Nelson* (1893), 145 Ill. 586; 32 N. E. Rep. 916; *Slevin v. Wallace* (1892), 64 Hun, 288.

² *Gray v. Smith* (1889), L. R. 43 Ch. Div. 208.

³ *McMillen v. Pratt*, 89 Wis. 612; 62 N. W. Rep. 588, per Pinney, J.: "It is obvious that the objection that the agreement is within the statute of frauds (Revised Statutes, § 2302), and void, is well taken, and that no action at law for the recovery of damages for its breach can be maintained. *Brandeis v. Neustadt*, 13 Wis. 158; *Levy v. Brush*, 45 N. Y. 589. An agreement for a partnership in real estate is void, unless in writing (*Bird v. Morrison*, 12 Wis. 138); and a sale of standing timber, and an agreement to buy it, are within the statute (*Daniels v. Bailey*, 43 Wis. 566). The distinction between the case of *Treat v. Hiles*, 68 Wis. 344; 32 N. W. Rep. 517, and the present case, is obvious. In *Treat v. Hiles* the real estate to be purchased was not, nor was any interest in it, to become partnership property, and the

agreement was simply a partnership or an agreement for a partnership for working the stone quarry on the land of one of the parties. And *Hill v. Palmer*, 56 Wis. 123; 14 N. W. Rep. 20, is in principle the same. The agreement here was for the purchase of an interest in real estate (*Babcock v. Read*, 99 N. Y. 609; 1 N. E. Rep. 141; *Daniels v. Bailey*, *supra*); and not merely for sharing in the profits or losses of a contemplated speculation in such property. We have not been referred to any case where a recovery at law of damages for breach of a verbal contract, such as this, has been sustained; and the following cases, we think, sustain the conclusion at which we have arrived. *Levy v. Brush*, 45 N. Y. 589; *Dunphy v. Ryan*, 116 U. S. 491; 6 Sup. Ct. Rep. 486; *Parsons v. Phelan*, 134 Mass. 109; *Horsey v. Graham*, L. R. 5 C. P. 9; *Raub v. Smith*, 61 Mich. 543; 28 N. W. Rep. 676; *Brosnan v. McKee*, 63 Mich. 454; 30 N. W. Rep. 107; *Bailey v. Hemenway*, 147 Mass. 326; 17 N. E. Rep. 645."

⁴ *Brewer v. Cropp*, 10 Wash. 136; 38 Pac. Rep. 866, *Scott, J.*: "While the

§ 547. Agreements not to be performed within a year.—The clause of the statute in regard to agreements “not to be performed within the space of one year from the making thereof” means to include any agreement which, by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, does not admit of its performance, according to its language and intention, within a year from the time of its making.¹ In order to bring a parol contract within this clause, it must either have been expressly stipulated by the parties, or it must appear to have been understood by them that it was not to be performed within a year, and this stipulation or understanding must be absolute and certain, and not depend on any contingency.² If an agree-

real estate owned by the partnership is regarded as personal property for some purposes, it is an equitable conversion only, and the requirements of the law relating to conveyances of land must be observed in disposing of it. *T. Parson on Partnership* (4th ed.), §§ 269, 270, 272; *Davis v. Christian*, 15 Gratt. 11; *Piatt v. Oliver*, 3 McLean, 27; *Fed. Cas. No. 11,116*; *Moreau v. Saffarans*, 3 Sneed, 596; *Miller v. Proctor*, 20 Ohio St. 442. An oral contract to convey real estate is not binding here; *Nichols v. Oppermann*, 6 Wash. 618; 34 Pac. 162; and we see no reason to exempt partnership lands from this rule. Every reason which supports such a holding as to the transfer of real estate by an individual applies with equal force to land held by a partnership.”

¹ *Warner v. Texas, etc., R. Co.* (1893), 54 Fed. Rep. 922; 4 C. C. A. 673; *Wooldridge v. Stern* (1890), 42 Fed. Rep. 311; *Heffin v. Milton* (1881), 69 Ala. 354. The mischief meant to be prevented was the leaving to memory the terms of a contract for a longer time than a year. The persons might die who were to prove it, or they might lose their faithful recollection of the terms of it. *Boydell v. Drummond*, 11 East, 142;

Smith v. Westall, 1 Lord Ray. 316; *Baillett v. Wheeler*, 44 Barb. 162.

² *Roberts v. Summit Park Co.* (1893), 72 Hun, 458; *Hinkle v. Fisher* (1885), 104 Ind. 84; *Boydell v. Drummond*, 11 East, 142. Justice Miller, in *McPherson v. Cox* (1877), 96 U. S. 404, says: “The statute of frauds applies only to contracts which, by the terms, are not to be performed within a year.

* * In other words, to make a parol contract void, it must be apparent that it was the understanding of the parties that it was not to be performed within a year from the time it was made.” *Walker v. Johnson*, 96 U. S. 424; *Hall v. Solomon* (1892), 61 Conn. 476; *Aiken v. Nogle* (1891), 47 Kan. 96; *Railway Co. v. Whitley* (1891), 54 Ark. 199; *Warren, etc., Co. v. Holbrook* (1890), 118 N. Y. 587; *Van Woert v. Albany, etc., R. Co.*, 67 N. Y. 538; *Durham v. Hiatt* (1890), 127 Ind. 514; *Marley v. Noblett*, 42 Ind. 85; *Wilson v. Ray*, 13 Ind. 1; *Hodges v. Richmond Mfg. Co.*, 9 R. I. 482; *Somerby v. Buntin* (1875), 118 Mass. 279; *Larimer v. Kelley*, 10 Kan. 298; *Blackburn v. Mann*, 85 Ill. 222; *Green v. Pennsylvania Steel Co.* (1891), 75 Md. 109. “The statute of

ment is capable of being performed within a year from the making thereof, the statute does not apply although it is not actually performed until after that period, and although the parties may have intended that its operations should extend through a longer period.¹ The presumptions are all in favor of the validity of the contract, and oral agreements have been upheld in numerous instances where the parties must have expected that they would not be performed within a year, on the ground that consistently with their terms they could be fully performed within that time.²

§ 548. **The same subject continued.**—A promise not to be performed within a year within the meaning of the Kentucky statute of frauds is only one which is necessarily not to be performed within the year.³ Accordingly an agreement not to remove stock from a county, and not to dispose of real estate there situate, is a valid consideration for an agreement to extend a note. Such agreement, being susceptible of performance within a year, is not within the statute of frauds.⁴

frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. * * It does not extend to cases where the thing only *may* be performed within the year." *Fenton v. Emblers*, 3 Burr. (1762) 1278.

¹ See the leading case of *Peter v. Compton*, Skinner, 353, and notes in 1 Smith's Leading Cases (9 Am. ed.), 586. In that case the defendant made an oral agreement with the plaintiff that, in consideration of one guinea, then paid him by the plaintiff, he would pay the plaintiff a certain greater sum upon the day of his marriage. The marriage did not happen within the year, but it was held that an action would lie, although the contract was not reduced to writing, as there was nothing in the contract which rendered it incapable of being performed within the year.

² *Wooldridge v. Stern* (1890), 42

Fed. Rep. 311; *Osment v. McElrath* (1886), 68 Cal. 466; *Sutphen v. Sutphen* (1883), 30 Kan. 510; *Cole v. Singerly* (1883), 60 Md. 348; *Ellicott v. Turner*, 4 Md. 488; *The Blair, etc., Co. v. Walker*, 39 Iowa, 406; *Kent v. Kent* (1875), 62 N. Y. 560; *Gault v. Brown* (1868), 48 N. H. 183; *Blanding v. Sargent*, 33 N. H. 239; *Thomas v. Hammond*, 47 Texas, 42; *Seddon v. Rosenbaum*, 85 Va. 928; 3 L. Rep. Ann. 337; English and American decisions collected, and notes to *Doyle v. Dixon*, 97 Mass. 208; 93 Am. Dec. 85.

³ *Fain v. Turner* (Ky. 1895), 29 S. W. Rep. 628; *Howard v. Burgen*, 4 Dana (Ky.), 137.

⁴ *Jones v. Green* (Texas App. 1895), 31 S. W. Rep. 1087. In *Jackson Iron Co. v. Negaunee Co.* (1895), 65 Fed. Rep. 298, Ricks, J., said: "We are of opinion that if any contract can be said to have arisen from the conversation above stated, it was within the statute of frauds of Michigan,

§ 549. The Texas doctrine.—The Texas statute of frauds provides that no action shall be brought “upon any agreement which is not to be performed within the space of one year from the making thereof,” “unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized.”¹ It has been held by the Texas supreme court, affirming the judgment of the court of appeals of that state, that a verbal agreement by a railroad company to issue once a year for ten years an annual pass to a person and his family and to stop its trains during that time at his house, was not an agreement not to be performed within a year within the statute of frauds, since it was to be performed within a year upon the contingency of the death of such person and his family within that time.²

which renders unenforcible every agreement not in writing that by its terms is not to be performed within one year from the making thereof. Howell's Annotated Statutes, § 6185. Giving the evidence the construction most favorable for the plaintiff, the contract was an agreement by the defendant to pay during the life of the contract at least \$2,500 a year for the privilege of taking the iron ore and using it, in consideration of the plaintiff's agreement to forbear to forfeit the rights of the Union Company under the contract, and thereby to prevent the defendant company from continuing its operation under its contract with the Union Company. This was certainly an agreement on the part of the defendant to do something which, by its terms, could not be performed within a year, for both contracts had at least ten years to run. Even if it can be said that the plaintiff could and did fully perform within a year on its part that which formed the consideration of the defendant's promise, namely, the forbearance to terminate

the contract for a reasonable time, this was not, in Michigan, such a part performance as would take the case out of the statute of frauds. *Whipple v. Parker*, 29 Mich. 369; *Perkins v. Clay*, 54 N. H. 518; *Emery v. Smith*, 46 N. H. 151; *Frary v. Sterling*, 99 Mass. 461; *Reinheimer v. Carter*, 31 Ohio St. 579; *Pierce v. Estate of Payne*, 28 Vt. 34; *Lockwood v. Barnes*, 3 Hill, 128; *Broadwell v. Getman*, 2 Denio, 87; 1 Smith's Lead. Cas. 45, etc.; *Browne on Statute of Frauds*, § 286.”

¹ Section 4, subsection 6.

² *Weatherford, etc., R. Co. v. Wood* (Texas, 1895), 30 S. W. Rep. 859. The judgment of the lower court was affirmed by the Texas supreme court, and Denman, J., delivered the following opinion: “Some learned courts, whose reasoning is difficult to answer, have given effect to that clause of the statute under consideration here by holding it applicable to that numerous class of cases where the contract or agreement of the party sought to be ‘charged therewith’ in the partic-

§ 550. Illustrations—Cases within the statute.—The statute applies when from the language used it must necessarily be

ular suit was not to be performed within the year, though the promise of the other party was performable within the year, or the consideration executed. *Pierce v. Estate of Payne*, 28 Vt. 34; *Sheehy v. Adarene*, 41 Vt. 541; *Parks v. Francis*, 50 Vt. 626; *Doyle v. Dixon*, 97 Mass. 208; *Frary v. Sterling*, 99 Mass. 461; *Bartlett v. Wheeler*, 44 Barb. 162; *Reinheimer v. Carter*, 31 Ohio St. 579; *Broadwell v. Getman*, 2 Denio, 87. Under the view we have taken of this case, it does not become necessary for us to determine now which of these two conflicting lines of decisions we will follow. It seems to be well settled that where there is a contingency expressed upon the face of the contract or implied from the circumstances, upon the happening of which within a year the contract or agreement will be performed, the contract is not within the statute, though it be clear that it can not be performed within a year, except in the event the contingency happens. Thus an agreement to give an annual pass over a railroad during life is performable by the happening of the implied contingency of the death of the donee within the year, and is not within the statute. *Atchison, etc., R. Co. v. English*, 38 Kan. 110; 16 Pac. Rep. 82. So an agreement to support a child or children until majority will be performed upon the happening of the implied contingency of the death of such child or children within the year, and is therefore not within the statute. *Peters v. Westborough*, 19 Pick. 364; *Wiggins' Adm'r v. Keizer*, 6 Ind. 252. So an agreement not to do business at a certain place will be performed upon the death of the party so agreeing, within a year, and therefore is not within the

statute. *Lyon v. King*, 11 Metc. (Mass.) 411; *Worthy v. Jones*, 11 Gray, 168; *Hill v. Jamieson*, 16 Ind. 125; *Foster v. McO'Brien*, 18 Mo. 88. So an agreement to support one during life may be performed upon the contingency of the death of the person to be supported, and is not within the statute. *Heath v. Heath*, 31 Wis. 223; *Carr v. McCarthy*, 70 Mich. 258; 38 N. W. Rep. 241; *Hutchinson v. Hutchinson*, 46 Maine, 154; *Howard's Adm'r v. Burgen*, 4 Dana, 137; *Burney v. Ball*, 24 Ga. 505. Some courts have undertaken to draw a distinction between that class of contracts or agreements to do or refrain from doing a thing during life and that class of contracts or agreements to do or refrain from doing a thing for a stipulated period of years, holding that where the former will be performed upon the happening within the year of the implied contingency of death, the statute does not apply to the latter class, although performable upon the happening of the same contingency within the year. The reason given is that by the terms of the contract the parties in the latter class contemplate that the same will not be performed within a year. *Mallett v. Lewis*, 61 Miss. 105. Thus, according to this reasoning, an agreement to give A. an annual pass for life is not within the statute, because performable within the year upon the happening of the contingency of A.'s death within that time, while an agreement to give him a pass for ten years is within the statute, for, although the contract would appear to be performable within a year upon the happening of the contingency of A.'s death within that time, still the parties contemplated by the terms of the agreement that it would not be performable within a

understood that performance of the undertaking within the year is absolutely and of necessity impossible, or, what amounts to the same thing, is distinctly contrary to the intent. According to the same reasoning, a contract to give A. an annual pass for ten years would be within the statute, although it is clear the contract would be performed upon A.'s death within a year, while a contract to give A. an annual pass for ten years, provided the contract shall be considered performed if A. die within a year, would not be within the statute; for in the first case the parties by their contract contemplated that it would not be performed within a year, whereas, in the latter case, they, by their contract, contemplated its performance within a year if A. should die within that time. We think this reasoning untenable, and not justified by the statute. If the contingency is beyond the control of the parties, and one that may, in the usual course of events, happen within the year, whereby the contract will be performed, the law will presume that the parties contemplated its happening, whether they mention it in the contract or not. *Peters v. Westborough*, 19 Pick. 364; *Ellicott v. Turner*, 4 Md. 476; *Peter v. Compton*, Skin. 353; *Fenton v. Emblers*, 3 Burrows, 1278; *Wells v. Horton*, 4 Bing. 40. The statute only applies to contracts 'not to be performed within the space of one year from the making thereof.' If the contingency is such that its happening may bring the performance within a year, the contract is not within the terms of the statute and this is true whether the parties at the time had in mind the happening of the contingency or not. The existence of the contingency in this class of cases, and not the fact that the parties may or may not have contemplated its happening, is what prevents the agreement from coming within the scope of the statute. Applying these principles to the case under consideration, we think it clear that the contract above set out was not within the statute. The agreement to give the pass and stop the trains was personal to Wood and family. He could not transfer it. In case of his death within the year, the obligation of the company to him would have been performed, and no right thereunder would have passed to his heirs or executors. If it be held that each member of his family had an interest in the agreement, the same result would have followed the death of such member or all of them within the year. If the agreement had been to give Wood a pass for life, it would, under the above authorities, not have been within the statute, and we can see no good reason for holding it to be within the statute because his right could not have extended beyond ten years. The happening of the contingency of death of himself and family within a year would have performed the contract in one case as certainly as in the other. The judgment is affirmed." The lower court's opinion was as follows: "We think that the trial court correctly held that the verbal agreement declared upon was not, under the attendant facts, within the statute. Mr. Wood, in his work on the Statute of Frauds (§ 279), states the following rule applicable to this subject as deduced from the weight of authority: 'In England and most of the states of this country it is held that the statute only applies to contracts which are not to be performed by either side within a year, and therefore, where a contract has been completely performed on one side within the year, the case will not be within the statute.' Cases cited by him, including *Miller v. Roberts*, 18 Texas, 16, seem

tent.¹ Thus a contract to do any act at a time more than a year distant, as to pay off an incumbrance that will not mature for more than a year,² to deliver a crop that can not be grown within a year,³ to form a partnership to be continued beyond one year,⁴ or a contract for service for a period of more than a year, or for a year, the service to begin at a future day,⁵ comes within the statute and must, in consequence thereof,⁶ be in writing.

to support the text. See also, *Blanding v. Sargent*, 33 N. H. 239; 66 Am. Dec. 720; *Westfall v. Perry* (Texas Civ. App.), 23 S. W. Rep. 740. Here it seems that, within the year, the contract had been completely performed on the part of the appellee. In settlement of his judgment against the company for \$1,000, he accepted the sum of \$800 then paid, and the agreement of the appellant to issue the annual pass and to stop its trains as indicated. This performance was contemporaneous with the agreement, and was therefore within the year. The judgment was in truth satisfied by the payment to the plaintiff of \$800 in cash, and by the agreement of the latter to accept the free transportation, and the further consideration of the stopping of appellant's trains. This promise, and not the compliance therewith by the appellant, was accepted by the appellee as in discharge of the judgment. *Gulf, etc., Ry. Co. v. Harriett*, 80 Texas, 73; 15 S. W. Rep. 556; *Jennings v. City of Fort Worth*, 7 Texas Civ. App. 329; 26 S. W. Rep. 927. As the contract sued upon is not within the statute of frauds, we order an affirmation of the judgment."

¹*Rogers v. Brightman*, 10 Wis. 55. A contract to clear land within three years, and seed down one acre the first, one acre the second, and one acre the third year, was held to be within the statute. *Herrin v. Butters*, 20 Maine, 119. The court said, in that case: "It is urged that the defendant

might have cleared up the land and seeded it down in one year, and thereby performed his contract. * * We are not to inquire what, by possibility, the defendant might have done by way of fulfilling his contract. We must look to the contract itself, and see what he was bound to do, and what, according to the terms of the contract, it was the understanding that he should do. Was it the understanding and intention of the parties that the contract might be performed within one year? If not, the case is clearly with the defendant." See also, *Saunders v. Kastenbine*, 6 B. Mon. 17; *Hinckley v. Southgate*, 11 Vt. 428; *Swift v. Swift*, 46 Cal. 266. An agreement to pay money by annual installments is within the statute. *Parks v. Francis*, 50 Vt. 626. Also a contract to pay at intervals of less than a year, the whole period of payment to extend beyond the year. *Hill v. Hooper*, 1 Gray, 131; *Tiernan v. Granger*, 65 Ill. 351. An agreement to pay money after the lapse of a year for land to be presently conveyed. *Kellogg v. Clark* (1881), 23 Hun, 393; *Marcy v. Marcy* (1864), 9 Allen, 8.

²*Curtis v. Sage*, 35 Ill. 22.

³*Holloway v. Hampton*, 4 B. Mon. 415.

⁴*Wahl et al. v. Barnum* (1889), 116 N. Y. 87; *Morris v. Peckham* (1883), 51 Conn. 128.

⁵*Hartwell v. Young* (1893), 67 Hun, 472; *Billington v. Cahill* (1889), 51 Hun, 132; *Blanck v. Littell* (1880), 9 Daly (N.Y.), 268; *Drummond v. Bur-*

§ 551. **Illustrations—Cases not within the statute.**—A contract which may or may not be performed within a year depending on a contingency, for example, a contract to support a person during life,¹ or to work for another during his

rell, 13 Wend. 307; *La Du-King Mfg. Co. v. La Du* (1887), 36 Minn. 473; *Freeman v. Foss* (1887), 145 Mass. 361; *Meyer v. Roberts* (1885), 46 Ark. 80; *Sutcliffe v. Atlantic Mills* (1882), 13 R. I. 480; *McElroy v. Ludlum* (1880), 32 N. J. Eq. 828; *Wm. Butcher Steel Works v. Atkinson* (1873), 68 Ill. 421; *Kleeman v. Collins* (1872), 9 Bush, 460; *Comes v. Lamson*, 16 Conn. 246; *Bernier v. Cabot Manfg. Co.*, 71 Maine, 506; *Tuttle v. Swett*, 31 Maine, 555; *Shumate v. Farlow* (1890), 125 Ind. 359; *Lee's Administrator v. Hill* (1891), 87 Va. 497; *Smith v. Theobald* (1887), 86 Ky. 141; *Girard v. Richmond*, 2 C. B. 835. The year is to be computed from the day of making the contract. *Bracegirdle v. Heald*, 1 B. & Ald. 722. A contract made one day to begin the next is within the statute. *Billington v. Cahill* (1889), 51 Hun, 132. But see *Dickson v. Frisbee*, 52 Ala. 165, which excluded the day of making, the decision being based upon the decision in the case of *Cawthorne v. Cordrey* (1863), 13 C. B. (N. S.) 406. An agreement to pay an annuity is within the statute. *Sweet v. Lee*, 3 M. & G. (42 E. C. L. R.) 452. The possibility of defeasance does not make it less a contract not to be performed within the year. *Packet Co. v. Sickles* (1866), 5 Wall. 580. The contract was to use a certain invention on a boat for twelve years, if the boat should last so long. *Gray, C. J.*, in *Somerby v. Buntin*, 118 Mass. 279, doubts if this decision can be reconciled with the general current of authority. *Birch v. Earl of Liverpool*, 9 Barn. & C. 392.

¹ *Carr v. McCarthy* (1888), 70 Mich.

258; *Thorp v. Stewart* (1887), 44 Hun, 232; *Hutchinson v. Hutchinson* (1858), 46 Maine, 154; *Burney v. Ball* (1858), 24 Ga. 505; *Harper v. Harper*, 57 Ind. 547; *Heath v. Heath*, 31 Wis. 223; *Howard v. Burgen*, 4 Dana, 137; *Murphy v. O'Sullivan*, 18 Ir. Jur. (11 N. S.) 111. In the English case of *Souch v. Strawbridge* (1846), 2 C. B. 808; 10 Jur. 357; 15 L. J. C. P. 170, a contract to maintain a child so long as the defendant pleased was held not to be within the statute; also *Ellicott v. Turner*, 4 Md. 476, and *Wiggins v. Keizer* (1855), 6 Ind. 252, a contract to educate and support a child. *Hill v. Jamieson* (1861), 16 Ind. 125. Where a limit is fixed to the duration of the agreement such as the attainment of majority by a minor, the rule is not well settled as to whether the statute applies. Many American cases recognize the contingency of death as sufficient to take the case out of the statute where the contract is to support a person for a term of years named. In *Peters v. Westborough*, 19 Pick. 364, it was held that an agreement to support a child twelve years old until she became eighteen was not within the statute, as the death of the child within the year would put an end to the contract. *Woolbridge v. Stern* (1890), 42 Fed. Rep. 311, and *McKinney v. McCloskey* (1878), 8 Daly (N. Y.), 368, affirmed by the court of appeals 76 N. Y. 594, where the contract was to support a child until its majority and it was held that the statute did not apply. *Per contra* *Goodrich v. Johnson* (1879), 66 Ind. 258, and *Van Schoyck v. Backus*, 9 Hun, 68. In *Farrington v. Donohoe*, 1 Ir. Rep. C. L. 675, it was

life,¹ does not come within the statute, as the person whose life is involved may die within a year. Nor does it apply to a contract where there is no stipulation as to any fixed time for its performance, and where further performance may cease at the option of either party,² nor to a contract for a year's service when the time is not fixed for its commencement,³ nor to a contract of partnership without any fixed time for its continuance.⁴

§ 552. Further illustrations—Cases not within the statute.—

It has been held that the statute does not apply to a contract to refrain from a certain course of action for an indefinite period,⁵ as never to practice medicine in a certain town,⁶ or not

held an agreement to support a child then five years of age until she could do for herself was within the statute. In *McGregor v. McGregor* (1888), L. R. 21 Q. B. Div. 424, the decision in *Murphy v. O'Sullivan*, 18 Ir. Jur. (11 N. S.) 111, was referred to as correct doctrine, viz., that a contract to maintain a child for life was not within the statute. In *Shute v. Dorr*, 5 Wend. (N. Y.) 204, a promise to pay for the services of a youth 16 years of age when he became of age was held to be within the statute. See also, *Baker v. Lauterbach* (1887), 68 Md. 64. Cf. *Reed on Statute of Frauds*, § 204. A contract for the payment of a specific amount monthly until a definite period, that is, when the youngest child should become of age within the statute. *Deaton v. Tenn., etc., Co.* (1874), 12 Heis. 650.

¹ *Pennsylvania Co. v. Doland*, 6 Ind. App. 109; 32 N. E. Rep. 802; *Updike v. Ten Broeck* (1866), 32 N. J. Law, 105, 116. In *Ely v. Positive Assur. Co.* (1875), L. R. 1 Ex. D. 20, an agreement to employ a solicitor for life subject to removal for misconduct was held to be within the statute, a ruling which is against the general current of American decisions.

² *Blake v. Voight* (1892), 134 N. Y. 69; *Trustees of First Baptist Church*

v. Brooklyn Fire Ins. Co., 19 N. Y. 305; 28 N. Y. 153; *Kent v. Kent* (1875), 62 N. Y. 560; *Walker v. Wilmington, etc., R. Co.* (1886), 26 S. C. 80; *Blakeney v. Goode* (1876), 30 Ohio St. 350; *Esty v. Aldridge* (1865), 46 N. H. 127; *Sherman v. Champlain Trans. Co.* (1858), 31 Vt. 162.

³ *Russell v. Slade*, 12 Conn. 455. Where a contract for service is silent as to the time when the service is to commence, the presumption is that it is to commence forthwith. *Hearne v. Chadbourne* (1876), 65 Maine, 302.

⁴ *Jordon v. Miller*, 75 Va. 442. The statute does not apply to a hiring from year to year (*Beeston v. Collyer* (1827), 12 Moore, 552; 4 Bing. 309), nor to a contract for service for an indefinite time, the services under it to be compensated for in half-yearly payments (*Moore v. Fox*, 10 Johns. (N. Y.) 244), nor to a contract to work for another as long as they are mutually satisfied (*Greene v. Harris*, 9 R. I. 401).

⁵ *Perkins v. Clay* (1874), 54 N. H. 518; *Worthy v. Jones* (1858), 11 Gray, 168; *Foster v. McO'Brien* (1853), 18 Mo. 88.

⁶ *Blanchard v. Weeks* (1861), 34 Vt. 589; *Blanding v. Sargent* (1856), 33 N. H. 239.

to engage in the livery business in a certain town indefinitely,¹ nor to a contract of insurance, being a promise to pay upon the happening of an event which may occur within a year;² nor to a promise to pay when money is received from a third person;³ nor to a contract to be performed on the death of one of the parties, or of a third person;⁴ nor to an agreement to take stock and pay when the company is incorporated;⁵ nor to marry within three or four years,⁶ or at the end of a voyage expected to last about eighteen months;⁷ or upon restoration to health.⁸

¹ *Lyon v. King* (1846), 11 Metc. 411. To relinquish the trade and business of a butcher in and around the village of K., *Richardson v. Pierce* (1862), 7 R. I. 330. An agreement not to engage in a rival business, *Welz v. Rhodius*, 87 Ind. 1. It was held in *Doyle v. Dixon* (1867), 97 Mass. 208, that an agreement not to engage in a certain kind of business, at a particular place, for a specified number of years, is not within the statute. Gray, J., in delivering the opinion of the court said: "It has accordingly been repeatedly held by this court that an agreement not hereafter to carry on a certain business at a particular place was not within the statute. * * * An agreement not to engage in a certain kind of business at a particular place for a specified number of years is within the same principle; for whether a man agrees not to do a thing for his life, or never to do it, or only not to do it for a certain number of years, it is in either form an agreement by which he does not promise that anything shall be done after his death, and the performance is therefore completed with his life." In the case of *Davey v. Shannon*, L. R. 4 Ex. D. 81, a verbal promise not to engage thereafter in a certain trade was held to be within the statute. This decision is contrary to the current of authority and was

overruled by *McGregor v. McGregor* (1888), L. R. 21 Q. B. Div. 424.

² *Wiebler v. Milwaukee, etc., Ins. Co.* (1883), 30 Minn. 464; *Walker v. Metropolitan Ins. Co.*, 56 Maine, 371. As to validity of parol contracts of insurance; 2 *Parsons on Maritime Law*, 19; *Parsons on Mercantile Law*, 403.

³ *Archer v. Zeh*, 5 Hill, 200; *Hedges v. Strong*, 3 Ore. 18.

⁴ *Frost v. Tarr* (1876), 53 Ind. 390; *Sword v. Keith* (1875), 31 Mich. 247; *Riddle v. Backus* (1874), 38 Iowa, 81; *Thompson v. Gordon*, 3 Strobb. Law (S. C.), 196.

⁵ *Bullock v. Falmouth, etc., Road Co.* (1887), 85 Ky. 185.

⁶ *Paris v. Strong* (1875), 57 Ind. 339; *Lawrence v. Cooke* (1868), 56 Maine, 187; *Brick v. Gannar*, 36 Hun, 52, holding that the year clause does not apply in New York to promises to marry and distinguishing *Derby v. Phelps*, 2 N. H. 515; *Nichols v. Weaver*, 7 Kan. 373; and *Lawrence v. Cooke*, 56 Maine, 186.

⁷ *Clark v. Pendleton*, 20 Conn. 495.

⁸ *McConahey v. Griffey* (1891), 82 Iowa, 564. A contract to labor for five years, or so long as A. shall be agent of a company, not within the statute. *Roberts v. Rockbottom Co.*, 7 Metc. 46. In view of the length courts have gone in relieving parties from the operation of the statutes,

§ 553. **Performance on one side within a year.**—In England the rule prevails that the statute does not extend to contracts which are wholly executed on one side, or which may be executed on one side within a year, but only to contracts which, as a whole, are not to be executed within that time. In other words, that performance by one party within the year takes the case out of the statute, however many years may have to elapse before the agreement is performed by the other party. This doctrine is based upon the decision rendered in the Court of King's Bench in 1832, in the case of *Donellan v. Read*,¹ which has been followed and approved in subsequent cases to an extent which has established it as a rule of law in that country.² In this country, however, there has been a conflict of opinion upon this question. The English rule has been sustained more generally, especially in the southern and western states;³ but other courts of high repute, especially in Vermont, Massachusetts and New York,⁴ hold to the contrary. The question

Bell, J., remarked in *Blanding v. Sargent*, 33 N. H. 239, that, "These decisions are almost equivalent to a repeal of this clause of the statute." See also, *Rogers v. Brightman*, 10 Wis. 55, in which the court used the following language: "The course of decisions upon this act presents the most striking example of the liberties courts have taken with positive statutes which exist. But great excuse may be found in the inherent difficulty of establishing any exact interpretation which shall be applicable in all cases, and in the temptation to hold it inapplicable upon slight grounds, growing out of the hardship in many instances in applying it."

¹ *Donellan v. Read*, 3 Barn. & Ad. 899.

² *Cherry v. Heming* (1849), 4 Exch. Rep. 631; *Smith v. Neale* (1857), 2 C. B. (N. S.) 67; *Bevan v. Carr* (1885), 1 Cababe & Ellis, 499; *Miles v. New Zealand, etc.* (1886), L. R. 32 Ch. Div. 266; 54 L. J. Rep. Eq. 1035.

³ *Lowman v. Sheets* (1890), 124 Ind.

416; *Durfee v. O'Brien* (1888), 16 R. I. 213; *Dant v. Head* (1890), 90 Ky. 255; *Seddon v. Rosenbaum* (1889), 85 Va. 928; *Grace v. Lynch* (1891), 80 Wis. 166; *McClellan v. Sanford* (1870), 26 Wis. 595; *Holbrook v. Armstrong* (1833), 10 Maine, 31; *Perkins v. Clay* (1874), 54 N. H. 518; *Blanding v. Sargent* (1856), 33 N. H. 239 (but see *Emery v. Smith, contra*, 46 N. H. 151); *Berry v. Doremus* (1863), 30 N. J. Law, 399; *Smalley v. Greene* (1879), 52 Iowa, 241; *Hoyle v. Bush* (1883), 14 Mo. App. 408; *Self v. Cordell* (1870), 45 Mo. 345; *Horner v. Frazier*, 65 Md. 1; *Ellicott v. Turner*, 4 Md. 476; *Rake v. Pope*, 7 Ala. 161; *Johnson v. Watson*, 1 Ga. 348; *Compton v. Martin*, 5 Rich. L. (S. C.) 14; *Curtis v. Sage*, 35 Ill. 22; *Fraser v. Gates*, 118 Ill. 99; *Atchison, etc., R. Co. v. English*, 38 Kan. 110.

⁴ *Pierce v. Estate of Payne* (1855), 28 Vt. 34; *Frary v. Sterling* (1888), 99 Mass. 461; *Marcy v. Marcy*, 9 Allen, 8; *Cabot v. Haskins*, 3 Pick. 83; *Kellogg v. Clark* (1881), 23 Hun, 393;

turns upon the construction of the words "not to be performed." In the cases in which the English rule is sustained these words are construed as meaning not to be performed *on either side*; whereas it is held in the other cases that performance by one party is not performance of the agreement, and that, in any view, the part of the contract sued upon comes within the statute, for which the part performed is only the consideration.¹ This is a question distinct from the doctrine of part performance, which arises only in equity, and does not affect contracts within the statute of frauds, other than those respecting lands.²

§ 554. Contracts for the sale of goods, wares and merchandise—Executory sales.—Notwithstanding the decisions of the courts in the earlier cases,³ it is now the settled rule that

Broadwell v. Getman, 2 Denio, 87; Bartlett v. Wheeler, 44 Barb. 162; Weir v. Hill, 2 Lans. 278; Whipple v. Parker (1874), 29 Mich. 369; Reinheimer v. Carter (1877), 31 Ohio St. 579 (criticising the doctrine).

¹ In the case of Duff v. Snider, 54 Miss. 245, the question was said to be merely one of pleading, if confined to promises to pay money when the consideration has been received by the defendant. To the same effect, Durfee v. O'Brien, 16 R. I. 213. Cf. Browne on Statute of Frauds, §§ 289, 290. The author expresses a doubt as to the soundness of the views by which the English courts have been governed. Also, 1 Smith's Leading Cases, 586; notes in case of Peters v. Compton, Skin. 353; 1 Smith's L. C. 614 (351); Smith on Contracts, 126. Redfield, C. J., in an able exposition of the subject, in Pierce v. Estate of Payne, 28 Vt. 34, says: "If the contract has been performed on one side in such a manner that the performance goes to the benefit of the other party, whether this was done within the year or not, it undoubtedly lays the foundation of a recovery against the

party benefited by such performance. But when the contract, on the part of this party, was not to be performed within one year from the time it was made, the recovery is not upon the contract, but upon the *quantum meruit* or *valebat*, or upon money counts. It is a recovery back of the consideration of a contract upon which no action will lie, and which has been repudiated by the other party. * * * But the payment or performance of the consideration of an agreement or contract, within any section of the statute of frauds, never takes it out of the statute; if it were so, no contract upon an executed consideration would ever come within the statute."

² Britain v. Rossiter (1879), L. R. 11 Q. B. Div. 123; Osborne v. Kimball (1889), 41 Kan. 187; Smith's Equity, 660.

³ Towers v. Osborne (1724), 1 Stra. 506; Clayton v. Andrews (1767), 4 Burr. 2101. These decisions were overruled in Rondeau v. Wyatt (1792), 2 H. Bl. R. 63. In that case Lord Ellenborough said: "It is singular that an idea could ever prevail that this section of the statute was only appli-

executory contracts are within the statute, and are not taken out of it by the mere circumstance that the goods are not ready for delivery.¹

§ 555. Contracts for sale of goods distinguished from contracts for work and labor.—One of the difficult questions which arise under this clause of the statute is to determine whether the contract is for the sale of goods, wares or merchandise, or where the article is not in existence at the time, whether it is for work and labor. The distinctions made have in some instances been extremely nice, and it is difficult, if not impossible, to reconcile all the determinations, or to frame a general rule. The difficulty arises from “the infinitely various shades of different contracts.”² If the article existed at the time of the contract in the condition in which it is to be delivered it is regarded as a contract of sale, but if what is contemplated by the agreement is the peculiar skill, labor or care of the maker then the contract is for work and labor, and need not be proved by a note in writing.³ A contract to paint a portrait

cable to cases where the bargain was immediate, for it seems plain, from the words made use of, that it was meant to regulate executory as well as other contracts.” The statute has since settled the matter in England. Lord Tenterden’s Act (1829), Stat. 9 Geo. IV, c. 14, § 7, extended the statute of frauds “to all contracts for the sale of goods, * * notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.”

¹ *Atwater v. Hough*, 29 Conn. 508, (an agreement for the purchase and sale of sewing machines); *Carman v. Smick*, 15 N. J. Law, 252; *Bennett v. Hull*, 10 John. 364; *Ide v. Stanton*, 15 Vt. 685; *Edwards v. Grand Trunk Ry. Co.*, 48 Maine, 379; *Burrell v. High-*

leyman, 33 Mo. App. 183; *Prescott v. Locke*, 51 N. H. 94; *Pitkin v. Noyes*, 48 N. H. 294. “The reasons upon which the policy of the statute rests apply with greater force to executory than to executed contracts. In the former there is opened a wider field for fraud than in the latter. * * Comparatively little litigation can grow out of an executed contract—the execution concludes in most cases the rights of parties; whereas, where contracts are to be consummated, misconstructions of what they are, imperfect compliance, or total failure to comply, are fruitful sources of litigation.” *Cason v. Cheely*, 6 Ga. 554.

² *Gardner v. Joy*, 9 Metc. 177; *Atwater v. Hough*, 29 Conn. 508.

³ *Prescott v. Locke* (1871), 51 N. H. 94; *Hight v. Ripley*, 19 Maine, 137. This was an action for the recovery of damages for the non-performance of a contract for the delivery of a stipulated quantity of hoe shanks to be

of a child for its parents was held not to be a sale of chattels, the skill and labor of the artist being the essential considerations.¹ The fact that the article contracted for does not exist at the time of the contract, but is to be made or manufactured, will not necessarily take the case out of the statute, as when a person stipulates for the sale of articles which he is habitually making.² A contract to purchase flax straw to be raised from forty-five bushels of flax seed was held to be a contract of sale and not for labor or skill in producing the straw.³ A test in some cases is held to be whether the person, contracting to take the article, is bound to receive one which may be bought or procured by the other party after the contract, and if he is, that it is a case of sale.⁴ When the contract is to furnish material and manufacture the article according to specifications furnished or a model selected, and when without the special contract the thing would never have been manufactured in the particular manner, shape or condition it was, it has been held that the contract is essentially for special skill, labor or

furnished "as soon as practicable" agreeably to certain patterns; held a contract for manufacture. *Abbott v. Gilchrist*, 38 Maine, 260; *Crockett v. Scribner*, 64 Maine, 447.

¹ *Turner v. Mason* (1887), 65 Mich. 662; 32 N. W. Rep. 846. But see *Isaacs v. Hardy*, 1 Cabebe & E. 287. Where the labor and service are the essential considerations, as in case of the manufacture of a thing not *in esse*, the statute does not apply, but where the labor and services are only incidental to a subject-matter *in esse*, the statute applies. Story on Sales, § 260; *Clay v. Yates* (1856), 25 L. J. Ex. 237; 1 H. & N. 73 (case of a printer employed to print a book). See *Lee v. Griffin*, 1 B. & S. 272. In Iowa it is provided by law (Code, § 3665) that this clause does not apply "when the article of personal property sold is not at the time of the contract owned by the vendor, and ready for delivery, but labor, skill or money are necessary to be expended in producing or

procuring the same." *Brown v. Allen*, 35 Iowa, 306.

² *Edwards v. Grand Trunk Ry. Co.*, 48 Maine, 379; *Lamb v. Crafts*, 12 Metc. 353. The court, per Shaw, C. J., said: "The distinction we believe is now well understood. When a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale and not a contract for labor; otherwise when the article is made pursuant to the agreement." *Smith v. N. Y. Central R. Co.*, 4 Keyes, 180.

³ *Brown v. Sanborn* (1875), 21 Minn. 402. In *Cason v. Cheely*, 6 Ga. 554 (a contract for a crop of cotton entered into after the crop was planted to be delivered as soon as it could be gathered and prepared for market held a contract for the sale of goods and within the statute.

⁴ *Edwards v. Grand Trunk Ry. Co.*, 48 Maine, 379.

workmanship.¹ In Massachusetts where the agreement was to build a carriage for a party who was to take it when finished and pay for it, it was held that this was not a contract of sale within the meaning of the statute. The rule was laid down that when the contract is a contract of sale, either of an article then existing, or of articles which the vendor usually has for sale in the course of his business, the statute applies whether the contract is to be executed at a future time or to be executed immediately. But where it is an agreement with a workman, to put materials together and construct an article for the employer, whether at an agreed price or not, although in common parlance it may be called a purchase and sale of the article, to be completed *in futuro*, it is not a sale until an actual or constructive delivery and acceptance.²

§ 556. The English rule.—The rule which now prevails in England was laid down in the case of *Lee v. Griffin*,³ in which it was held that a contract to make a set of artificial teeth was a contract for the sale of goods, wares and merchandise. As then stated, in order to ascertain whether the action should be brought for goods sold and delivered, or for work and labor done and materials provided, the particular contract entered into between the parties must be looked at. If the subject-matter is such that it will result in the sale of a chattel to be afterwards delivered, then the action must be for goods sold and delivered. Reference is had to the time of delivery as con-

¹ *Meincke v. Falk*, 55 Wis. 427, citing cases.

² *Mixer v. Howarth*, 21 Pick. 205; *Gardner v. Joy*, 9 Metc. 177, where the agreement was for the delivery of candles which were not then in existence. *Goddard v. Binney*, 115 Mass. 450, affirming *Mixer v. Howarth*, 21 Pick. 205; *Dowling v. McKenney*, 124 Mass. 478. In *New Jersey* in the case of *Finney v. Apgar* (1865), 31 N. J. Law, 266, it was stated that the weight of authority deduced from the English and American cases seemed to establish the general rule that where a contract is made for an article not existing at

the time *in solido*, and where such article is to be made according to order, and as a thing distinguished from the general business of the maker, then such contract is in substance and effect not for a sale but for work and materials. When the work and labor is the substantial object contracted for, although such work and labor is to be expended on the materials of the party who is to furnish the article at a given price, such contract is not for a sale, and consequently not within the statute.

³ Decided in the Queen's Bench in 1861, *Lee v. Griffin*, 1 Best & S. 272.

templated by the parties. If at that time it is a chattel it is enough according to this rule. If the work and labor be bestowed in such a manner that the result is not anything which can properly be said to be the subject of sale, the action is for work and labor.¹

§ 557. The rule in New York.—It is held in New York, by a long course of decisions, that an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale. Stress is laid on the word *sale*.²

§ 558. Shares in corporations and choses in action.—In England it is held that contracts for the sale of shares in a corporation are not within the scope of the seventeenth section of the statute.³ In this country they have been held to be included in the term “goods, wares and merchandise;”⁴ and the

¹ *Wolfenden v. Wilson*, 33 U. C. Q. B. 442; cases collected and rule stated as follows: “If the contract is intended to result in transferring for a price, from B. to A., a chattel in which A. had no previous property, it is a contract for the sale of a chattel.” Benjamin on Sales (6 Am. ed., Bennett’s), § 103, *et seq.*

² *Cooke v. Millard* (1875), 65 N. Y. 352, in which the authorities upon the subject are collated and the different views in regard thereto of the English, Massachusetts and New York courts pointed out, distinguishing the following cases: *Parsons v. Loucks* (1871), 48 N. Y. 17 (a contract to manufacture and deliver 20,000 pounds of paper); *Sewall v. Fitch* (1828), 8 Cow. 215 (to make 300 casks of nails); *Crofoot v. Bennett*, 2 N. Y. 258; *Kimberly v. Patchin*, 19 N. Y. 330, questioning *Mead v. Case*, 33 Barb. 202. The court refers to the rule enunciated in *Lee v. Griffin*, 1 Best & S. 272, with

approval, and says per Dwight, C.: “Were the subject now open to full discussion upon principle, no more convenient and easily understood rule could be adopted than that enunciated in *Lee v. Griffin*. * * It is too late to adopt it in full in this state. So far as authoritative decisions have gone, they must be respected, even at the expense of sound principle.”

³ *Humble v. Mitchell*, 11 A. & E. 205 (banking company); *Tempest v. Kilner*, 3 C. B. 249 (railway shares); *Bowlby v. Bell*, 3 C. B. 284 (*ibid*); *Duncuft v. Albrecht*, 12 Sim. 189 (*ibid*).

⁴ *Tisdale v. Harris*, 20 Pick. 9 (leading case). Shaw, C. J., delivering the opinion, said: “There is nothing in the nature of stocks or shares in companies which in reason or sound policy should exempt contracts in respect to them from those reasonable restrictions, designed by the statute to prevent frauds in the sale of other commodities. On the contrary, these

doctrine has been extended in some states so as to include the sale of promissory notes.¹ But in New Hampshire promissory notes were held not to be goods, wares or merchandise within the meaning of the statute.² The words of the statute have not been extended beyond securities which are subjects of common sale and barter, and which have a visible and palpable form; therefore, an agreement for the sale of an interest in an invention before letters patent are obtained was held not to be within the statute.³

§ 559. Receipt and acceptance.—If the contract is oral, and no part of the price is paid by the vendee, there must not only be a delivery of the goods, or a part of them, by the vendor, but a receipt and acceptance of the same by the vendee to pass

companies have become so numerous, so large an amount of the property of the community is now invested in them. * * * There seems to be peculiar reason for extending the provisions of the statute to them." Boardman v. Cutter, 128 Mass. 388; North v. Forest, 15 Conn. 400; Pray v. Mitchell, 60 Maine, 430; Colvin v. Williams, 3 H. & J. (Md.) 38 (bank stock); Fay v. Wheeler, 44 Vt. 292; Fine v. Hornsby, 2 Mo. App. 61. Sale of shares of stock in a company not yet organized held not within the statute. Green v. Brookins 23 Mich. 48. In Meehan v. Sharp (1890), 151 Mass. 564, the plaintiff had a certificate showing that he was the beneficial owner of fifty shares of stock in a corporation. The shares had not been issued, but were held in pool, and were to be issued whenever the board of directors should vote to authorize a delivery of them. The court said: "It is at least doubtful whether the contract, which was for the sale of stock that had not been regularly issued, can properly be brought within the statute." The statute of New York includes "things in action;" that of Florida and some

other states is extended to sales of "personal property."

¹Baldwin v. Williams, 3 Metc. (Mass.) 365; Gooch v. Holmes, 41 Maine, 523 (bank bills); Riggs v. Magruder, 2 Cr. C. C. 143 (notes of a private bank).

²Whittemore v. Gibbs, 24 N. H. 484. "A promissory note is neither goods, wares nor merchandise, in the common and ordinary sense of these terms. It is one by giving them a broad and unusual signification, that bills of exchange and notes of hand can be included." Per Eastman, J. See also, Vawter v. Griffin, 40 Ind. 593. The Indiana statute omits the words "wares or merchandise."

³Somerby v. Buntin (1875), 118 Mass. 279. "Before letters patent are obtained, the invention exists only in right, and neither that right nor any evidence of it has any outward form which is capable of being transferred or delivered *in specie*, or which upon any construction, however liberal, can be considered as goods, wares and merchandise." In a contract for the sale of gold this article is regarded as a commodity, not as money. Peabody v. Speyers (1874), 56 N. Y. 230.

the title or to make the vendee liable for the price.¹ An acceptance of part of the goods is sufficient, although the rest are not in existence at the time of the contract.² The statute does not fix or limit the time when the acceptance and actual receipt of the goods must take place, in order to make the contract valid; the acceptance and receipt may be after the sale. The authorities allow of an "oral order of one day and an acceptance at another."³ It is not necessary that the acceptance should follow or be contemporaneous with the receipt of the goods. The acceptance may take place prior to the receipt or thereafter.⁴ To constitute a delivery and acceptance, such as the statute requires, something more than mere words is necessary. Super-

¹ *Caulkins v. Hellman*, 47 N. Y. 449; 7 Am. Rep. 461; *Maxwell v. Brown*, 39 Me. 98; *Gibbs v. Benjamin*, 45 Vt. 124; *Richardson v. Squires*, 37 Vt. 640; *Stone v. Browning*, 51 N. Y. 211; *Amson v. Dreher*, 35 Wis. 615; *Shepherd v. Pressey*, 32 N. H. 49; *Denmead v. Glass*, 30 Ga. 637; *Jones v. Mechanics Bank*, 29 Md. 287; *Smith v. Hudson*, 6 B. & S. 431; *Hinde v. Whitehouse*, 7 East, 558. If the contract be for specified goods, the acceptance takes place at the time of the bargain and the same evidence that proves the bargain will prove an acceptance. *Cusack v. Robinson*, 1 B. & S. 299. In *Phillips v. Bistolli*, 2 B. & C. 511, the property was sold by an auctioneer and delivered to the purchaser, who after detaining it three or four minutes handed it back saying he was mistaken as to the price. The vendor refused to receive the property, and the jury found that the excuse was false in fact. The verdict was set aside; the court saying that to satisfy the statute there must be a delivery by the vendor, with an intention of investing the right of possession in the vendee, and there must be an actual acceptance by the latter with the intent of taking possession as owner.

² "If a man enters into an entire

agreement for goods made, and for others to be made, his accepting part of the goods made is evidence of his having entered into the agreement." *Scott v. Eastern, etc., Ry. Co.*, 12 M. & W. 33, per Alderson, B.

³ *Sprague v. Blake*, 20 Wend. 61; *McKnight v. Dunlop*, 5 N. Y. 537. Where the plaintiff, by a verbal agreement, in June, purchased 5,000 bushels of barley malt of the defendant, at a fixed price, to be paid for by the plaintiff's note, whenever \$1,000 worth of the malt should be delivered. The defendant, in August and September, delivered about 1,400 bushels in pursuance of the agreement and refused to deliver the residue. *Held*, that the contract was valid, and that the plaintiff was entitled to damages for the non-delivery of the residue of the 5,000 bushels. *Marsh v. Hyde*, 3 Gray, 331; *Davis v. Moore*, 13 Maine, 424; *Buckingham v. Osborne*, 44 Conn. 133; *Schmidt v. Thomas*, 75 Wis. 529.

⁴ *Cusack v. Robinson* (1861), 1 B. & S. 299; *Bog Lead Mining Co. v. Montague*, 10 C. B. (N. S.) 481; *Cross v. O'Donnell*, 44 N. Y. 661. In *Saunders v. Topp* (1849), 4 Ex. 390, it was doubted whether "acceptance" could precede "actual receipt," but that doubt was removed by *Cusack v. Robinson*, 1 B. & S. 299.

added to the language of the contract, there must be some act of the parties amounting to a transfer of the possession and an acceptance thereof by the buyer.¹ In this country the language of the decisions is that there must be "acts of such a character as to place the property unequivocally within the power and under the exclusive dominion of the buyer, as absolute owner, discharged of all lien for the price."² If the contract provides that the absolute legal title is not to pass until payment, there may still be such a receipt and acceptance as will take the case out of the statute. Thus, where a sewing-machine was sold to be paid for in monthly installments, and it was

¹*Ham v. Van Orden*, 4 Hun, 709; *Caulkins v. Hellman*, 47 N. Y. 449; *Dole v. Stimpson*, 21 Pick. 384; *Temp-est v. Fitzgerald*, 3 B. & Ald. 680; *Bassett v. Camp*, 54 Vt. 232; *Nicholle v. Plume*, 1 C. & P. 272.

²*Hinchman v. Lincoln* (1887), 124 U. S. 38; *Marsh v. Rouse* (1871), 44 N. Y. 643; *Rodgers v. Phillips*, 40 N. Y. 519; *Shindler v. Houston*, 1 N. Y. (1 Com.) 261; 49 Am. Dec. 316, and notes. Where the cases are collected, in that case the plaintiff and defendant bargained respecting the sale by the former to the latter of a quantity of lumber, piled apart from other lumber, on a dock, and in view of the parties at the time of the bargain, and which had before that time been measured and inspected. The parties having agreed as to the price, the plaintiff said to the defendant, "the lumber is yours." The defendant then told the plaintiff to get the inspector's bill and take it to one House, who would pay the amount. This was done the next day and payment refused. The price was over fifty dollars. It was held, in an action to recover the price that there was no delivery and acceptance of the lumber within the meaning of the statute. This case is regarded as a leading authority on the subject in the state of New York, and has been uniformly followed

there, and is recognized and supported by the decisions of the highest courts in many other states. *Kirby v. Johnson*, 22 Mo. 354; *Malone v. Plato*, 22 Cal. 103; *Edwards v. Grand Trunk R. Co.*, 54 Maine, 105; *Matthiessen, etc., Co. v. McMahon's Administrator*, 38 N. J. Law, 541. In *Knight v. Mann*, 120 Mass. 219, by the terms of the contract the buyer was to send for the goods which were picked out in accord with his orders and placed ready for delivery, and seen by buyer, who promised to send for them. They were destroyed by fire before he did so; it was held there had been no such unequivocal act of acceptance as would take the case out of the statute. No receipt and acceptance unless vendor's lien is abandoned. *Bill v. Bament*, 9 M. & W. 36. "To constitute delivery the possession must have been parted with by the owner, so as to deprive him of the right of lien," per Parke, B. *Smith v. Surman* (1829), 9 B. & Cr. 561; *Howe v. Palmer*, 3 B. & Ald. 321; *Hanson v. Armitage*, 5 B. & Ald. 557; *Morton v. Tibbett*, 15 Q. B. 428; *Holmes v. Hoskins* (1854), 9 Ex. 753; *Baldey v. Parker*, 2 B. & C. 37, but see *Wright v. Percival*, 8 L. J. R. Q. B. (N. S.) 258; *Dodsley v. Varley*, 12 A. & E. 632, considered overruled as to lien.

agreed that the machine should remain the property of the vendor until the last installment was paid and the machine was delivered and accepted at the time of the contract, it was held that the acceptance of the machine by the vendee was a sufficient acceptance under the statute.¹ In this case payment is a condition precedent, and until performance property is not vested in the vendee, but remains in the vendor, subject to be divested by the performance of the condition.²

§ 560. The same subject continued.—When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of acceptance, but it is not the same thing. The receipt by the buyer is often for the purpose of seeing whether he will accept or not.³ An acceptance to satisfy the statute has been held to mean some act done, after the vendee has exercised, or had the means of exercising, his right of rejection.⁴ He may refuse or neglect to accept unreasonably, assigning insufficient reasons, or giving no reason at all; the question is not why he did not, or whether he ought to accept, but whether he did accept. And whether he has accepted is to be determined in every case by his acts.⁵ Where the goods are sold by sample, that fact must be considered as an element in the case in determining whether the buyer has taken actual or constructive possession as owner, so as to

¹ *Pinkham v. Mattox* (1873), 53 N. H. 600.

² *Armington v. Houston* (1866), 38 Vt. 448; *Goodwin v. May*, 23 Ga. 205; *Shireman v. Jackson*, 14 Ind. 459; *Bailey v. Harris*, 8 Iowa, 331; *Patton v. McCane*, 15 B. Mon. 555; *Hussey v. Thornton*, 4 Mass. 405.

³ *Blackburn on Sale*, 23; *Kent v. Huskinson*, 3 B. & P. 233 (receipt but no acceptance).

⁴ *Hunt v. Hecht* (1853), 8 Ex. 814; 22 L. J. Ex. 293, per Martin, B. Caulkins *et al. v. Hellman*, 47 N. Y. 449; *Coombs v. Bristol, etc., Ry. Co.* (1858), 3 H. & N. 510; *Smith v. Hudson*

(1865), 6 B. & S. 431. "Acceptance means something more than receipt."

Taylor v. Smith (1893), L. R. 2 Q. B. 65. There is no acceptance unless the purchaser has exercised his option to receive the goods or not, or done something that has deprived him of his option. *Gilman v. Hill*, 36 N. H. 311; *Gorham v. Fisher*, 30 Vt. 428. If the goods are made to order very decisive acts will be required to prove acceptance before they are finished and ready for delivery. *Maberley v. Sheppard*, 10 Bing. 99.

⁵ *Knight v. Mann*, 118 Mass. 143.

indicate an acceptance thereby.¹ In the case of an executory contract for the future sale and delivery of goods of a specified quality, in the absence of express warranty the quality is a part of the description of the thing agreed to be sold, and the vendor is bound to furnish articles corresponding with the description. If he tenders articles of an inferior quality the purchaser is not bound to accept them. It has been held that if he does accept them, he is, in the absence of fraud, deemed to have assented that they correspond with the description, and is concluded from subsequently questioning it. This imposed upon the vendee the duty of inspection before acceptance if he wishes to save his rights in case the goods are of inferior quality.² But where the question is whether the contract has been fulfilled, it is sufficient to show an acceptance and actual receipt of a part of the thing sold, even though it does not preclude the purchaser from refusing to accept the residue of the goods, if it clearly appears that they do not conform to the contract.³

¹ *Remick v. Sanford*, 120 Mass. 309; *Gardner v. Grout*, 2 C. B. N. S. 340. If the buyer has received and retained a sample of the goods, the statute will be satisfied if the sample was actually a part of the goods sold. *Hinde v. Whitehouse*, 7 East, 558; *Klinitz v. Surry*, 5 Esp. 267; *Talver v. West*, Holt (N. P.) 178; *Smith v. Stoller*, 26 Wis. 671. Where tea was sold by sample and a chest of it delivered to the buyer and after opening it he undertook to return it, the court ruled that to satisfy the statute there must be a delivery of the tea by the plaintiff with the intention of vesting the possession in the defendant, and that there must be an actual acceptance by the latter with the intention of keeping it if it agreed with the sample. And it appearing that the tea did agree with the sample, then certain acts, such as weighing the tea, agreeing upon the price, and delivering it into the possession of the defendant without objection from him at the time, would

be such a delivery, acceptance and receipt as to satisfy the statute and make the contract valid.

² *Pierson v. Crooks* (1889), 115 N. Y. 539; *Pope v. Allis* (1885), 115 U. S. 363. In *Bacon v. Eccles* (1877), 43 Wis. 227, the vendee insures the goods *in transitu*, pays the freight, and intending to accept the goods if found to be such as ordered, takes them into his possession for examination, and then within a reasonable time refuses to accept them, as not according to order. *Held*, that there was not an acceptance within the meaning of the statute, if the goods are not in fact such as the order called for.

³ *Garfield v. Paris* (1877), 96 U. S. 557; *Morton v. Tibbett*, 15 Q. B. 428, leading case, holding that there may be an acceptance and receipt "without the buyer having examined the goods or done anything to preclude him from contending that they do not correspond with the contract"; *Kibble v. Gough*, 38 L. T. Rep. (N. S.) 204 (goods

§ 561. **Further illustrations.**—The act or conduct on the part of the buyer to constitute acceptance must be such as would reasonably lead the seller to think the goods are accepted, and this may be by retention of them for such a time as might reasonably lead to that conclusion.¹ The vendee, having an election to repudiate the delivery, must do it within a reasonable time, or he is bound by the acquiescence as an acceptance.² The mere use of an article on trial may in some cases be contemplated by the parties as a means of ascertaining whether it corresponds in quality with the article agreed to be furnished. In such cases mere use will not constitute an acceptance.³ If a chattel is sold and delivered upon condition that it shall be returned to the seller at a fixed price, in a certain event, and the buyer agrees so to return it, it has been held that such agreement is not for a resale of the chattel, and so not within the statute.⁴ Where goods had been sold and

equal to sample); *Rickard v. Moore*, 38 L. T. Rep. (N. S.) 841, C. A. (goods not equal to sample); *Page v. Morgan*, L. R. 15 Q. B. D. 228, in which Brett, M. R., said, referring to *Kibble v. Gough*, 38 L. T. Rep. (N. S.) 204: "It was then pointed out that there must be under the statute both an acceptance and an actual receipt, but such acceptance need not be an absolute acceptance"; *Hewes v. Jordan*, 39 Md. 472; 17 Am. Rep. 578; *Tower v. Tudhope*, 37 U. C. Q. B. 200; *Strong v. Dodds*, 47 Vt. 348, where the court, per Ross, J., said: "No doubt some confusion in the cases deciding what would or would not constitute an acceptance by the purchaser, within the meaning of the statute, has arisen by not clearly distinguishing an acceptance by the purchaser that will remove the statute disability from an acceptance that amounts to a waiver at common law by the purchaser of his right to object to the goods because they do not answer to the order in quantity or quality." In *Taylor v. Smith* (1893), L. R. 2 Q. B. 65, in which the above mentioned cases were considered, Lord Herschell said: "Accept-

ance is not used in the statute according to its common acceptation and in what precise sense it is used has never been determined."

¹ *Bowes v. Pontifex*, 3 F. & F. 739; *Downs v. Marsh*, 29 Conn. 409; *Coplay Iron Co. v. Pope*, 108 N. Y. 232.

² *Hirshhorn v. Stewart*, 49 Iowa, 418; *Spencer v. Hale*, 30 Vt. 314; *Pierson v. Crooks*, 115 N. Y. 539. It was said by Lord Ellenborough, in *Fisher v. Samuda*, 1 Camp. 190, that "it was the duty of a purchaser of any commodity, immediately on discovering that it was not according to order, and unfit for the purpose intended, to return it to his vendor, or give him notice to take it back." Similar language was used by the same judge in *Hopkins v. Appleby*, 1 Stark. 388; *Coleman v. Gibson*, 1 M. & R. 168; *Parker v. Wallis*, 5 E. & B. 21.

³ *Pierson v. Crooks* (1889), 115 N. Y. 539; *Curtis v. Pugh*, 10 Q. B. 111 (question whether the article was dealt with by vendee so as to constitute acceptance).

⁴ *Williams v. Burgess*, 10 A. & E. 499.

delivered, and a part used and appropriated by the vendee, and by a subsequent agreement between the parties the vendor was to "buy back" the property, it was held not a modification or rescission of the original contract simply, but a new contract required to be in writing or accompanied by a delivery to take it out of the statute.¹

§ 562. Constructive delivery and acceptance.—The delivery may be actual or symbolical. Where the goods are so situated as not to admit of actual delivery, the sale will be valid without it. Where the articles sold are ponderous, a symbolical or constructive delivery will be equivalent in its effect to an actual one. When goods sold are in a warehouse, the delivery of the key has been deemed sufficient. The delivery of wine in a cellar is held to be made by a delivery of the keys of the cellar. The title to a ship at sea may pass by a delivery of the bill of sale.² The circumstances held tantamount to an actual delivery ought, however, to be so strong and unequivocal as to leave no doubt of the intent of the parties.³ If the goods are

¹ *Blanchard v. Trim* (1868), 38 N. Y. 225. "Where the title of the vendee has not been perfected for any reason, where there has not been a perfect delivery, where fraud has occurred, or where the contract in any respect remains executory, the idea of a rescission is quite appropriate." Per Hunt, Ch. J.

² *Ricker v. Cross*, 5 N. H. 570; *Vining v. Gilbreth*, 39 Maine, 496; *Currie v. Anderson*, 2 E. & E. 592; *Benford v. Schell*, 55 Pa. St. 393 (delivery of keys of a safe sold, and of the room in which it stood); *Wilkes v. Ferris*, 5 John. 335 (delivery of keys); *Badlam v. Tucker*, 1 Pick. 389 (ship at sea); *Putnam v. Dutch*, 8 Mass. 287 (sale of vessel by bill of sale); *Pratt v. Parkman*, 24 Pick. 42 (delivery of bill of lading, etc.); *Boynton v. Veazie*, 24 Maine, 286 (sale of logs); *Burton v. Curyea*, 40 Ill. 320 (discussing the subject of delivery of warehouse receipts). In

Meredith v. Meigh, 2 E. & B. 364, Erle, J., says: "I have no doubt that the bill of lading, which is the symbol of property, may be so received and dealt with as to be equivalent to an actual receipt of the property itself." *Chaplin v. Rogers*, 1 East, 192 (the bulk of the commodity precluded actual delivery).

³ An agreement with the vendor about the storage of the goods, and the delivery by him of the import entry to the agent of the vendee, were held not to be sufficiently certain to amount to a constructive delivery, or to afford an *indictum* of ownership in *Bailey v. Ogden*, 3 John. 399; 3 Am. Dec. 509, a leading case on the statute of frauds and frequently cited in New York and elsewhere. *Proctor v. Jones*, 2 Carr & P. 532. "It is the intention of the statute that there should be as complete a delivery as can be according to the nature of the article." In *Boardman v. Spooner*, 95 Mass. 353,

in the custody of a third person as bailee of the seller, the possession is changed as soon as such custodian, with the authority and consent of the seller, becomes the bailee of the buyer.¹ The vendor may be the agent of the vendee to receive the goods, as where they are so situated that the vendee can rightfully take possession at his pleasure, but by mutual consent they are retained in the custody of the vendor.² There may also be a constructive acceptance under the statute, such as may arise from the vendee dealing with the goods as owner.³

it was held that the acceptance of a bill of goods in a warehouse in New York, with an order on the warehouseman for their delivery without notice to the warehouseman, was not an acceptance or receipt of the goods which would take the sale out of the operation of the statute. In *Farina v. Home*, 16 M. & W. 119, where the seller indorsed and delivered to the buyer a document by which the bailee of goods agreed to deliver them to the seller or his indorsee, it was held that there was no actual receipt by the buyer until the bailee "attorned" to him. *Bentall v. Burn*, 3 B. & C. 423.

¹ *Searle v. Keeves*, 2 Esp. 598; *Simmonds v. Humble*, 13 C. B. (N. S.) 258; *Blackburn on Sale*, 28, 29.

² *Castle v. Sworder*, 29 L. J. R. Ex. 235; 30 L. J. R. Ex. 310; *Means v. Williamson*, 37 Maine, 556; *Marvin v. Wallis*, 6 E. & B. 726; *Elmore v. Stone*, 1 Taunt. 458; *Barrett v. Goddard*, 3 Mason, 107. But if the vendor does not part with his lien there is no delivery. *Rodgers v. Jones*, 129 Mass. 420; *Safford v. McDonough*, 120 Mass. 290; *Baldev v. Parker*, 2 B. & C. 37.

³ *Rice v. Austin*, 17 Mass. 197; *Shepherd v. Pressey*, 32 N. H. 49; *Eass v. Walsh*, 39 Mo. 192; *Garfield v. Paris*, 96 U. S. 557; *Parker v. Wallis*, 5 E. & Bl. 21; *Baines v. Jevons*, 7 Car. & P. 288; *Maberley v. Sheppard*,

10 Bing. 99; *Currie v. Anderson*, 2 El. & El. 592; *Marshall v. Green*, L. R. 1 C. P. Div. 35; *Robinson v. Gordon*, 23 Up. Can. Q. B. 143. "If the vendee does any act to the goods, of wrong if he is not the owner of the goods, and of right if he is the owner of the goods, the doing of that act is evidence that he has accepted them." *Erle, J.*, in *Parker v. Wallis*, 5 E. & B. 21. *Chaplin v. Rogers*, 1 East, 192, which was assumpsit for a stack of hay. The plaintiff was put to the proof of the delivery of it, which he maintained by showing that the defendant had sold a part of the hay to one who had taken it away. This was held sufficient to prove that the defendant had the possession; inasmuch as he had made a valid sale of the hay, and dealt with the property as his own. Directing silverware to be engraved with the buyer's name before delivery has been held a good acceptance. *Walker v. Boulton*, 3 U. C. Q. B. (O. S.) 252. To directing an alteration in a carriage and taking it out for a drive. *Beaumont v. Brengeri*, 5 C. B. 301. *Green v. Merriam*, 28 Vt. 801, is an authority for the doctrine that all that a purchaser need to do to accept personal property sold by parol so as to remove the statute disability is to assume control over the property. If the goods, at the time of the bargain, are on the

§ 563. **Delivery to a carrier.**—Acceptance and receipt may be through an authorized agent. But a common carrier, whether selected by the seller or the buyer, to whom the goods are entrusted without express instructions to do anything but to carry and deliver them to the buyer, is no more than an agent to carry and deliver the goods, and has no implied authority to do the acts required to constitute an acceptance and receipt on the part of the buyer.¹ Where an agent of a business firm called upon a party with samples of goods, and articles were selected which the party agreed to take, the goods to be shipped by a designated express company, and they were accordingly shipped, and a bill of the goods sent to the purchaser, who declined to receive them on the ground that they were not like the samples, it was held that the sole duty of the carrier was to receive and transport the goods, and there was no implied authority from the buyer to accept the goods for him.² But it has been held that when the goods have been accepted by the buyer, so as to answer that portion of the statute which requires acceptance, a delivery to a car-

land of a third person (such person not having the custody of them as bailee), or are in some public place to which buyer and seller have equal right of access, it seems that the possession, as well as the title, may be transferred by the mere agreement of the parties to that effect. *Tansley v. Turner*, 2 Bing. N. C. 151; *Cooper v. Bill*, 3 H. & C. 722.

¹ *Snow v. Warner*, 10 Metc. 132; *Pierson v. Crooks* (1889), 115 N. Y. 539; *Frostburg Mining Co. v. New England Glass Co.*, 9 Cush. 115; *Keiwert v. Meyer*, 62 Ind. 587; 30 Am. Rep. 206; *Quintard v. Bacon*, 99 Mass. 185; *Nicholson v. Bower*, 1 E. & E. 172; *Johnson v. Cuttle* (1870), 105 Mass. 447; *Rodgers v. Phillips* (1869), 40 N. Y. 519; *Maxwell v. Brown*, 39 Maine, 98, in which, after an examination and reference to the English authorities, the court held that the

delivery to the carrier was insufficient to show an acceptance by the vendee. *Norman v. Phillips*, 14 M. & W. 277, in which the effect of the delivery of goods at a railway station, to be forwarded to the vendee in pursuance of the terms of a verbal contract of sale, was discussed, and a verdict for the plaintiff, founded upon such a delivery and upon the additional fact that the vendor sent an invoice to the vendee, which he retained for several weeks, was set aside. In *Morton v. Tibbett*, 15 Q. B. 428, the defendant sent a carrier for the grain purchased by sample, and previous to its arrival resold it by the same sample, before he had inspected it; and it was held that its receipt by the carrier was not an acceptance, but that his resale of it was evidence of an acceptance.

² *Allard v. Greasert*, 61 N. Y. 1.

rier selected by the buyer will answer that portion of the statute which requires the buyer to receive.¹

§ 564. Delivery which takes contract out of the statute.—

The fact that logs were banked and marked with the vendee's name ready to be put in the river, under a verbal contract that they were to be paid for when put in the river, is not a sufficient delivery to take the contract out of the statute of frauds. And payment for logs sold under a verbal contract after the contract was made is not a sufficient payment of some part of the purchase-money "at the time" to take the contract out of the statute of frauds, when the logs were not delivered.² But where one orally contracting to buy goods, on being told by the seller to take them, directs a third person to do so, the latter, upon doing so, is not liable for their value to the seller, his receipt of the goods having the effect of taking the contract of sale out of the statute of frauds.³ And a payment by one for the pasturage of a

¹ *Allard v. Greasert* (1874), 61 N. Y. 1; *Cross v. O'Donnell*, 44 N. Y. 661; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17.

² *Crosby Hardwood Co. v. Trester*, 90 Wis. 412; 63 N. W. Rep. 1057, per Newman, J.: "It is clear that the contract for the sale of the logs by Thompson to Darwin was void for want of compliance with the statute of frauds, and was binding on neither party. It was an agreement for the sale of property for the price of more than \$50. It was not in writing. Nor was there any delivery or payment at the time. Revised Statutes, § 2308. Logs to be got out are merchandise which is within the statute. *Hanson v. Roter*, 64 Wis. 622; 25 N. W. Rep. 530. The agreement of sale, being void, could not be made valid by the mere payment, or tender, of even the entire purchase-money, afterwards. For that purpose there must be a delivery and acceptance of the logs as well; or there must be a distinct renewal of, or assent to, the terms of the original agree-

ment, so as to make the payment apply on a present and not on a past agreement of sale. *Bates v. Chesebro*, 32 Wis. 594; 36 Wis. 636; *Paine v. Fulton*, 34 Wis. 83; *Kerkhof v. Paper Co.*, 68 Wis. 674; 32 N. W. Rep. 766. Whether there was payment is controverted. But it is not claimed that there was ever any delivery to or acceptance of these logs by any person representing the plaintiff, or through whom it claims to derive title, nor any later agreement of sale." See also, *Shaw Lumber Co. v. Manville* (Idaho 1895), 39 Pac. Rep. 559.

³ *Moore v. Hays*, 12 Ind. App. 476; 40 N. E. Rep. 638, per Gavin, J.: "It is undoubtedly true that the parol contract was invalid and unenforceable (not void—*Morrison v. Collier*, 79 Ind. 417; *Dixon v. Duke*, 85 Ind. 434) until executed by the receipt of the goods by the purchaser; and, had the sale been revoked by Moore prior to the receipt of the goods, then no rights could have been acquired under it. But the parol contract of sale was ac-

colt after his purchase thereof, the seller having previously paid therefor, constitutes a constructive delivery of the colt.¹

§ 565. Question for the jury.—It is the general rule that it is a question for the jury whether, under all the circumstances, the acts which the buyer does or forbears to do amount to a receipt and acceptance within the terms of the statute.² And any acts of the parties indicative of ownership by the vendee may be given in evidence to show the receipt and acceptance.³

accompanied with an express direction and license to get the corn from a certain pen. In pursuance of this license the corn was taken by Hays under authority from Carmichael. The corn having been thus taken under the express license and permission of Moore, he can not afterwards say that Hays was a wrong-doer, and sue him as such. That is what is being done here, in effect, the tort being waived. Where standing trees are sold by parol, the contract is unenforceable; but if the purchaser, in execution of it, and before revocation by the landowner, cut down the trees, he is entitled to hold them. *Owens v. Lewis*, 46 Ind. 488; *Cool v. Peters, etc.*, Box Co., 87 Ind. 531. As claimed by counsel, mere words would not constitute a delivery. *Dehority v. Paxson*, 97 Ind. 253. But there was here much more than mere words. There was actual receipt of the goods by the purchaser, or by another under his direction, which amounts to the same thing. Neither do the facts bring it within the rule invoked by appellant, that where anything remains to be done by the seller, such as weighing or measuring, the title does not pass. *Commercial, etc., Bank v. Gillett*, 90 Ind. 268; *Fordice v. Gibson*, 129 Ind. 7; 28 N. E. Rep. 303." In *Burchinell v. Smidle*, 5 Colo. App. 417; 38 Pac. Rep. 1097, plaintiff bought a restaurant, and paid full consideration therefor. When the bill of sale

was made and the purchase price paid, the vendor went with plaintiff to the restaurant, and gave plaintiff possession, and, after notifying the help of the sale, went away, and plaintiff assumed control. Defendant's officers then came, and took possession of the place, under attachments against the vendor. The vendor's name never was on the outside of the restaurant, the only sign there being one designating it "Jim's Place," and this sign had been allowed to remain as it was. The bills of fare had not been changed. It was held that there was such a change of possession as would satisfy the statute of fraud.

¹ *Stockwell v. Baird* (Del. 1895), 31 Atl. Rep. 811.

² *Hinchman v. Lincoln* (1887), 124 U. S. 38; *Bushell v. Wheeler*, 15 Q. B. 442; *Morton v. Tibbett*, 15 Q. B. 428; *Borrowdale v. Bosworth*, 99 Mass. 378, 381; *Taylor v. Mueller*, 30 Minn. 343; 44 Am. Rep. 199; *Stone v. Browning*, 68 N. Y. 598; *Bass v. Walsh*, 39 Mo. 192; *Burrows v. Whitaker*, 71 N. Y. 291; *Smith v. Stoller*, 26 Wis. 671. "The question in regard to what constitutes a delivery under the statute, and what constitutes an acceptance, is rather one of fact for the jury than of law for the court." Per Cole, J.

³ *Garfield v. Paris* (1877), 96 U. S. 557; *Gray v. Davis*, 10 N. Y. 285. The burden of proof to show acceptance is on the party setting up the contract.

But when the facts in relation to a contract of sale alleged to be within the statute are not in dispute, it belongs to the court to determine their legal effect.¹

§ 566. Earnest or part payment.—Earnest and part payment are two distinct things, each of which is sufficient to give validity to a parol contract under the seventeenth section of the statute.² Where part payment is made in order to render the contract binding, it is not required that such payment shall be shown by writing. The statute leaves the parties to prove payment by such proof as they may have, but actual part payment is required. A mere agreement to pay or to apply in payment is not sufficient.³ Part payment does not re-

Remick v. Sanford, 120 Mass. 309. A sale of personal property and a receipt acknowledging payment, with delivery of a portion, do not necessarily transfer to the vendee title in the whole property sold. The intention of the parties in the delivery is to govern, and the jury must find what that was. *Pratt v. Chase*, 40 Maine, 269. "It is not impossible but that some of the subtle and nice distinctions raised and adopted in reference to the matter of acceptance, of which Chancellor Kent complained—2 Kent's Commentaries, 495—and some of the apparent if not real confusion and conflict in the English cases since that time, might have been avoided had the question of acceptance, which, in its essence, is purely a question of fact, been uniformly sent to the jury under suitable instructions as to the law. I am satisfied that the most careful examination of the great mass of cases, when the fact of acceptance has been determined one way or the other by the court, will not result in the discovery of any uniform rule; that such examination can be little more useful or satisfactory than the examination of a thousand verdicts relating to the same subject-matter, together with the cir-

cumstances upon which they were found." Per Ladd, J., in *Pinkham v. Mattox*, 53 N. H. 600.

¹ *Shepherd v. Pressey*, 32 N. H. 49; *Norman v. Phillips*, 14 M. & W. 277; *Howe v. Palmer*, 3 B. & Ald. 321; *Tempest v. Fitzgerald*, 3 B. & Ald. 630; *Carter v. Toussaint*, 5 B. & Ald. 855; *Hanson v. Armitage*, 5 B. & Ald. 557; *Thompson v. Maceroni*, 3 B. & C. 1; *Holmes v. Hoskins*, 9 Ex. 753; *Hunt v. Hecht*, 8 Ex. 814; *Coombs v. Bristol & E. Ry. Co.*, 3 H. & N. 510.

² The practice of giving something to signify the conclusion of the contract, sometimes a sum of money, sometimes a ring or other object, to be repaid or redelivered on the completion of the contract, appears to be one of great antiquity. It was familiar to the law of Rome and was an old common law mode of binding a bargain to show that the parties were "in earnest." *Howe v. Smith* (1884), L. R. 27 Ch. Div. 89; *Blenkinsop v. Clayton*, 7 Taunt. 597.

³ *Dow v. Worthen* (1864), 37 Vt. 108; *Edgerton v. Hodge* (1869), 41 Vt. 676; *Matthiessen, etc., Co. v. McMahon* (1876), 38 N. J. Law, 536. "The object was to have something pass between the parties besides mere words." *Artcher v. Zeh*, 5 Hill. 200.

quire the actual passing of money from the vendee to the vendor. The giving of a check is not absolute payment, but when it is received as such, and is afterwards paid, it becomes a good and valid payment as of the time when it was given.¹ The payment may be made in property or in the discharge of an existing debt, in whole or in part, due from the vendor to the purchaser.² In the latter case the agreement must be carried into effect by some act which shall be obligatory upon the purchaser, and enable the vendor to enforce the contract of sale. The note should be delivered up and canceled, or if not fully paid, an indorsement should be made upon it in writing, which shall operate effectually as an extinguishment *pro tanto*. Or if the money is to be applied to pay an open account, in whole or in part, the creditor and purchaser should part with some written evidence of such application, which shall bind him and put it into the power of his debtor and vendor to enforce the contract. This, or something like this, is necessary to bring the case within the statute.³

§ 567. Auctioneer's sale.—A sale by auction is within the statute, and the auctioneer, who makes the sale, is the agent of

In *Walker v. Nussey*, 16 M. & W. 302; 16 L. J. Ex. 120, it was verbally agreed that the debt which the vendee owed the vendor of four pounds and over should go in part payment for leather. It was contended that the credit on the invoice was sufficient to take the case out of the statute, but it was held not. "Where one of the terms of an oral bargain is for the seller to take something in part payment, that term can not alone be equivalent to part payment." Per Alderson, B.

¹ *Hunter v. Wetsell*, 17 Hun, 135.

² *Dow v. Worthen*, 37 Vt. 108; *Brabin v. Hyde*, 32 N. Y. 519.

³ *Brabin v. Hyde*, 32 N. Y. 519. Where parties made an oral contract for the sale of property and each of them deposited the sum of \$200 in the

hands of a third party as a forfeiture to be paid over to the party who was ready to perform the contract, if the other party neglected to do so, it was held that the deposit was not an earnest to bind the bargain, nor part payment, within the statute that earnest was regarded as a part payment of the price. *Howe v. Hayward* (1871), 108 Mass. 54. To the same effect, *Noakes v. Morey*, 30 Ind. 103. A pecuniary deposit upon a purchase is to be considered as a payment in part of the purchase-money and not as a mere pledge. *Ockenden v. Henry*, E. B. & E. 485. The question as to the right of the purchaser to the return of the deposit money must, in each case, be a question of the conditions of the contract. *Howe v. Smith* (1884), L. R. 27 Ch. Div. 89.

both parties, and has authority to sign the promise, contract, or agreement, or a memorandum or note thereof, for the party to be charged therewith.¹ The actual agreement is constituted by the bidding on the one part, and acceptance of it by the auctioneer on the other; the auctioneer is the agent for the vendor in setting up the property for sale, in receiving the biddings for it, and accepting that of the highest bidder, and thus concluding the bargain. He is agent for the highest bidder in recording his bidding.²

§ 568. Judicial sales.—Judicial sales are not within the statute, and are binding upon the purchaser without any written contract or memorandum of the terms of sale. The sale is made by the court, through the sheriff acting as its officer. The sheriff in such a case is under no duty to bind himself personally, or to demand that the bidder shall be bound to him personally. By bidding he subjects himself to the jurisdiction of the court, and in effect becomes a party to the proceeding, and he may be compelled to complete his purchase by an order of the court, and by its process for contempt, if necessary.³

§ 569. Form of the memorandum.—The form of the memorandum is not material so long as it complies with the requirement of the statute.⁴ But the writing must within itself, or by a reference to other writings, state the whole contract so clearly that parol proof is not required to ascertain what it is.⁵ The

¹ *Morton v. Dean*, 13 Metc. 385; *Davis v. Rowell*, 2 Pick. 64; *Cleaves v. Foss*, 4 Greenl. 1; *McComb v. Wright*, 4 John. Ch. 659; *Bird v. Boulter*, 4 B. & Ad. 443; *Hicks v. Whitmore*, 12 Wend. 548; *O'Donnell v. Leeman* (1857), 43 Maine, 158; *Emmerson v. Heelis*, 2 Taunt. 38; *Pike v. Balch*, 38 Maine, 302; *Blagden v. Bradbear*, 12 Ves. 466; *Smith v. Arnold*, 5 Mas. C. C. 414; *Kenworthy v. Schofield*, 2 B. & C. 945, overruling *Simon v. Metivier*, 1 Wm. Bl. 599.

² *Dyas v. Stafford*, 7 L. R. Ired. 590.

³ *Andrews v. O'Mahoney* (1889), 112

N. Y. 567; *Hegeman v. Johnson*, 35 Barb. 200; *Cazet v. Hubbell*, 36 N. Y. 677; *Miller v. Collyer*, 36 Barb. 250; *Matter of Davis*, 7 Daly (N. Y.), 1; *Emley v. Drumm*, 36 Pa. St. 123; *King v. Gunnison*, 4 Pa. St. 171; *Warfield v. Dorsey*, 39 Md. 299; *Armstrong v. Vroman*, 11 Minn. 220; *Halleck v. Guy*, 9 Cal. 181; *Fulton v. Moore*, 25 Pa. St. 468; *Attorney General v. Day*, 1 Ves. Sen. 218.

⁴ *Clason v. Bailey*, 14 John. 484.

⁵ *North v. Mendel* (1884), 73 Ga. 400; *Cushman v. Burritt* (1882), 14 N. Y. Week. Dig. 59; *Wright v. Weeks* (1862), 25 N. Y. 153; *Bailey v. Ogden*, 3 John.

note or memorandum of the contract is not the contract itself but the evidence by which it is to be proved, and may be made later than the contract.¹ A receipt acknowledging the purchase-money is sufficient, if it contains the requisites to constitute it valid evidence of an agreement.² A bill of parcels, although not the contract itself, may amount to a note or memorandum of the contract within the meaning of the statute.³ Any document signed by the party to be charged containing the terms of the contract will suffice, as a letter to a third party, a will, or an affidavit in a different matter.⁴ An entry in its book of minutes of a resolution passed by the governing or legislative body of a municipal corporation, expressing the terms of a contract signed by the clerk, is held a satisfactory compliance with the statute.⁵ An auctioneer is, as we have seen, deemed the agent of both parties, and his memorandum, entered in his own book, is taken to be a memorandum in writing, binding upon both parties, because by them respectively authorized.⁶

399; *Buck v. Pickwell*, 27 Vt. 157; *Watt v. Wisconsin Cranberry Co.* (1884), 63 Iowa, 730; *Fry v. Platt*, 32 Kan. 62. "The meaning of the statute is, to reduce contracts to a certainty, in order to avoid perjury on the one hand and fraud on the other; and, therefore both in this court and the courts of common law, where an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted upon." Lord Hardwicke in *Welford v. Beazely*, 3 Atk. 503.

¹ *Williams v. Robinson*, 73 Maine, 186; *Johnson v. Trinity Church Soc.*, 11 Allen, 123: "If the original contract was itself in writing signed by both parties, that would be the binding instrument, and no subsequent memorandum signed by one party could have any effect." *Siewewright v. Archibald*, 17 Q. B. 102; *Parton v. Crofts*, 33 L. J. R. C. P. 189.

² *Evans v. Prothero*, 1 De G. M. & G. 572; *Camp v. Moreman*, 84 Ky. 635;

Voorheis v. Eiting (Ky. 1893), 22 S. W. Rep. 80.

³ *Saunderson v. Jackson*, 2 B. & P. 238.

⁴ *In re Hoyle* (1893), L. R. 1 Ch. 84; *Cooth v. Jackson*, 6 Ves. Jr. 12; *Barkworth v. Young*, 4 Drew. 1; 26 L. J. Ch. 153 (affidavit); *Gibson v. Holland*, L. R. 1 C. P. 1, where the subject is fully considered; *Peabody v. Speyers* (1874), 56 N. Y. 230.

⁵ *Argus Co. v. Mayor, etc., of Albany*, 55 N. Y. 495; *Chase v. Lowell*, 7 Gray, 33 (record of a resolution of city council); *Tufts v. Plymouth, etc., Co.*, 14 Allen, 407 (record of votes sufficient to bind corporation). In *Johnson v. Dodgson*, 2 M. & W. 653, the defendant made the note of the sale in his own book, and got the agent of the plaintiff to sign it and the defendant retained the book, held sufficient memorandum.

⁶ *Hawkins v. Chace*, 19 Pick. 502. So also, in the case of a broker, *Coddington v. Goddard*, 16 Gray, 436. See also, § 567, *supra*.

§ 570. **The contents of the memorandum.**—The memorandum must contain within itself, or by some reference to other written evidence, the names of the vendor and vendee, and all the essential terms and conditions of the contract, expressed with such reasonable certainty that they may be understood from the memorandum and other written evidence referred to without aid from parol testimony.¹ No more particular description is necessary under the statute in a contract for the sale of real estate, than in one relating to personal property. In each, to constitute a bargain and sale, or a contract which will be specifically enforced in equity, the subject-matter thereof must be identified.² Where the only writings consisted in correspondence between the defendant and the agent of the plaintiff, and the only description of the land was in a letter from the plaintiff's agent to the defendant in which it was called "your land," the correspondence was held insufficient as it did not disclose what land nor where it was situated.³ The time and place of delivery are material stipulations in contracts for the purchase and delivery of chattels, and when stipulated must appear in the memorandum. But if the time and place are not agreed upon the memorandum will be construed as a contract for delivery in a reasonable time and at the vendor's customary place.⁴ The memorandum is fatally defective if it

¹ *Williams v. Robinson*, 73 Maine, 186; *Smith v. Shell* (1884), 82 Mo. 215; 52 Am. Rep. 365; *Parkhurst v. Van Cortlandt*, 1 John. Ch. 273; *Abel v. Radcliff*, 13 John. 297 (an agreement to lease land without specifying for what term held void for uncertainty); *Brown v. Whipple* (1877), 58 N. H. 229; *Williams v. Morris*, 95 U. S. 444; *Gault v. Stormont*, 51 Mich. 636. "It must contain the essential elements of the contract, expressed with such degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties." *Browne on Statute of Frauds*, § 371. The names of the parties must appear. *Coddington v. Goddard* (1860), 16 Gray, 436; *Grafton v. Cummings*, 99 U. S. 100; *Sherburne v. Shaw*, 1

N. H. 157; *Wheeler v. Collier*, Moo. & M. 123; *Champion v. Plummer*, 1 Bos. & P. N. R. 252; *Anderson v. Harold*, 10 Ohio, 399.

² *Hurley v. Brown*, 98 Mass. 545; *Sherer v. Trowbridge*, 135 Mass. 500; *Whelan v. Sullivan*, 102 Mass. 204; *Williams v. Morris*, 95 U. S. 444; *Bishop v. Fletcher*, 48 Mich. 555; *Pierson v. Ballard*, 32 Minn. 263; *Scarritt v. St. John's Church*, 7 Mo. App. 174; *Webster v. Clark*, 60 N. H. 36; *Ferguson v. Staver*, 33 Pa. St. 411; *Johnson v. Granger*, 51 Texas, 42; *Sharlow v. Cotterell*, 20 L. R. Ch. Div. 90.

³ *Taylor v. Allen* (1889), 40 Minn. 433.

⁴ *Smith v. Shell* (1884), 82 Mo. 215.

does not disclose the price, as that is an essential ingredient in the contract of sale.¹ But where no price is fixed upon, a contract may be complete and binding, and the law will infer that the parties intended a reasonable price.² Where an auctioneer entered in his sales book the names of the vendor and purchaser, the subject-matter of the sale and the amount of the purchase-money, but omitted any reference to the particulars or conditions subject to which the sale was made, the memorandum was held insufficient.³ A memorandum written by a broker employed to make the purchase containing the substance of the agreement, thus: "February 29, bought for Isaac Clason, of Bailey and Voorhees, three thousand bushels of good merchantable rye, deliverable from 5th to 15th of April next, at one dollar per bushel, and payable on delivery" is sufficient. Here are the names of the parties, the subject-matter of the sale, the time of delivery, the price, and the time of payment, and the fact stated that a sale had been made.⁴

§ 571. The same subject continued.—Under the Indiana statute of frauds it is essential that the note or memorandum of a contract of bargain and sale of goods shall contain within itself a description of the property agreed to be sold, by which

¹ *Blagden v. Bradbear*, 12 Ves. 466; *Ide v. Stanton*, 15 Vt. 685; *Parkhurst v. Van Cortlandt*, 1 John. Ch. 273; *Holmes v. Evans*, 48 Miss. 247; *Ashcroft v. Butterworth* (1884), 136 Mass. 511; *Phelps v. Stillings* (1881), 60 N. H. 505.

² *Valpy v. Gibson*, 4 C. B. 837; *Acebal v. Levy*, 10 Bing. 376; *Hoadly v. McLaine*, 10 Bing. 482; *Norton v. Gale* (1880), 95 Ill. 533 (arbitration).

³ *Rishton v. Whatmore* (1878), L. R. 8 Ch. D. 467; *Kenworthy v. Schofield*, 2 B. & C. 945; *Pierce v. Corf*, L. R. 9 Q. B. 210.

⁴ *Clason v. Bailey*, 14 John. 484. A memorandum as follows: "Received, the 18th of December, 1837, of J. H. \$500 in full for one hundred acres of land, in part payment," and signed by the defendant, was held insufficient.

The writing was defective in two respects. It did not locate the land nor name the price, and extrinsic evidence could not supply the data for there was no foundation in the writing to place it upon. *Barickman v. Kuykendall*, 6 Blackf. (Ind.) 21; *Banks v. Harris Mfg. Co.* (1884), 20 Fed. Rep. 667, where the traveling agent of the defendant addressed to his principals an order, "Send to C. W. S. Banks; terms, net 30 days; freight allowed," signed by him as agent and followed by a list of the merchandise desired, with prices and directions for shipping signed by the plaintiff. It was held that the paper was, upon its face, merely an order, and not a memorandum of sale signed by the defendant or his agent.

it can be known or identified, of the price to be paid for it, of the party who sells it, and of the party who buys it. It is settled to be indispensable that the written memorandum should show, not only who is the person to be charged, but also who is the party in whose favor he is charged.¹

¹ *Peoria Sugar Co. v. Babcock Co.* (1895), 67 Fed. Rep. 892, in this case a memorandum in the form: "2/17. 15 cars mx. glucose, \$1.17¹/₂. Our guarantee price. Shipment: Feby., March. L. J. R. Peoria Grape Sugar Co."—is insufficient to sustain an action under the Indiana statute of frauds, providing that no contract of sale of goods, over \$50 in value, shall be valid unless some note or memorandum in writing is made and signed by the party to be charged, such memorandum failing to disclose the name of one party to the contract, and being indefinite as to the quantity of glucose, and the price. Baker, J., said: "The name of the party to be charged is required by the statute to be signed, so that there can be no question of the necessity of his name in the writing. But the authorities have equally established that the name, or a sufficient description, of the other party is indispensable, because without it no contract is shown, inasmuch as a stipulation or promise by one does not bind him, save only to the person to whom the promise was made, and, until that person's name is shown, it is impossible to say that the writing contains a memorandum of the bargain. In *Grafton v. Cummings*, 99 U. S. 100, 107, it appeared that the purchaser of property at auction signed an agreement which did not mention the name of the seller. The court, speaking by Mr. Justice Miller, say: 'The statute not only requires that the agreement on which the action is brought, or some memorandum thereof, shall be signed by the party to be charged, but that the

agreement or memorandum shall be in writing. In an agreement of sale there can be no contract without both a vendor and a vendee. There can be no purchase without a seller. There must be a sufficient description of the thing sold and of the price to be paid for it. It is, therefore, an essential element of a contract in writing that it shall contain within itself a description of the thing sold, by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it. * * * The name of the vendor, or some designation of him which could be recognized without parol proof extraneous to the instrument, was an essential part of that instrument to its validity.' In *Sanborn v. Flagler*, 9 Allen, 474, the contract was to deliver to plaintiff certain iron. Bigelow, C. J., said: 'It is urged that the paper does not disclose which of the parties is the purchaser and which is the seller, and that no purchaser is in fact named in the paper. This would be a fatal objection, if well founded. There can be no valid memorandum of a contract which does not show who are the contracting parties.' In the case of *Ridgway v. Ingram*, 50 Ind. 145, the requisites of the note or memorandum in writing referred to in the statute of frauds were considered by the court, and it was there said by Worden, J., in delivering the opinion of the court, that: 'A memorandum in order to be sufficient within the statute, must state the contract with such reasonable certainty that its terms may be understood from the

§ 572. Sale of realty in Texas and Kentucky—The memorandum.—The Texas statute provides that no action shall be brought in any of the courts upon any contract for the sale of real estate, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing, and signed by the party charged therewith, or by some person by him thereunto lawfully authorized.¹ The memorandum required must contain all the essential terms of the agreement, so that parol evidence shall not be required to supply any substantive feature which has been omitted. It must embrace the substance of the contract, though it need not describe its terms in a complete and detailed manner. If what the parties have really assented to can be gathered from the writing, and is not left to the recollection of witnesses, it is sufficient.² But a paper acknowledging receipt from the husband of the signers' deceased mother of a specified sum in full payment and satisfaction of the amount due them from their mother's estate, is not sufficient as a memorandum, with-

writing itself, without recourse to parol proof.' The case of *Lee v. Hills*, 66 Ind. 474, involved a counter-claim founded upon a memorandum in writing. The counter-claim was for the recovery of damages for the failure to deliver certain personal property sold by the plaintiff to the defendant. It was alleged that by the mutual mistake of the parties, the word 'sold' was omitted from before the name of the counter-claimant. It was held that the memorandum, the word 'sold' being omitted, was not a note or memorandum in writing of the bargain within the meaning of the statute of frauds, and that parol evidence was not admissible to supply the omitted word in the memorandum. The case of *Wilstach v. Heyd*, 122 Ind. 574; 23 N. E. Rep. 963, was an action to recover damages for the alleged breach of a contract for the sale of a lot evidenced by a memorandum in writing. The memorandum of sale was as follows: '\$200. New

Albany, April 23d, 1887. Received of J. B. Wilstach two hundred dollars as part purchase-money of a lot at \$2,560. Balance twenty-three hundred and sixty dollars. Geo. Heyd, Admr. Est. Jacob Heyd.' And there were indorsed on the reverse side these words: 'The lot No. 14 Ekin ave.' It was held that the memorandum was insufficient."

¹ Texas Revised Statutes, art. 2464.

² *Pomeroy on Specific Performance*, § 85; *Watson v. Baker*, 71 Texas, 739; 9 S. W. Rep. 867; *Johnson v. Granger*, 51 Texas, 42; *Peters v. Phillips*, 19 Texas, 70; *Browne on Statute of Frauds*, § 371; *Reed on Statute of Frauds*, 392; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 274; *Williams v. Morris*, 95 U. S. 444; *Pipkin v. James*, 1 Humph. 327; *Atwood v. Cobb*, 16 Pick. 227; 26 Am. Dec. 657; *Joseph v. Holt*, 37 Cal. 250; *Ham v. Johnson*, 55 Minn. 115; 56 N. W. Rep. 584; *Clipson v. Villars*, 151 Ill. 165; 37 N. E. Rep. 695.

in the statute of frauds, of a contract of sale of their interest in land inherited from their mother.¹ A contract for the sale of real estate, signed only by the vendor, which is sufficient, under the Kentucky statute, to bind him, will support an action against the vendee for the purchase price, although he has not signed the contract.²

¹ *Munk v. Weidner* (Texas App. 1895), 29 S. W. Rep. 409, Neill, J.: "No contract, agreement or promise to sell land, or anything else, appears from the instrument. If any was made between the parties, it rests entirely upon parol, for no evidence of it is found in the receipt."

² *Moore v. Chenault* (Ky. App. 1895), 29 S. W. Rep. 140, Paynter, J.: "The vendor is the party vested with title. It is he who can assume a liability which will compel him to convey the title to the property to the vendee. It is he alone who can sign such writing as will divest him of title. The law intended him to be protected in his right to his property until he voluntarily disposed of it by a writing. It did not intend that he should be placed in the power of perjurers, to take it from him by proving a parol sale. It is the vendor who is 'to be charged' with the contract of sale. To make the vendee liable for the purchase-money, when the contract of sale is in writing, it is not necessary for him to sign any obligation to pay the price of the land. The only contract the vendee could be expected to sign, in such a transaction, would be an obligation to pay the price of the land. Suppose the vendee, in this case, had signed the writing exhibited. It would simply be evidencing by a writing a liability which the law had imposed the instant the contract of sale was made, and the necessary writing executed by the vendor. Such signing would not have lessened or increased his liability. Neither could it have added to or diminished that of

the vendor. To do so was wholly unnecessary, to take the case out of the statute. In the case of *Ellis v. Deadman*, 4 Bibb, 466, this court held that a receipt for part of the purchase-money, signed by the vendor, specifying the terms of sale, would have been such a memorandum of the agreement as would have taken the case out of the provision of the statute. In the more recent case of *Tyler v. Onzts*, 93 Ky. 331; 20 S. W. Rep. 256, this court announced the same doctrine, holding that either party could maintain an action on a receipt for purchase-money signed by the vendor alone, specifying the term of contract. In the case of *Lewis v. Grimes*, 7 J. J. Marsh. 336, the vendor, Lewis, alone, had signed the writing evidencing the sale. The contract price was \$2,000, but for which the vendee, Grimes, had executed no obligation. The action was to recover the purchase-money. The vendee relied upon the statute. The court held that the vendor was entitled to recover, and, among other things, said: "See 2 Saunders on Pleading and Evidence, 903; and such seems to have been virtually the decision of this court in the case of *McDowel v. Delap*, 2 A. K. Marsh. 33. That was an action of assumpsit by a vendor of land against his vendee for the price. The defendant succeeded, as he ought to have done, because there was no written memorial of the sale, and because, therefore, there was no legal consideration for the promise to pay the stipulated price. But in the opinion delivered this court said that, as the contract of sale was not obligatory on

§ 573. What is a sufficient memorandum in other states.—

Where the memorandum executed by defendant described the lots, acknowledged the receipt of the money as part of the purchase price, and declared the trust and the taking of the title by defendant, it was held, that recovery by plaintiff was not prevented by the statute of frauds.¹ And where an agent, who

the plaintiff, such an agreement was consequently not a sufficient or valid consideration for the promise on the part of the defendant, and also that it was certainly necessary to produce in evidence some memorandum in writing of the agreement signed by the plaintiff, or some one duly authorized by him. Here is a plain intimation that if the plaintiff, who was the vendor, had been bound by a proper memorandum in writing, he could have maintained assumpsit against the vendee for the promised price, even though the defendant had signed no memorandum in writing; and the record in the case of *Hopkins v. Alvis*, 2 A. K. Marsh. 374, shows that the same point was involved, and was necessarily decided judicially and expressly in the same way.¹ ”

¹ *Waterbury v. Fisher*, 5 Colo. App. 362; 38 Pac. Rep. 846, *Reed, J.*: “The memorandum executed by the party to be charged, describes the property; admits the receipt of the money as part of the purchase price; declares the trust and the taking of the title. It is true it does not state the cost of the property, nor the proportion the amount paid bore to the whole purchase price, but it did state the amount for which he was chargeable. The memorandum made the transaction an express trust. Without the memorandum the law would have made it a resulting trust, that could have been established by parol. See *Knox v. McFarran*, 4 Colo. 586; *Learned v. Tritch*, 6 Colo. 440; *Lipscomb v. Nichols*, 6 Colo. 290; *Kayser*

v. Maugham, 8 Colo. 232; 6 Pac. Rep. 803; *Meagher v. Reed*, 14 Colo. 335; 24 Pac. Rep. 681. We think the memorandum sufficient to establish the trust, under the statute of frauds, and that the party seeking to enforce it, with the written memorandum, should not, by reason of the statute, be placed in a worse position than if there had been no written acknowledgment. The object of the statute was to prevent frauds, not to allow a party to perpetrate them, shielded by the statute. See *Wood on Statute of Frauds*, § 445; *Haigh v. Kaye*, L. R. 7 Ch. App. 469; *Lincoln v. Wright*, 4 De Gex & J. 16; *Davies v. Otty*, 35 Beav. 208. As was clearly said by Lord Alvanley in *Denton v. Davies*, 18 Ves. 499: ‘It is not required by statute that a trust should be created by a writing, * * * but that there should be evidence in writing proving that there was such a trust.’ *Wood on Statute of Frauds*, § 447; *Smith v. Matthews*, 3 De Gex F. & J. 139. Proof of the trust may be made by letters and informal documents, and parol evidence admitted to apply them. *Forster v. Hale*, 3 Ves. 696; *Smith v. Matthews*, 3 De G., F. & J. 139; Certainly, under the authorities, the writing was sufficient to establish the existence of the trust.” In *Nugent v. Smith* (1893), 85 Maine, 433, it is held that a memorandum in writing of the following form is sufficient, within the statute of frauds: “Bath, April 10, 1890. Mary E. Nugent bought of Frances B. Smith, house and land on Winter street, number 21, owned and occupied by said Frances B. Smith,

was orally appointed by a married woman with her husband's sanction, purchased land at auction, and the auctioneer made a memorandum in his book of the purchaser's name and terms of sale, the purchase is binding on the woman, as the transaction is not within the statute of frauds.¹

§ 574. Whether the memorandum must show the consideration.—The rule was for the first time announced in England, in *Wain v. Warlters*,² that the memorandum must contain the

for one thousand dollars. Paid one hundred dollars on account. Frances B. Smith."

¹ *Moore v. Taylor*, 81 Md. 644; 32 Atl. Rep. 320, Bryan, J.: "The written agreement which the heirs made for a sale by auction was valid and competent. A question is made as to the binding effect of the purchase upon Mrs. Jenifer, she being a married woman. The fourth section of the statute of frauds enacts that contracts for the sale of land shall be in writing and 'signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized.' A marked difference is to be noted between the language thus used and that of the first section, in which it is required that certain estates in land shall be made or created by writing 'signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing.' The text-books and decided cases have directed particular attention to this difference between the two sections, and to its necessary consequences. Browne on the Statute of Frauds states the result of the cases to be that the agent for signing may, in all the cases enumerated in the fourth section, be appointed without writing, unless the memorandum to be signed is to be sealed also, in which case the power must be conferred by an instrument of equal dignity. Section 370a. And when at a public sale land

is knocked down to the highest bidder by the auctioneer, it is conclusively settled that he becomes the agent of both buyer and seller, and that the memorandum required by the statute of frauds is complete when he makes in his book an entry of the purchaser's name and the terms of sale. *Singstack's Ex'rs v. Harding*, 4 Har. & J. 186; *Ijams v. Hoffman*, 1 Md. 423; Browne on Statute of Frauds, § 351. Longnecker was the agent of Mrs. Jenifer and Mrs. Taylor to bid for this land, appointed by the sanction of Mrs. Jenifer's husband. He bid it off for them, and the memorandum in writing was duly made by the auctioneer. Nothing more is required to make the contract of sale binding under the statute of frauds."

² *Wain v. Warlters* (1804), 5 East, 10. The agreement in that case was as follows: "Messrs. Wain & Co.. I will engage to pay you by half past four this day fifty-six pounds and expenses on bill that amount on Hall. (Signed) John Warlters, and dated No. 2 Cornhill. April 30, 1803. Lord Ellenborough said: "And indeed it seems necessary for effectuating the object of the statute that the consideration should be set down in writing as well as the promise, for otherwise the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterward be able to prove,

consideration for the promise, and was based mainly upon the assumption that the word "agreement" was used in its strict legal, and not in its popular sense.¹ This rule has been followed in England in a long series of cases.² In the courts in this country there has been a contrariety of opinion upon this point, depending to some extent upon the language of the statutes in the different states. In some states the statute expressly provides that the consideration need not appear in the memorandum, while in others the statute requires the consideration to appear.³ The weight of American authority would seem to preponderate against the rule, even where the construction depends on the legal meaning of the word "agreement."⁴ The words "for value received" sufficiently express

the omission of which would materially vary the promise by turning that into an absolute promise which was only a conditional one." 2 Smith's Leading Cases, *Wain v. Warlters*, 5 East, 10.

¹ *Osborne v. Baker* (1885), 34 Minn. 307. Lawrence, J., said, in *Wain v. Warlters*, 5 East, 10: "If the question had arisen merely on the first part of the clause, I conceive that it would only have been necessary that the promise should have been stated in writing; but it goes on to direct that no person shall be charged on such promise, unless the agreement, or some note or memorandum thereof—that is, of the agreement—be in writing; which shows that the word *agreement* was meant to be used in a sense different from *promise*, and that something besides the mere promise was required to be stated. And, as the consideration for the promise is part of the agreement, that ought also to be stated in writing."

² *Saunders v. Wakefield*, 4 B. & Ald. 595; *Jenkins v. Reynolds*, 3 Brod. & Bing. 14; *Morley v. Boothley*, 3 Bing. 107; *Hawes v. Armstrong*, 1 Bing. N. C. 761; *Cole v. Dyer*, 1 Cro. & Jer. 461; *James v. Williams*, 3 Nev. &

Man. 196; *Clancy v. Piggott*, 4 Nev. & Man. 496; *Raikes v. Todd*, 8 Adol. & Ell. 846; *Sweet v. Lee*, 3 Man. & Gr. 452. But by statutes 19 and 20 Vic., c. 97 (1856), a memorandum of a guaranty need not state the consideration. *Holmes v. Durkee*, 1 Cababe & E. 23.

³ It was held, in *Violett v. Patton*, 5 Cranch, 142, that the reasoning of the judges in the cases in which they had decided that the consideration ought to be in writing turned upon the word "agreement," and that this reasoning did not apply where the word "promise" was introduced.

⁴ *Britton v. Angier*, 48 N. H. 420; *Davis v. Tift* (1883), 70 Ga. 52; *Sage v. Wilcox*, 6 Conn. 81; *Reed v. Evans*, 17 Ohio, 128; *Patchin v. Swift*, 21 Vt. 292; *Smith v. Ide*, 3 Vt. 290; *Thornburg v. Masten* (1883), 88 N. C. 293; *Fulton v. Robinson*, 55 Texas, 401; *Landers v. Barlow* (1884), 21 Fed. Rep. 836. *Contra*, *Hutton v. Padgett*, 26 Md. 228; *Nichols v. Allen*, 23 Minn. 542; *Drake v. Seaman* (1884), 97 N. Y. 230 (an elaborate discussion of the present New York law). The states of Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, Nebraska, New Jer-

the consideration to amount to a compliance with the requirements of the law. This seems to be so, both in those states whose statute expressly requires the consideration to be expressed and in those whose courts follow the doctrine of *Wain v. Warlters*.¹

§ 575. Correspondence as evidence of the contract.—The principle is well established that a complete contract binding under the statute may be gathered from letters, writings and telegrams between the parties relating to the subject-matter of the contract, and so connected with each other that they may be fairly said to constitute one paper relating to the contract.²

sey, and Virginia provide that the consideration need not be stated. *Stimson's American Statute Law*, § 4142.

¹ 5 East, 10; *Osborne v. Baker* (1885), 34 Minn. 307; *Miller v. Cook*, 23 N. Y. 495, and cases cited; *Dahlman v. Hammel*, 45 Wis. 466; *Cheney v. Cook*, 7 Wis. 413; *Edelen v. Gough*, 5 Gill. 103; *Brooks v. Morgan*, 1 Harrington (Del.), 123; *Whitney v. Stearns*, 16 Maine, 394; *Lapham v. Barrett*, 1 Vt. 247; *McMorris v. Herndon*. 2 Bailey L. (S.C.) 56. The text-writers also generally state the law to be that the words "for value received" sufficiently express the consideration. 3 *Parsons on Contracts*, 16; *Brandt on Suretyship*, § 84; *Daniel on Negotiable Instruments*, § 1767; *Baylies on Sureties*, 87. It has been held that, if the consideration expressed was a fictitious one, it was sufficient. *Happe v. Stout*, 2 Cal. 460.

² *Ryan v. United States* (1889), 136 U. S. 68; *Beckwith v. Talbot*, 95 U. S. 289, 292; *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Coles v. Trecothick*, 9 Ves. 234, 250; *Case v. Hastings*, L. R. 7 Q. B. Div. 125; *Long v. Millar*, L. R. 4 C. P. Div. 450, 456; *Higginson v. Clowes*, 15 Ves. 516; *Sandilands v. Marsh*, 2 Barn. & Ald. 673; *Gaston v. Frankum*, 2 DeG. & S. 561; *Williams*

v. Morris, 95 U. S. 444; *Byrne v. Marshall*, 44 Ala. 355; *Esmay v. Gorton*, 18 Ill. 483; *Wills v. Ross*, 77 Ind. 1; *O'Donnell v. Leeman*, 43 Maine, 158; *Drury v. Young*, 58 Md. 546; *Atwood v. Cobb*, 16 Pick. 227; *Packard v. Putman*, 57 N. H. 43; *Wright v. Weeks*, 25 N. Y. 153; *Peabody v. Speyers*, 56 N. Y. 230; *Grafton v. Cummings*, 99 U. S. 100; *Freeland v. Ritz* (1891), 154 Mass. 257; *Peck v. Vandemark*, 99 N. Y. 29; *Louisville Asphalt, etc., Co. v. Lorick*, 29 S. C. 533; *Fitzmaurice v. Bayley*, 9 H. L. Cas. 78; *Baumann v. James*, L. R. 3 Ch. 508; *Shardlow v. Cotterell*, L. R. 18 Ch. Div. 280; L. R. 20 Ch. Div. 90; *Studds v. Watson*, 28 Ch. Div. 305; *Oliver v. Hunting*, 44 Ch. Div. 205. Where parties negotiated for the exchange of certain real estate and defendant was to pay a sum agreed upon as the difference in the values of the land to be exchanged, the receipt and the check held to constitute the contract. *Raubitschek v. Blank* (1880), 80 N. Y. 478. A telegram properly identified is equivalent to a letter. *McBlain v. Cross*, 25 Law T. R. (N. S.) 804; *Murphy v. Thompson*, 28 U. C. C. P. 233; *Coupland v. Arrow-smith*, 18 Law T. R. (N. S.) 755; *Dilworth v. Bostwick*, 1 Sweeny (N. Y.), 581; *Kinghorne v. Montreal Tel. Co.*, 18 U. C. Q. B. 60. "We must look, I

§ 576. **Bought and sold notes**—"Slip contracts."—The bought and sold notes of a broker, when they correspond and state all the terms of the bargain, are held to be a sufficient memorandum.¹ "Slip contracts" in the form prescribed by the rules and regulations of the New York Cotton Exchange, showing upon their face that the purchasers named therein bought cotton, stating the quantity sold, the price, the name of purchasers and the sellers, the latter designated by fictitious names, were held to satisfy the statute. Parol evidence is admissible to show who are the parties represented by the fictitious names for whose account the sales were made.²

think, in the case of each communication, at the papers delivered by the party who sent the message, not at the transcript of the message taken through the wire at the other end of the wire, with all the chances of mistakes in apprehending and noting the signals and in transcribing for delivery," per Robinson, C. J.

¹ *Suydam v. Clark*, 2 Sandf. 133; *Peltier v. Collins*, 3 Wend. 459; *Davis v. Shields*, 26 Wend. 341; *Parton v. Crofts* (1864), 33 L. J. C. P. 189; *Grant v. Fletcher*, 5 B. & C. 436; *Gregson v. Ruck*, 4 Q. B. 737; *Greeley Bernham Co. v. Capen* (1886), 23 Mo. App. 301; *Sievwright v. Archibald*, 6 Eng. L. & Eq. 286; 17 Q. B. 103, where the subject was elaborately discussed. There was a discrepancy in that case between the bought and sold notes. The diversity was held to avoid the contract. It has been frequently said by English judges that brokers' bought and sold notes were in their origin merely copies of the entries in their books, per Lord Ellenborough, in *Heyman v. Neale*, 2 Camp, 337; per Abbott, C. J., in *Grant v. Fletcher*, 5 B. & C. 436; per Lord Campbell, in *Sievwright v. Archibald* (1851), 17 Q. B. 103; but this view is not adopted by Blackburn (Blackburn on Sale, 86). Bought and sold notes are not peculiar to brokers.

They appear to be in familiar use in England between buyer and seller, where no broker intervenes, the seller delivering to the buyer a sold note and the buyer delivering to the seller a bought note. *Buxton v. Rust*, L. R. 7 Ex. 1; *Wilmshurst v. Bowker*, 7 M. & G. 882; *Tarling v. Baxter*, 6 B. & C. 360. When a broker intervenes he does for the parties respectively what each would otherwise do for himself, that is, he makes out and signs a sold note on behalf of the seller, and a bought note on behalf of the buyer. *Moore v. Campbell*, 10 Ex. 323. In one important particular a bought or sold note made by a broker seems to differ from one delivered by buyer to seller directly or *vice versa*, viz., that while the former can seldom or never be more than a memorandum of a verbal contract, the latter may be a contract in writing. Langdell's Cases on Sales, Index, 1036, 1037.

² *Bibb v. Allen* (1893), 149 U. S. 481. The slip contracts were in the following form: "New York, Nov. 10, 1886. —B. 10, ac. Albert; 10 ac. Alexander; 5 ac. Andrew. Seller, —, Buyer, Zerega & White. On contract subject to rules and regulations of New York Cotton Exchange, twenty-five hundred bales of cotton. Jan. 1 delivery; price 8.99. Per Z. and White, seventy-five."

§ 577. Insufficient writings to take contract out of statute.

—While two or more papers, executed as parts of one transaction involving the sale of personal property, which was not delivered or paid for, may be construed together to ascertain whether the transaction is within the statute of frauds, under the Iowa code, providing that no evidence of a contract for the sale of personalty is competent, where the property is not delivered nor paid for, unless it be in writing, evidence of the contract, not found in the writing, can not be supplied by parol. And a dated list of personal property, showing merely the price of each item thereof, and signed by the agent of the seller only, in connection with a letter from the seller to the buyer, giving the terms upon which the goods will be shipped, is not sufficient to take the contract out of the statute of frauds.¹

¹ *American Oak Leather Co. v. Porter* (Iowa, 1895), 62 N. W. Rep. 658, Robinson, J.: "Section 3663 of the code is as follows: 'Except when otherwise specially provided, no evidence of the contracts enumerated in the next succeeding section is competent unless it be in writing and signed by the party charged or by his lawfully authorized agent.' Among the contracts enumerated in the next succeeding section are 'those in relation to the sale of personal property, when no part of the property is delivered and no part of the price is paid.' None of the personal property in controversy in this action was delivered, and no part of the price has been paid. It is the general rule that two or more papers which have been executed as parts of one transaction may be read and construed together, in order to ascertain the scope and effect of the transaction, and ascertain whether it is within the statute of frauds. *Lee v. Mahoney*, 9 Iowa, 344; *Myers v. Munson*, 65 Iowa, 423; 21 N. W. 759; *Salmon, etc., Mfg. Co. v. Goddard*, 14 How. 446; *Beckwith v. Talbot*, 95 U. S. 289; *Olson v. Sharpless*, 53 Minn. 91; 55 N. W. Rep. 125. It is also the general

rule that the evidence necessary to take a contract out of the statute of frauds must all be furnished by the writings, parol evidence not being admissible to supply evidence not found in them. 1 *Greenleaf on Evidence*, § 268; *Watt v. Wisconsin Cranberry Co.*, 63 Iowa, 730; 18 N. W. Rep. 898; *Vaughan v. Smith*, 58 Iowa, 553; 12 N. W. Rep. 604; 3 *Phillipps on Evidence*, 351; 8 *Am. and Eng. Encyc. of Law*, 722. A memorandum of sale in some respects similar to the first of the two papers we have copied was considered in *Salmon, etc., Manufacturing Co. v. Goddard*, 14 How. 446, and held sufficient with parol evidence to take the case out of the statute. The doctrine of that case was questioned in *Grafton v. Cummings*, 99 U. S. 100, and does not appear to be supported by the weight of authority. However that may be, it is not controlling in this state. Our statute provides that no evidence of contracts such as that alleged in this case is competent unless it be in writing, and signed by the party charged, or by his lawfully authorized agent. The first writing we have set out as written in the order book of the defendants.

§ 578. **The signature.**—Much liberality has been used in regard to this requirement of the statute.¹ The signature is held valid and binding, though made with the initials of the party only, and parol evidence is admissible to explain and apply them.² The statute is satisfied by the mark of the person to be charged, or any figure or designation, if the party affixing intends to be bound thereby.³ It is not even essential that the party to be charged should have affixed either signature, initial, or mark of any kind, with his own hand, if his name be even printed with his authority, and the printed signature be intended to bind, it will be sufficient.⁴ If the name appears in the memorandum, and is applicable to the whole substance of the writing, and is put there by the party, or by his au-

It is true that parol evidence is admissible to show the meaning of technical terms and trade symbols used in the instrument, which were sanctioned by usage in the business in which they were used, and which must have been understood by the parties in interest. But, if such evidence be admitted, and the facts shown to be as claimed by the plaintiff, and if it be conceded that the instrument was signed by the agent of the plaintiff, still a contract would not be shown. Even with the aids mentioned the writing would fail to show who was the buyer, who the seller, or that an agreement to sell anything had been made. The instrument is in form neither a contract nor an order. If it was the latter, an acceptance by the plaintiff was required to make a contract. *McCormick, etc., Machine Co. v. Richardson*, 89 Iowa, 525; 56 N.W. Rep. 682. If the letter we have set out refers to the first instrument, it is treated as an order, and there is no evidence in writing that the instrument was ever more than an unaccepted offer to purchase. We conclude that the case is within the statute of frauds."

¹ *Cabot v. Haskins*, 3 Pick. 83.

² *Sanborn v. Flagler*, 9 Allen, 474.

The words "your affectionate mother" at the end of a letter, held insufficient as a signature. *Selby v. Selby*, 3 Meriv. 2.

³ *Helshaw v. Langley*, 11 L. J. Ch. 17; *Palmer v. Stephens*, 1 Denio, 471; *Brown v. Butchers' Bank*, 6 Hill, 443; *Weston v. Myers*, 33 Ill. 424; *McFarson's Appeal*, 11 Pa. St. 503; *Hubert v. Moreau*, 2 Car. & P. 528. A mere scrawl held sufficient. *Baker v. Denning*, 8 A. & E. 94. An agreement annexed to conditions of sale by auction, to which D. (an illiterate person) had put his mark, held a good memorandum within the statute. *Dyas v. Stafford*, 7 L. R. Irish, 590.

⁴ *Drury v. Young* (1882), 58 Md. 546, an instructive case. *Schneider v. Norris*, 2 M. & S. 286, where the seller filled the blank in a printed bill of parcels with the name of the purchaser, and delivered it to him. But in *Boardman v. Spooner*, 13 Allen, 353, where the purchaser stamped his name and a date on the bill of parcels, without delivering it to the seller, in the absence of evidence to show that he had adopted such a stamp as a signature and had affixed it to the instrument with the intent to bind himself, held an insufficient memorandum.

thority, it is immaterial in what part of the instrument it appears, whether at the top, in the middle, or at the bottom.¹ A memorandum of a contract for the purchase of goods, written by a broker, employed to make the purchase, with a lead pencil, in his book, in the presence of the vendor, the names of the vendor and vendee, and the terms of purchase being in the body of the memorandum, but not subscribed by the parties, was held to be sufficient.² But the signature must be intended to govern the whole contract, otherwise its position may make a difference.³ There is no difference between the fourth and seventeenth sections of the statute caused by the use of the word "party" in the one and "parties" in the other; in either case, in the absence of special provisions in local statutes, the memorandum need be signed only by the "party" to be charged.⁴

§ 579. Oral variation of written agreement.—The general rule is, that no verbal agreements between the parties to a written contract, made before or at the time of the execution of such contract, are admissible to vary its terms or to effect its construction. All such verbal agreements are considered as

¹ *Drury v. Young* (1882), 58 Md. 546; *Evans v. Hoare* (1892), L. R. 1 Q. B. 593; *Hawkins v. Chace*, 19 Pick. 502; *Knight v. Crockford*, 1 Esp. 190; *Saunders v. Jackson*, 2 Bos. & Pul. 238; *Barry v. Coombe*, 1 Pet. 640; *Higdon v. Thomas*, 1 H. & G. 152.

² *Clason v. Bailey*, 14 John. 484. With respect to the rule that an auctioneer is the agent of both the vendor and the vendee, and that his taking down the name of a purchaser in any form of memorandum connected with and clearly referring to the conditions of sale is a sufficient signature to satisfy the statute. See note 3 to *Buckmaster v. Harrot*, 7 Ves. 341; *Dyas v. Stafford*, 7 L. R. Ir. 590. When the agreement is required to be "subscribed" by the terms of the statute, the signature, to be binding, must be at the foot. *Davis v. Shields*, 26

Wend. 341; *McGivern v. Fleming* (1884), 12 Daly, 289.

³ *Caton v. Caton*, L. R. 2 H. L. 127.

⁴ *Egerton v. Matthews*, 6 East, 307; *Liverpool Borough Bank v. Eccles*, 4 H. & N. 138; *Bank of British America v. Simpson*, 24 U. C. C. P. 357; *Kizer v. Lock*, 9 Ala. 269; *Vassault v. Edwards*, 43 Cal. 458; *Welden v. Porter*, 4 Houst. (Del.) 236; *Brandon Mfg. Co. v. Morse*, 48 Vt. 322; *Linton v. Williams*, 25 Ga. 391; *Perkins v. Hadsell*, 50 Ill. 216; *Cook v. Anderson*, 20 Ind. 15; *Williams v. Robinson*, 73 Maine, 186; *Dresel v. Jordan*, 104 Mass. 407; *Scott v. Bush*, 26 Mich. 418; *Marqueze v. Caldwell*, 48 Miss. 23; *Lockett v. Williamson*, 37 Mo. 388; *National Fire Ins. Co. v. Loomis*, 11 Paige, 431; *Mizell v. Burnett*, 4 Jones L. (N. C.) 249; *Johnston v. Cowan*, 59 Pa. St. 275; *Sheid v. Stamps*, 2 Sneed (Tenn.), 172.

merged in the written contract.¹ It is held that a contract for the sale of lands can not rest partly in writing and partly in parol. If new terms are sought to be ingrafted upon the original contract they must be reduced to writing; otherwise the modified agreement can not be proved.² To allow a party to sue partly on a written and partly on an oral agreement would be in direct contravention of the statute;³ but it has been held that in defense to an action on a written contract, the defendant may show that he has performed it according to the terms of a subsequent parol agreement.⁴ Upon this question the au-

¹ "There is no rule of evidence better settled than that which declares that parol evidence is inadmissible to contradict or substantially vary the legal import of a written agreement. Such testimony is not only contrary to the statute of frauds, but to the maxims of the common law; and the rules of evidence on this, as on most other points, are the same in courts of law and of equity." Chancellor Kent in *Stevens v. Cooper*, 1 John. Ch. 425.

² *Heisley v. Swanstrom* (1889), 40 Minn. 196. This is the more generally received doctrine as respects contracts required to be in writing by the statute of frauds in contradistinction to other classes of contracts. *Emerson v. Slater*, 22 How. 28; *Blood v. Goodrich*, 9 Wend. 68; 24 Am. Dec. 121; *Dana v. Hancock*, 30 Vt. 616; *Abell v. Munson* (1869), 18 Mich. 305; 100 Am. Dec. 165 and cases cited; *Ladd v. King*, 1 R. I. 224; 51 Am. Dec. 624; *Brown v. Sanborn*, 21 Minn. 402; *Hewitt v. Brown*, 21 Minn. 163; *Stowell v. Robinson*, 3 Bing. N. C. 928; 1 Chitty on Contracts, 154; 1 Addison on Contracts, § 201. In *Espy v. Anderson*, 14 Pa. St. 308, the court per Coulter, J., said: "A written agreement respecting the sale of land can not be altered by parol testimony. If it could the statute of frauds and

perjuries would be of no practical use, nor answer any beneficial purpose." In the leading case of *Goss v. Lord Nugent*, 5 B. & Ad. 58, Lord Denman, C. J., said: "We think the object of the statute of frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only."

³ *Whittier v. Dana* (1865), 10 Allen, 326. "When the law requires the contract to be in writing it means that the complete contract must be proved by the writing. That is not a written contract that is not self-sustaining," per Lowrie, J., in *Soles v. Hickman*, 20 Pa. St. 180.

⁴ In *Cummings v. Arnold*, 3 Metc. (Mass.) 486, which was a suit for breach of written agreement to manufacture and deliver weekly to the plaintiff a certain quantity of cloth at a certain price per yard on eight months' credit, it was held that the defendant might give in evidence, as a good defense, a subsequent parol agreement between him and the plaintiff, made on a legal consideration, by which the terms of payment were varied, and that the plaintiff had refused to perform the parol agreement. *Negley v. Jeffers*, 28 Ohio St. 90; *Marsh v. Bellew*, 45 Wis. 36; *Stearns v. Hall*, 9 Cush. 31, where the plaintiff would have paid

thorities are conflicting, but the weight of authority is against the admission of parol evidence to modify the time of payment or performance of contracts within the statute.¹

§ 580. Parol discharge of written agreement.—It was stated by Lord Chancellor Eldon as clearly settled that an agreement in writing may be dissolved by parol.² But the evidence in such cases is good only as a defense to a bill for a specific performance, and is totally inadmissible, at law or equity, as a ground to compel a performance *in specie*.³ Such a defense

the money within the time limited in the written contract if the defendant had not orally agreed to substitute another time. The defendant refused to receive the money at the substituted time and set up non-performance by the plaintiff within the time originally limited, which the defendant had occasioned by his own act; held that the defense could not be maintained.

¹The leading English case in support of the admissibility of such evidence is *Cuff v. Penn*, 1 M. & S. 21, decided by Lord Ellenborough in 1813. This was overruled in *Stead v. Dawber*, 2 Per. & Dav. 447; 10 Ad. & E. 57. In *Hickman v. Haynes* (1875) L. R. 10 C. P. 598, Lindley, J., after reviewing the cases of *Noble v. Ward*, L. R. 1 Ex. 117; in error L. R. 2 Ex. 135; *Stead v. Darber*, 10 Ad. & E. 57; *Marshall v. Lynn*, 6 M. & W. 109; *Goss v. Lord Nugent*, 5 B. & Ad. 58; and *Stowell v. Robinson*, 3 Bing. N. C. 928. "The result of these cases appears to be that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing and required so to be by the statute of frauds." In *Blood v. Goodrich*, 9 Wend. 68, the court, per Savage, Ch. J., says: "There are cases when the time of performance of a written

contract may be enlarged by parol, but I apprehend that doctrine does not apply to contracts for the conveyance of land, or to any other contract, where the contract itself would not have been valid if made by parol." *Swain v. Seamens* (1869), 9 Wall. 254; *Atlee v. Bartholomew* (1887), 69 Wis. 43. In Massachusetts it is held that if part of an agreement is void under the statute of frauds, this does not avoid or annul other parts of the agreement which are separable from it and not founded upon it. *Rand v. Mather*, 11 Cush. 1; 59 Am. Dec. 131, and note.

²*Coles v. Trecothick* (1804), 9 Ves. Jr. 234. This must be understood as applying either to a complete verbal abandonment of the whole contract, or at least to parol variations so acted upon that the original agreement could not be enforced without injustice to one party. *Price v. Dyer*, 17 Ves. 356; *Harvey v. Grabham*, 5 A. & E. 61.

³Chancellor Kent in *Stevens v. Cooper*, 1 John. Ch. 425. In the case of *Goss v. Lord Nugent*, 5 B. & A. 38, the court, per Denman, C. J., observed that the statute did not say that all contracts concerning the sale of lands should be in writing, but only that no action should be brought unless they were in writing; and that as there was no clause in the act which re-

must be established with the greatest clearness and precision, and the circumstances of waiver and abandonment must amount to a total dissolution of the contract, placing the parties in the same situation in which they stood before the agreement was entered into.¹

§ 581. When parol evidence may be resorted to.—Parol evidence may be resorted to in aid of the writing, where an ambiguity exists in respect to the property intended to be sold, or to which the contract relates.² Where the writing disclosed an agreement for the sale of “a house and lot of land situated on Amity street,” there being several such, parol evidence was admitted to show that there was only one which the defendant had any right to convey, and that the parties had been in treaty for the sale and purchase of it. The court held that the subject-matter of the contract might thus be identified, and, when so ascertained, the writing might be construed to apply to it.³ Parol evidence is admissible to identify documents to which the signed paper refers.⁴ What was said and done by the parties, at or about the time the written agreement was entered into, may be given in evidence, in explanation, or to cor-

quired the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands might still be waived and abandoned by a new agreement not in writing, and so as to prevent either party from recovering in an action on the contract which was in writing. *Long v. Hartwell* (1870), 34 N. J. Law, 116. “Oral evidence is admissible to reform a written instrument, or to subvert or overthrow it entirely, but not to vary or alter it.” *Van Syckel v. Dalrymple* (1880), 32 N. J. Eq. 233. Also to show that no contract was intended or was only to be binding upon the happening of a certain event. *Rogers v. Hadley*, 2 H. & C. 227; *Pym v. Campbell*, 6 E. & B. 370.

¹ *Robinson v. Page*, 3 Russ. 114.

² *Mead v. Parker*, 115 Mass. 413; *Ogilvie v. Foljambe*, 3 Mer. 52. This was a contract by which “Mr. Ogil-

vie’s house,” with all its fixtures, was to be bought for £14,000. The objection was taken that there was no certain description of the property. The master of the rolls said: “The defendant speaks of ‘Mr. Ogilvie’s house,’ and agrees ‘to give £14,000 for the premises,’ and parol evidence has always been admitted in such a case to show to what house and to what premises the treaty related.”

³ *Hurley v. Brown*, 98 Mass. 545. Parol evidence is admissible to explain latent ambiguities and to apply the instrument to the subject-matter. *Williams v. Morris* (1877), 95 U. S. 444; *Barry v. Coombe*, 1 Pet. 640.

⁴ *Ridgway v. Wharton*, 6 H. L. C. 238; *Baumann v. James*, L. R. 3 Ch. 508; *Long v. Millar*, L. R. 4 C. P. Div. 450; *Cave v. Hastings*, L. R. 7 Q. B. Div. 125; *Freeland v. Ritz* (1891), 154 Mass. 257.

rect a mistake of the scrivener.¹ Where the initials were not given, the designation being "Price, the son of Price," the entire Christian name was supplied by parol evidence.² Where a written instrument contains no date, parol evidence is admissible to show when it was written.³ The authority of one person to sign for another need itself not be proved by written evidence, but may be proved by parol evidence.⁴ Where technical words are used in a written agreement, or abbreviations, parol evidence is admissible to show their meaning. It is competent to show what significance is attached to ambiguous terms by reputation or usage of trade. The object of admitting proof of usage is that effect may be given to the contract according to the intent of the parties.⁵

§ 582. Remedy for services rendered under voidable contract.—Where a person has rendered services under a verbal contract which comes within the statute, he may recover upon a *quantum meruit*, upon an implied agreement that the employer will pay for such services what they are fairly and reasonably worth. So also, if property has been transferred under a contract voidable under the statute, the value may be recovered under a *quantum valebat*.⁶ A person who has received

¹ *Espy v. Anderson*, 14 Pa. St. 308.

² *Price v. Page*, 4 Ves. Jr. 680.

³ *Hartley v. Wharton*, 11 Ad. & E. 934.

⁴ *Hawkins v. Chace*, 19 Pick. 502. If such proof were incompetent, a broker might make a memorandum of a contract wholly different from that which he was authorized to sign, and thereby preclude all proof that no such contract was ever made. *Coddingon v. Goddard*, 16 Gray, 436; *Pitts v. Beckett*, 13 M. & W. 743. Except where the statute otherwise provides the agent may be appointed by parol. *Coles v. Trecothick*, 9 Ves. 234. In some of the states, the statute expressly provides that the memorandum must be signed by the party to be charged, or by some person by him authorized *in writing* and in several

he must be authorized in writing when the contract relates to real estate. *Stimson's American Stat. Law*, § 4140.

⁵ *Hart v. Hammett*, 18 Vt. 127; *Stoops v. Smith*, 100 Mass. 63; *Banks v. Harris Mfg. Co.* (1884), 20 Fed. Rep. 667; *Wright v. Weeks*, 25 N. Y. 153; *Cross v. Eglin*, 2 B. & Ad. 106; *Salman Falls Man. Co. v. Goddard*, 14 How. 446.

⁶ *Hartwell v. Young* (1893), 67 Hun, 472; *Dunphy v. Ryan* (1885), 116 U. S. 491; *Wolke v. Fleming* (1885), 103 Ind. 105; *Baker v. Lauterbach* (1887), 68 Md. 64; *Patten v. Hicks* (1872), 43 Cal. 509; *Shute v. Dorr*, 5 Wend. 204; *Ray v. Young*, 13 Texas, 550; *Gray v. Hill, Ryan & Moody*, 420; *Wetherbee v. Potter*, 99 Mass. 354; *Clark v. Terry*, 25 Conn. 395; *Williams v. Bemis*, 108 Mass. 91. The measure of damages is

a benefit under such an agreement, and then repudiates it, is held to pay for that which he has received. The plaintiff in the action is entitled to recover what is due him, or the balance that is due arising out of the transaction between the parties. If the suit is to recover the value of lands conveyed, and there has been part performance by the party refusing to complete the contract, that is to be considered in determining what is due. If payments have been made they must be deducted from the amount to be recovered for the value of the land. And if the land was not to be paid for in money, but by furnishing support and maintenance, and there has been a partial performance in this respect, the value of such partial performance to the plaintiff must be allowed by him.¹

§ 583. As to pleading the statute.—The statute of frauds is a shield which a party may use or not for his protection, just as he may use the statute of limitations. It is not available to a party unless specifically pleaded. In New York,² if the com-

the value of the services, and the contract does not control. *Rosepaugh v. Vredenburg* (1878), 16 Hun, 60; *Day v. New York, etc., R. Co.*, 51 N. Y. 583; *Erben v. Lorillard* (1895), 19 N. Y. 299; *William Butcher Steel Works v. Atkinson*, 68 Ill. 421; *Emery v. Smith*, 46 N. H. 151. *Contra*, *Fuller v. Rice* (1884), 52 Mich. 435; *La Du-King, etc., Co. v. La Du* (1887), 36 Minn. 473. *Cf.* *Sedgwick on Damages*, § 651. The contract may be referred to in considering the amount of compensation which may be recovered. *Shumate v. Farlow* (1890), 125 Ind. 359; *Comes v. Lamson*, 16 Conn. 246; *King v. Welcome*, 5 Gray, 41. A contract which is void under the statute of frauds is inadmissible in evidence for any purpose. *Poole v. Hayes*, 14 N. Y. St. Rep. 585.

¹ *Dix v. Marcy* (1875), 116 Mass. 416.

² *Crane v. Powell* (1893), 139 N. Y. 379; *Cozine v. Graham*, 2 Paige Ch.

177; *Vaupell v. Woodward*, 2 Sandf. Ch. 143; *Harris v. Knickerbacker*, 5 Wend. 638; *Duffy v. O'Donovan*, 46 N. Y. 223; *Marston v. Swett*, 66 N. Y. 206. In *Porter v. Wormser*, 94 N. Y. 431, Judge Andrews said: "The general rule is that the defense of the statute of frauds must be pleaded." In *Hamer v. Sidway*, 124 N. Y. 538, the action was against the executors of a deceased person upon a verbal promise to his nephew that he would give him a large sum of money at twenty-one if, in the meantime, he would abstain from the use of liquor, cigars, billiards, etc. The promise was confirmed by a letter from the uncle after the boy became of age. It was insisted that the promise was within the statute. Parker, J., delivering the opinion of the court said: "It does not appear on the face of the complaint that the agreement is one prohibited by the statute of frauds, and, therefore, such defense can not be made available unless set up in the

plaint alleges a verbal agreement within the statute, and the defendant, by his answer, admits it without pleading the statute as a defense, he is deemed to have waived its benefits.

answer." *Wells v. Monihan*, 129 N. Y. 161. It is necessary in England to plead the statute under the rules framed in pursuance of the judicature act, and in some states of the Union besides New York the same rule prevails. *Graffam v. Pierce*, 143 Mass. 386; *Lawrence v. Chase*, 54 Maine, 196; *Farwell v. Tillson*, 76 Maine, 227; *Bird v. Munroe*, 66 Maine, 337; *Boston Duck Co. v. Dewey*, 6 Gray, 446; *Bingham v. Carlisle*, 78 Ala. 243; *Martin v. Blanchett*, 77 Ala. 288; *Bailey v. Irwin*, 72 Ala. 505; *Guynn v. McCauley*, 32 Ark. 97; *McClure v. Otrich*, 118 Ill. 320; *Battell v. Matot*, 58 Vt. 271; *Chicago, etc., Coal Co. v. Liddell*, 69 Ill. 639; *Boston v. Nichols*, 47 Ill. 353; *Maybee v. Moore*, 90 Mo. 340; *Gordon v. Madden*, 82 Mo. 193. *Contra*, *May v. Sloan*, 101 U. S. 231; *Feeney v. Howard* (1889), 79 Cal. 525; *Andrews and Stoney's Judicature Acts*, 4th ed., 197.

CHAPTER XV.

THE LAW OF PLACE.

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| <p>§ 584. <i>Lex loci contractus</i>.
 585. The same subject continued.
 586. Illustrations.
 587. City ordinances.
 588. As affecting marriage—South Carolina rule.
 589. Promissory notes.
 590. Exception to the general principle.
 591. Intention of parties.
 592. The place of performance.
 593. Performance governed by what law.
 594. The same subject continued.
 595. <i>Lex fori</i>.
 596. The same subject continued—Statutes of limitation.
 597. Valid contract not enforceable everywhere.
 598. Matters affecting the remedy.
 599. As to real estate.</p> | <p>§ 600. As to personal property.
 601. Exception to the general rule as to personal property.
 602. Voluntary assignment for the benefit of creditors.
 603. Involuntary assignments under bankrupt and insolvent laws.
 604. Promissory notes and bills of exchange.
 605. The same subject continued.
 606. Interest.
 607. Days of grace.
 608. Insurance policies.
 609. The same subject continued.
 610. Contracts of carriers.
 611. Connecting lines of carriers—The English rule.
 612. The American rule.
 613. Contract tickets.
 614. Maritime contracts.
 615. Contracts of affreightment.</p> |
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§ 584. *Lex loci contractus*.—Contracts must be construed and their validity determined by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view.¹ Parties are presumed to contract in reference to the laws of the country in which the contract is made, and it is a maxim that *locus contractus regit actum*, unless the intention of the parties to the contrary is clearly shown.² The law of the place where the contract is

¹ *Lynch v. Postlethwaite*, 7 Martin Co. (1889), 128 Pa. St. 217 (enforcing (La.) 69; *Cox v. United States*, 6 Pet. a New York law.)
 172; *Scudder v. Union Nat. Bank*, 91
² *Dacosta v. Hatch*, 24 N. J. Law, 319; *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *Lewis v. Headley*, 36 Ill. 218; *Watts v. Camors*, 115 U. S. 353, 433. "The reasoning of all the ele- 362; *Forepaugh v. Delaware*, etc., R.

made is, without any express assent or agreement of the parties, incorporated into and forms a part of the contract.¹ In *Peninsular and Oriental Company v. Shaud*, Lord Justice Turner, [delivering judgment in the Privy Council reversing a decision of the supreme court of Mauritius, said: "The general rule is that the law of the country where a contract is made governs as to the nature, the obligation and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance; in either case equally, they must be understood to submit to the law there prevailing, and to agree to its action upon their contract."² A contract made in London between two English mercantile houses, by which one agreed to sell to the other twenty thousand tons of Algerian esparto, to be shipped by a French company at an Algerian port on board vessels furnished by the purchasers at London, and to be paid

mentary writers and the decisions of courts of justice have had a tendency to establish it as a general rule that the determination of questions founded on contract, depend chiefly on the place where the contract was made." *Smith v. Smith*, 2 John. 235; *Milliken v. Pratt*, 125 Mass. 374 (validity of contracts as regards capacity of parties); *Gibbs v. Fremont*, 9 Ex. 25; *Hope v. Hope*, 8 DeG. M. & G. 731; *Alves v. Hodgson*, 7 T. R. 237; *Dyer v. Hunt*, 5 N. H. 401; *Douglas v. Oldham*, 6 N. H. 150; *French v. Hall*, 9 N. H. 137 [32 Am. Dec. 341]; *Sessions v. Little*, 9 N. H. 271; *Bank of United States v. Donnelly*, 8 Pet. 361; *Wilcox v. Hunt*, 13 Pet. 378; *Pearsall v. Dwight*, 2 Mass. 84 [3 Am. Dec. 35]; *Trimbey v. Vignier*, 1 Bing. N. C. 151. In *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, Gray, J., said that the general rule as to what law should prevail, in case of a conflict of laws concerning a private contract, was concisely and exactly stated by Lord Mansfield (as reported by Sir William Blackstone), as follows:

"The general rule, established *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception when the parties (at the time of making the contract) had a view to a different kingdom." *Robinson v. Bland*, 1 W. Bl. 234; 2 Burr. 1077.

¹ *Baxter National Bank v. Talbot* (1891), 154 Mass. 213.

² It was accordingly held that the law of England, and not the French law in force at Mauritius, governed the validity and construction of a contract made in an English port between an English company and an English subject to carry him hence by way of Alexandria and Suez to Mauritius, and containing a stipulation that the company should not be liable for loss of passenger's baggage, which the court in Mauritius had held to be invalid by the French law. *Peninsular, etc., Co. v. Shand*, 3 Moore P. C. (N. S.) 272.

for by them in London on arrival, was held to be an English contract governed by English law; notwithstanding that the shipment of the goods in Algiers had been prevented by *vis major* which, by the law of France, in force there, excused the seller from performing the contract.¹

§ 585. The same subject continued.—Matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy depend upon the law of the place where the suit is brought. The law of the place where the contract is made governs as to the formalities necessary to the validity of the contract, and everything which concerns its proof and authenticity.² Upon general principles, if a man reside in one state and transacts his business in another, it would be presumed that his contracts were made at his place of business. If a bond and mortgage, given by a resident of New Jersey to a person temporarily residing there, but having his permanent residence and his place of business in New York, be made and executed in New Jersey, but delivered to the obligee at his place of business in the city of New York, and the money there paid, the place of the contract is in New York, and interest is to be computed according to the laws of that state, although the obligee be described in the bond as “now” of the state of New Jersey.³ Contracts made by written communication be-

¹ *Jacobs v. Crédit Lyonnais*, 12 L. R., Q. B. D. 589.

² *Scudder v. Union National Bank*, 91 U. S. 406. “The rule is clear that, if parties mean to bind themselves, they will adopt the forms and solemnities which the *lex loci* prescribes for establishing the validity of a contract; they are the only criteria for testing the intention of parties.” *Dacosta v. Davis*, 24 N. J. Law, 319. “Jurists treat as the *solemnia* of the contract ‘whatever formality or ceremony, either as to time, place or manner of making the contract, or as to its form, as

whether by parol or in writing, its attestation or authentication, and which the law renders essential to the perfection and validity of the contract and requires to be observed as a condition on which it recognizes the existence of the contract.’” *Burge or Sureties*, 100. As to conveyances or other contracts relating to real estate, the statutory regulations of the place where such estate is situated must be observed. *Pickering v. Fisk*, 6 Vt. 102.

³ *Varick’s Executor v. Crane*, 4 N. J. Eq. 128.

tween residents of different countries will be considered as made in the country where the final assent is given.¹ When a foreign government contracts a loan in another country, the contract is governed by the law of the state whose government contracts the loan, and not by the law of the country in which the contract is made.²

§ 586. **Illustrations.**—Where the soliciting agent for a foreign insurance company has no authority to pass upon applications nor to issue policies, and the policies, when issued, are not sent to him for delivery, and the premiums paid are forwarded directly to the home office, the contracts of insurance are contracts of the state in which the home office is located.³ And where personal property is sold in Massachusetts, conditionally, under a contract valid in Massachusetts, and is removed into New Hampshire, it is not within the provisions of the New Hampshire laws requiring a memorandum and record of the lien, although, when sold, it was understood it was to be taken to New Hampshire.⁴ So also, an insurance company

¹ *Dord v. Bonnaffée*, 6 La. Ann. 563; *Whiston v. Stodder*, 8 Martin (La.), 95; *Addison on Contracts*, 197.

² *Smith v. Weguelin*, 8 Eq. 198 (a contract made in England by the Peruvian government relative to guano).

³ *State Mut. Ins. Co. v. Brinkley, etc., Co.* (Ark. 1895), 31 S. W. Rep. 157, *Hughes, J.*: "These contracts, for the reasons stated, were not Arkansas contracts, but Illinois contracts. When the applications of the appellee had been received, passed upon, and accepted, and the policies of insurance had been dated and signed at Chicago, and then mailed to the appellee, the contracts were then and there complete, and were Illinois contracts, and governed by the laws of that state. 2 *Parson on Contracts*, 712; 2 *Kent's Commentaries* (12th ed.), p. 477, and note; *Tayloe v. Merchants', etc., Ins. Co.*, 9 How. 390; *McIntyre v. Parks*, 3 Metc. (Mass.) 207. Though the appellant company failed to comply with

the statute by not doing those things required of foreign corporations before doing business in this state, the contracts in this case were not void on that account, as they are Illinois contracts."

⁴ *Cleveland Works v. Lang* (N. H. 1893), 31 Atl. Rep. 20, *Clark, J.*: "The contract was negotiated in Massachusetts, by citizens of Massachusetts, respecting property situated in Massachusetts. The shipment of the machines at Worcester, Parsons paying the freight from that point, made Worcester the place of delivery, and vested in Parsons all the right and interest he ever acquired in the property. The written agreement shows that the parties understood that the conditional title passed upon the shipment of the machines by fixing the times of payment from that date. The contract was a conditional sale of chattels in Massachusetts, negotiated and completed there by Massachusetts

may, within the state of its domicile, make valid contracts of insurance against fire on property situated in a sister state, without regard to the laws of the latter state. Accordingly, where brokers domiciled in Illinois solicited fire insurance from defendant, a Wisconsin corporation, which consented to take insurance on certain Iowa property in acceptable companies, whereupon the brokers requested plaintiff, by letter addressed to its home office in Wisconsin, to write a portion of the insurance, and the plaintiff sent to the brokers a blank application and a blank premium note and a policy dated in Wisconsin, which recited that the application was a part of the policy, and was on file at its office, and the brokers sent the papers to defendant's office in Missouri, and the defendant filled out the application and note and returned them to the brokers, who sent them to plaintiff, it was held that the contract of insurance was executed in Wisconsin.¹ And where a

parties, and valid by the law of Massachusetts; and, being valid where it was made, its validity was not affected by the subsequent removal of the property to New Hampshire. *Sessions v. Little*, 9 N. H. 271; *Smith v. Godfrey*, 28 N. H. 379; *Stevens v. Norris*, 30 N. H. 466. As a general rule, contracts respecting the sale or transfer of personal property, valid where made and where the property is situated, will be upheld and enforced in another state or country, although not executed according to the law of the latter state, unless such enforcement would be in contravention of positive law and public interests. In *Smith v. Moore*, 11 N. H. 55, the court says: 'If the property had been situated out of the state when the mortgage was made, and the mortgage had been valid according to the law of the place, a subsequent removal of the property to this state would not have affected its validity;' citing *Offut v. Flagg*, 10 N. H. 46. Conditional sales were valid in this state, without record, until January 1, 1886. *McFar-*

land v. Farmer, 42 N. H. 386; *Holt v. Holt*, 58 N. H. 276; *Weeks v. Pike*, 60 N. H. 447. The statute of 1885 (chapter 30) had no application to contracts between parties residing out of the state, and made no provision for recording such contracts. The fact that the contract is not within the statute is an answer to the position that the plaintiff's title is to be tested by the law of New Hampshire. The attachment of the real estate gave the defendant no possession of, or right of property in, the machines. *Scott v. Manchester Print Works*, 44 N. H. 507."

¹ *Leamans v. Knap, Stout & Co.*, 89 Wis. 171; 61 N. W. Rep. 757, *Cassoday, J.*: "We are constrained to hold that the application, premium note and policy must be taken and construed together as one instrument, constituting the contract of insurance. *Herbst v. Lowe*, 65 Wis. 316; 26 N. W. Rep. 751. This being so, we must hold that the policy, blank application, and blank premium note, so made out by the Milwaukee Company,

vendor, having its place of business in a foreign state, contracted in Louisiana to sell machinery to a resident of Louisiana, and the terms of the sale were f. o. b. cars in the foreign state, and the contract was not made with regard to any particular machinery, the machinery shipped being selected to comply with the terms of the contract by the vendor, it was held that the vendor was entitled to the vendor's privilege for the unpaid purchase price given by the laws of Louisiana, as the acceptance of the goods when received by the vendee related back as to the place of the contract of sale, thereby giving the same effect to the sale as if the goods had originally

and mailed as mentioned, was a mere proposition by that company to insure the property in case the cash premium should be paid, the premium note should be signed by the defendant, and the several questions propounded in the application should be answered to its satisfaction. Certainly it was possible that those several questions might have been answered in such a way that neither the Milwaukee Company nor any other company would be justified or expected to insure the property. The trial court rightly held that the persons so soliciting the insurance were insurance brokers, and in no sense agents of the Milwaukee Company; that, in so far as they were agents for any one, they were agents of the defendant. This being so, it necessarily follows that the contract of insurance did not become complete and absolutely binding upon both parties until the note and application were filled out and signed, and submitted to, and, in effect, approved by, the Milwaukee Company. The contract, therefore, must be deemed to have been made at Milwaukee, where the final assent was given. *Whiston v. Stodder*, 8 Mart. (La.) 95; *Ford v. Buckeye, etc., Insurance Co.*, 6 Bush, 133; 99 Am. Dec. 663, and notes; *Hamilton v. Lycoming, etc., Insurance Co.*, 5 Pa. St. 339; *Mactier v. Frith*, 6

Wend. 103; *Milliken v. Pratt*, 125 Mass. 374. 'When a contract is made in one country, to be performed wholly or partially in another, *prima facie* the contract is to be construed and enforced according to the *lex loci contractus*; but the court will look at all the circumstances, to ascertain by the law of which country the parties intended the contract to be governed, and will enforce the contract accordingly, unless it should contain stipulations contrary to morality or expressly forbidden by positive law.' *In re Missouri Steamship Co.*, L. R. 42 Ch. Div. 321. The contract in that case was made in Massachusetts, between an American citizen and a British company, for the carriage of cattle from Boston to England in a British ship, and contained a clause void as against public policy by the law of Massachusetts, but valid by the law of England, and it was held that the contract itself showed that the parties intended to be governed by the law of England, giving effect to the clause mentioned. This is upon the well-established principle that when a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted. *Hobbs v. McLean*, 117 U. S. 567; 6 Sup. Ct. Rep. 870; *United States v. Central Pac. R. Co.*, 118 U. S. 235; 6 Sup. Ct. Rep. 1038."

been in Louisiana¹ But where a corporation domiciled in Louisiana placed an order for a machine with a manufacturing company located in Ohio, the correspondence showing the complete terms of the contract, both as to amount and time of payment, and the builder sent an agent to superintend the erection of the machine, and wrote to the purchaser that it might hand the cash and notes to him, and the machine being ready for operation, the purchaser telegraphed that it could not make the cash payment, and the seller then wired their agent to accept the purchaser's draft at sixty days, with interest, in lieu of the cash payment, it was held that the original contract was made under the law of Ohio, and that there was nothing in the circumstances to show a subsequent rescission of that contract and the making of a new one in Louisiana, and that as the common law governs contracts of sale of personal property in Ohio, where this contract was made, the sellers could not claim the vendor's privilege given by the civil code of Louisiana.²

¹ *McLane v. His Creditors* (1895), 47 La. Ann. —; 16 So. Rep. 764, Nicholls, C. J. "McLane had never seen the particular machine which would ultimately be brought in under the contract. It was in contemplation of both parties that it should reach him in Louisiana, and that, while there in his possession, a portion of the price would be still unpaid. It would be fair to presume, in absence of express stipulation to the contrary, that McLane should reserve a right of final acceptance to a reasonable time after its receipt by him at Franklin, and that both parties should contract with reference to the operation of the laws of Louisiana upon the enforcement of the rights of the seller. It will be observed that, if there were any acts in the matter of the execution of the contract to be performed in Missouri and by the seller, there were also acts in execution by the purchaser to be performed in Louisiana, where the contract was unquestionably made.

There was a double set of obligations in execution of the contract. We need not examine into the rights of parties from the standpoint of jurisprudence in courts other than our own, relatively to a change of ownership under a contract of sale of the character of that made between the parties in this case, nor discuss the difference between delivery of an object and the acceptance thereof under a contract of sale. The question will be found discussed at length in *Pope v. Allis*, 115 U. S. 363; 6 Sup. Ct. Rep. 69; 1 Benjamin on Sales, §§ 701, 706; 2 Benjamin on Sales, p. 1153; *Winfield Water Co. v. City of Winfield*, 51 Kan. 104; 33 Pac. Rep. 714."

² *Gray Co. v. Taylor Iron Works Co.* (1894), 66 Fed. Rep. 686, McCormick, J.: "We are of opinion that this case does not come within the authority of *McIlvaine v. Legare*, 36 La. Ann. 359, or within any of the authorities cited for appellant. This contract of sale was made under the

§ 587. City ordinances.—It is a general rule that contracts are to be construed according to the law of the place of their execution, and that the law, including city ordinances, in force upon any subject which is made the subject-matter of any contract is incorporated into and becomes a part of such contract,—as much so as if the law were actually and expressly made a part of the agreement between the contracting parties.¹

law of Ohio, the place of the domicile of the vendor. The sale was complete on the delivery of the finished machine to the carrier. The fact that appellant's superintendent came to New Orleans to be present at the starting of the machine to work did not effect or show a suspension of the contract of sale."

¹*Gerner v. Church*, 43 Neb. 690; 62 N. W. Rep. 51; *Jones v. Nebraska City*, 1 Neb. 176; *Stewart v. Otoe Co.*, 2 Neb. 177; *Sessions v. Irwin*, 8 Neb. 5; *Dorrington v. Myers*, 11 Neb. 388. In *Gerner v. Church*, 43 Neb. 690, Ragan, C., said: "The correctness of this rule (*i. e.*, the rule laid down in the text) is not controverted by counsel for Church & Oliver, but their contention is that the ordinances of the city of Lincoln are not within such rule. In *Brady v. Northwestern Insurance Co.*, 11 Mich. 425, Brady owned a wooden building in the city of Detroit. It was insured by the insurance company against loss or damage by fire, on the 1st of January, 1856, for one year. In accordance with the provisions of the policy, at the expiration of the year it was renewed for another, and from year to year until the 1st of January, 1861, when the policy was renewed for still another year. Some time in February, 1861, the building was partially destroyed by fire. The policy provided that the insurance company might pay the amount of the loss sustained in money, or, at its option, rebuild or repair the building with the same kind of material of which it was

constructed. At the time the policy was renewed, on January 1, 1861, there was in force in the city of Detroit an ordinance of that city which prohibited the rebuilding or repair of wooden buildings partially destroyed by fire in that part of the city in which was situate the building of Brady. Brady sued the insurance company on its contract of insurance. The property was insured for \$2,000. The evidence showed that the undestroyed material of the insured building was worth about \$100, but if the insurance company was allowed to use wood, and repair the building, it could do so at a cost of something over \$800. The contention of the insurance company was that the ordinance of the city of Detroit was not a part of its contract of insurance, and, since it was not allowed to repair the building, it was only liable to Brady for what it would cost it to rebuild the building with wood, if it was permitted to do so. Martin, C. J., delivering the opinion of the court, said: "The fair and reasonable interpretation of a policy of insurance against loss by fire will include within the obligation of the insurer every loss which necessarily follows from the occurrence of the fire, to the amount of the actual injury to the subject of the risk, whenever that injury arises directly and immediately from the peril, or necessarily from incidental and surrounding circumstances, the operation and influence of which could not be avoided. Under this rule, what was the plaintiff's loss

§ 588. As affecting marriage—South Carolina rule.—In South Carolina marriage is a civil contract and not a *res* or *status*,

in the present case? The property insured was situated within the fire limits of Detroit, within which the reconstruction or repair of any wood building injured by fire was prohibited. This charter and these ordinances were in existence at the time of the last renewal of the policy. They were local laws affecting the property and the risk which the defendant assumed, and of which the latter is presumed to have had knowledge, and to have estimated in renewing the policy. The risk was not taken upon a mere collection of beams, boards, and other materials thrown together without purpose or special adaptation. It was upon a building for trade, situated within a particular locality, within the jurisdiction of municipal authorities vested with legislative powers for special purposes, and subject to the exercise of those powers; and the parties must be regarded as contracting with a full knowledge of all the facts and the law, and the risk to which the property was thereby subjected.' And the court held that Brady was entitled to recover the whole insurance, and was not limited to such a sum as would cover the cost of repairing the building with wood, and that the insurance contract was governed by the local ordinance in force in the city of Detroit at the time of its issuance. In *Cordes v. Miller*, 39 Mich. 581, a landlord covenanted in his lease, with the tenant, that in case the building on the leased premises should be destroyed by fire he would rebuild it. The building on the leased premises was of wood, and was destroyed by fire. After the execution of the lease between the parties, the city council of Grand Rapids, in which said leased building was situ-

ate, passed an ordinance forbidding the erection of wooden buildings in that part of said city in which the landlord's premises were situated. The tenant sued the landlord on his covenant to rebuild, and the court held that the landlord was released from his contract to rebuild the wooden building by the passage of the ordinance forbidding it. These authorities recognize the doctrine that the ordinances of a city are within the rule that the law of the place where a contract is made enters into, and becomes a part of, such contract, when the subject-matter of the contract is within the legislative jurisdiction of the city council. If the ordinances of the city of Lincoln had prohibited the erection of a wooden building where the opera house is situate, and the contract between Gerner and Church & Oliver had expressly provided that the latter should erect a wooden theater on the site now occupied by the opera house, it certainly can not be questioned that neither of the parties to such contract could have enforced it against the other. The contract in suit between the parties does not, by its terms, require Church & Oliver to erect a building of a character prohibited by the ordinances of the city, but the ordinances of the city were as much a part of Gerner's contract with Church & Oliver as if they had been written therein. In other words, the contract should be construed as though it read that Gerner would pay to Church & Oliver \$200 when they erected an opera house covering a space of ground 100x142 feet on the side named, in accordance with the ordinances of the city of Lincoln regulating the construction of such buildings. The contract of Gerner is a donation, pure

and the common law doctrine that marriage is indissoluble obtains in that state. Accordingly, where a citizen of South Carolina was married in New York to a citizen of that state, and immediately thereafter the parties removed to and resided in South Carolina, until the wife left her husband and removed to Illinois, and judgment of divorce was there obtained by her against him in accordance with the laws of Illinois, but without personal service on or appearance of the husband, on a ground not recognized as cause for divorce either in New York or South Carolina, it was held that the Illinois judgment was void in South Carolina.¹

and simple, but it is not voidable for that reason. But, because it is a donation, the contract must be strictly construed in his favor. And the courts will not presume that Gerner agreed to make this donation upon any other terms than that Church & Oliver should build a building of the dimensions, and at the time and place, stated in the contract, and construct such building in accordance with the ordinances of the city in which it was to be erected."

¹ *McCreery v. Davis* (S. C. 1895), 22 S. E. Rep. 178, per Pope, J.: "To allow this Illinois judgment to be effective as a divorce, as to Charles W. McCreery, can not be law. In *Hull v. Hull*, 2 Strob. Eq. 174, it was held that Gideon J. Hull, having married his wife while both were domiciled in the state of Connecticut, under whose laws it was competent for either party to obtain a divorce for desertion, and in such a suit service might be made by publication, and he having deserted his wife, and thereafter she having procured a divorce from him, *a vinculo matrimonii*, in an action wherein he was served by publication, such divorce was valid. This judgment was rendered because the marriage contract between them was said to have been made with all the provisions of the laws of Connecticut per-

taining to marriage, including divorce, which had become part and parcel of such contract of marriage. And this was done and adjudged, notwithstanding the state of South Carolina did not allow divorces. As far as the Supreme Court of the United States has ever gone in the matter of divorce is to assume that, for the purpose of obtaining a divorce, a wife may acquire a domicile apart from that of the husband; that divorce, when granted, does not impair the obligation of a contract; that it is in the power of a legislature in a state different from that of the domicile of the married parties to grant a divorce which is operative in the state where granted; that it is the exercise of a legitimate power when the state legislature grants a divorce, either by the legislature acting directly, or by conferring a power so to do upon the courts of that state, provided the constitution of such state does not deny such power; that a divorce so granted is effective, even without the residence of both parties in the state at the time the divorce is granted. *Cheever v. Wilson*, 9 Wall. 108; *Maynard v. Hill*, 125 U. S. 190; 8 Sup. Ct. Rep. 723. In the first case cited, both parties (husband and wife) appeared to the action in the court of the state of Indiana, where the divorce was granted. In

§ 589. Promissory notes.—A promissory note is not complete until it has been delivered, and the place of the contract

the second case cited, the legislature of the territory of Washington acted on the prayer of the husband in the absence from that territory of the wife. But the Supreme Court of the United States has been careful to deny that the courts of the United States government had any original jurisdiction in the matter of granting divorces. It may be proper to say that, if the present contention had been made in the courts of the state of New York, and an effort had been made there to interpose the divorce a *vinculo matrimonii* granted by the court of the state of Illinois, on the ground of *saevitia* practiced by the husband, McCreery, upon the person of his wife, the courts of the former state (New York) would have refused to give such judgment of divorce any effect. In the leading case of *People v. Baker*, 76 N. Y. 78, the husband had been married to Sallie West, in the state of Ohio, in the year 1871, and thereafter the married couple resided at Rochester, in the state of New York. Some time afterwards the wife, Sallie West, returned to the state of Ohio, and began her action against Baker for an absolute divorce on the ground of gross neglect of duty by the husband. The husband was domiciled in the state of New York during the pendency of such divorce proceedings in the state of Ohio, and did not appear in or plead to such action. Divorce was granted. The husband, Baker, still domiciled in the state of New York, after such judgment of divorce, married again, whereupon he was indicted in the court of New York for bigamy. Being convicted, an appeal was taken. Thereafter the appeal from such judgment was finally considered in the court of

appeals of the state of New York, and the conviction was then affirmed. The court held, among other things, in answer to the question, 'Can a court in another state adjudge to be dissolved, and at an end, the matrimonial relation of a citizen of this state, domiciled and actually abiding here throughout the pendency of the judicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that state?' The court answered this question squarely in the negative, and that, too, after reviewing the federal decisions bearing on the subject. Many citations are made of New York decisions, and those of other states, by Judge Folger, who pronounced the judgment of that court. So, too, in the case of *Jones v. Jones*, 108 N. Y. 415; 15 N. E. Rep. 707, although the court of appeals of New York upheld a divorce of a New York marriage by the courts of Texas, it was done because the husband, who was domiciled in the state of New York when the wife began her action for divorce in the courts of the state of Texas, appeared in said action, and answered to the merits of the action. The court of appeals of the state of New York was careful to announce in its judgment 'that the marriage relation is not a *res* within the state of a party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service, or actual notice of the proceeding, given without the jurisdiction of said court; and, like other contracts, the contract of marriage can not be annulled by judicial sanction without jurisdiction

evidenced by such note does not depend upon where the note is dated, but upon the place where it is delivered, which may be shown by parol evidence, although the note is dated elsewhere.¹ Accordingly in an action on a note made and paya-

of the person of the defendant.' (Extract from the syllabus of the case cited.) And also the case of *Williams v. Williams*, 130 N. Y. 193; 29 N. E. Rep. 98, decided in December, 1891, is in point as illustrating the attitude of the courts of New York on this question of divorce, so far as judgment therefor rendered by the courts of a state different from that in which the domicile of the defendant was had and to which action for divorce he neither appeared nor answered. In the case just cited, the leading facts seemed to be these: The husband, after living a year or more with the wife after their marriage, demanded that the wife should give up all intercourse with her mother. This, at first, the wife declined to do, and he then lived apart from her. But before the husband removed to the state of Minnesota, the wife made an unconditional offer, in good faith, to live with her husband. This last proposition he declined, and removed to the state of Minnesota, where he commenced an action for absolute divorce on the ground of desertion. To this action the wife was made a party by publication. She was not in the state of Minnesota at any time, nor did she appear or plead to his action. Still the judgment adjudged that the parties were no longer husband and wife. When this husband returned to the state of New York, the wife brought her action for a separation of the parties from bed and board forever, on the ground of abandonment. The husband attempted to set up in his answer his judgment for absolute divorce obtained in the courts of the state of Minnesota. But the court de-

clined to recognize such a divorce as valid, and granted the wife's prayer for a legal separation for life. In the opinion of the court in the case just cited, the court admitted that every state may adjudge the *status* of one resident therein towards a non-resident, and that, so long as such judgment is confined in its operation to the territorial limits of that state, other states may acquiesce; but it tenaciously adhered to the position announced in *Jones v. Jones*, *supra*, that 'the marriage relation is not a *res* within the state of a party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted or actual notice of the proceedings given without the jurisdiction of the court where the proceeding is pending.' "

¹ *Wells, Fargo & Co. v. Vansickle* (1894), 64 Fed. Rep. 944. Hawley, J.: "I am of opinion that parol evidence is admissible to show that, notwithstanding the printed words, 'San Francisco, Cal.,' upon the face of the note, the note was actually made, executed, and delivered in Carson City, Nev. A promissory note is not complete until it has been delivered, and it takes effect only from the time of its delivery. The place of a contract evidenced by a promissory note does not depend upon where the note is dated, but upon the place where it is delivered. It is the delivery of the note that consummates the contract. 1 Daniel on Negotiable Instruments, § 865; 1 Parsons on Bills and Notes, 48; 2 Am. and Eng. Encyc. of Law, 330; *Lawrence v. Bassett*, 5 Allen, 140; *Overton v. Bolton*, 9 Heisk. 762; *Gay*

ble in a foreign state, or on a judgment on it obtained in such foreign state, the laws of the latter govern as to interest and attorney's fees. Pending an action on such a note suit may be brought and a judgment obtained on it in the foreign state. So where judgment is obtained in a foreign state on a note made and payable there, and secured by mortgage on land in Kentucky, in a suit in Kentucky on such judgment the court may enforce the mortgage lien on the land.¹

§ 590. Exception to the general principle.—There is, perhaps, no general principle of law better established than that the validity of a contract is to be decided by the law of the place where the contract is made. If valid there, it is valid elsewhere; but if void or illegal by the law of the place where made, it is void everywhere. This proposition, as a general one, is universally acknowledged and recognized. The rule, it is said, is founded not merely in the convenience but in the necessities of nations and states; for otherwise it would be im-

v. Rainey, 89 Ill. 221; *Woodford v. Dorwin*, 3 Vt. 82; *Fritsch v. Heislen*, 40 Mo. 555; *Flanagan v. Meyer*, 41 Ala. 132; *King v. Fleming*, 72 Ill. 21; *Tiedeman on Commercial Paper*, §§ 34b 34c. 'Commercial paper takes effect only from the time of delivery, and where there is a date given in the paper the delivery is presumed to have been made * * * on that date. * * * But this presumption may be rebutted, and it may be shown by parol evidence that the paper had been delivered on some other day.' *Tiedeman on Commercial Paper*, § 34b. In *Davis v. Coleman*, 7 Ired. L. 424, a note made in North Carolina was delivered in Georgia for a loan there made, and it was held to be a contract made in Georgia. In *Hyde v. Goodnow*, 3 N. Y. 266, two notes signed in Ohio were void by the law of that state, but, being delivered in New York, it was held that the place of delivery controlled the contract, as to its validity. The contract in the case

under consideration was not "obtained, made, executed, or incurred out of this state," and does not come within the provisions of the statute of limitations of Nevada, heretofore quoted."

¹ *Brown v. Todd* (Ky. 1895), 29 S.W. Rep. 621. In *Frank v. Morehead* (N.J. Eq. 1895), 31 Atl. Rep. 1016, notes made by a firm were indorsed by the wife of one of its members, a resident of New Jersey, who also gave a mortgage of her separate estate to secure them. Another of the members, who resided in New York, and to whom the notes and mortgage were given to be discounted in New York to procure funds for the partnership, fraudulently delivered the notes and mortgage to plaintiffs, who resided in New York, as security for a pre-existing debt for which he was liable. It was held that the rights of the holder of the notes and mortgage are to be determined by the laws of New York.

practicable for them to carry on an extensive intercourse and commerce with each other. The whole system of agencies, of purchases and sales of mutual credits, and of transfers of negotiable instruments rests on this foundation; and in sustaining the principle, there seems to be a unanimous consent of all courts and jurists, foreign and domestic.¹ But to this rule there is this exception, that no state or nation is bound to recognize or enforce contracts which are injurious to its own interests, or the welfare of its people, or which are in fraud or violation of its own laws.² The laws of a country have no binding force beyond its territorial limits, and their authority is admitted in other states, not *ex proprio vigore*, but *ex comitate*, and every community must judge for itself how far this comity shall be permitted to interfere with its domestic interests and policy.³ Comity does not require courts to enforce a foreign contract according to the laws where it is made if such enforcement would conflict with domestic laws and injure citizens giving foreigners an advantage which residents have not.⁴ It is in accordance with these general principles that the courts have held that the price of liquors sold and delivered in a state where such sale is legal, and nothing remains to be done by the vendor to complete the transaction, can be recovered in another state where such sale would be illegal.⁵ Although it is otherwise if the contract contains any ingredient or participation on the part of the original vendor that the goods shall be illegally sold, or that he shall do any act, beyond the mere sale, to assist or facilitate the illegal act, or to aid the purchaser in his unlawful design in the subsequent unlawful disposition of the

¹ *Smith v. Godfrey*, 28 N. H. 379; *Parsons v. Trask*, 7 Gray, 473.

² *Banchor v. Mansel*, 47 Maine, 58; *Wasserboehr v. Boulter*, 84 Maine, 165; *Bliss v. Brainard*, 41 N. H. 256; *Hill v. Spear*, 50 N. H. 253.

³ *Smith v. Godfrey*, 28 N. H. 379; *Andrews v. Pond*, 13 Pet. 65; 2 Kent's Commentaries, 457; Story on Conflict of Laws, § 244.

⁴ *Walters v. Whitlock*, 9 Fla. 86; *Saul v. His Creditors*, 17 Martin (5 N. S.), 569; *Cole v. Lucas*, 2 La. Ann. 946; *Groves*

v. Nutt, 13 La. Ann. 117; *Hughes v. Klingender*, 14 La. Ann. 52; *Whiston v. Stodder*, 8 Martin (La.), 95; *Trasher v. Everhart*, 3 Gill & J. (Md.) 234; *DeSobry v. DeLaistre*, 2 Harr. & J. (Md.) 191; *Greenwood v. Curtis*, 6 Mass. 358; *Blanchard v. Russell*, 13 Mass. 1; *Tappan v. Poor*, 15 Mass. 419; *Inhabitants of West Cambridge v. Lexington*, 1 Pick. 506.

⁵ *Torrey v. Corliss*, 33 Maine, 333; *Banchor v. Cilley*, 38 Maine, 553; *Orcutt v. Nelson*, 1 Gray, 536.

goods, or if the goods are to be delivered in the place where the sale is prohibited.¹

§ 591. Intention of parties.—Where the parties to a contract live under different systems of law, questions as to which of those systems must be applied to the construction of the contract or any part of it depend upon the mutual intention of the parties, either as expressed in the contract or as derivable by fair implication from its terms. Although an arbitration clause in which the arbiter is unnamed is invalid according to the law of Scotland, yet if the intention of the parties to a contract made in England in which such a clause is contained is that the clause should be interpreted according to the law of England, there is no reason why the Scotch courts should not give effect to it, as this rule does not appear to rest upon any essential considerations of public policy.²

¹Smith *v.* Godfrey, 28 N. H. 379; *Banchor v. Mansel*, 47 Maine, 58; *Hill v. Spear*, 50 N. H. 253; *Lindsey v. Stone*, 123 Mass. 332; *Wilson v. Stratton*, 47 Maine, 120. This principle is illustrated in the case of *Tyler v. Carlisle*, 79 Maine, 210, which was an action to recover money lent to be used for gambling purposes, and the distinction is there drawn between the mere loaning of money with a knowledge it is to be so used, and a loan made with the express understanding, intention and purpose that it is to be used to gamble with.

²*Hamlyn v. Talisker Distillery* (1894), L. R. A. C. 202; 6 The Reports, 188, per Lord Chancellor Herschel: "In the present case it appears to me that the language of the arbitration clause indicates very clearly that the parties intended that the rights under that clause should be determined according to the law of England. As I have said, the contract was made there; one of the parties was residing there. Where under such circumstances the parties agree that any dispute arising out of their contract shall be 'settled by

arbitration by two members of the London Corn Exchange or their umpire in the usual way,' it seems to me that they have indicated as clearly as it is possible to do, their intention that that particular stipulation, which is a part of the contract between them, shall be interpreted according to, and governed by the law, not of Scotland, but of England; and I am aware of nothing that stands in the way of the intention of the parties thus indicated by the contract they entered into being carried into effect. The contract with reference to arbitration would have been absolutely null and void, if it were to be governed by the law of Scotland. That can not have been the intention of the parties; it is not reasonable to attribute that intention to them, if the contract may be otherwise construed; and, for the reasons which I have given, I see no difficulty whatever in construing the contract between the parties as an indication that the contract, or that term of it, was to be governed and regulated by the law of England. But then it is said that the

§ 592. The place of performance.—If, by the terms or nature of the contract, it appears that it was to be executed in another country, then the place of making the contract becomes immaterial, and the law of the place where the contract is to be performed governs in determining the rights of the parties.¹ If a contract is made in one state or country, and it is to be performed in another, it will be presumed that it was entered into with reference to the laws of the latter, and those laws will be resorted to in ascertaining the validity, obligation and effect

Scotch court is asked to enforce a law which is against the public policy of the law of Scotland, and that although the parties may have so contracted, the courts in Scotland can not be bound to enforce a contract which is against the policy of their law. My Lords, I should be prepared to admit that an agreement which was against a fundamental principle of the law of Scotland, founded on considerations of public policy, could not be relied upon and insisted upon in the courts of Scotland; and if, according to the law of Scotland, the courts never allowed their jurisdiction to try the merits of a case to be interfered with by an arbitration clause, there would be considerable force in the contention which is insisted upon by the respondents. But that is not the case. The courts in Scotland recognize the right of the parties to a contract to determine that any disputes under it shall be settled, not in the ordinary course of litigation, but by an arbitration tribunal selected by the parties. If in the present case the arbitrators had been named, the courts in Scotland would have recognized and given effect to and enforced the arbitration clause, and would by reason of it have declined to enter upon a trial of the merits of the case. That being so, I have been unable to understand upon what fundamental principle of public

policy it can be said to rest as a foundation, that where an arbitrator is not named an agreement between the parties to refer a matter to arbitration ought not to be enforced."

¹ *Fanning v. Consequa*, 17 John. 511; *Harrison v. Edwards*, 12 Vt. 648; *Lewis v. Headley*, 36 Ill. 433; *Malpica v. McKown*, 1 La. 248. In *Wayman v. Southard*, 10 Wheat. 48, Chief Justice Marshall referred to the principle as one of universal law that "in every forum a contract is governed by the law with a view to which it was made." And in *Robinson v. Bland*, 2 Burr. 1077, Lord Mansfield said: "The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed." In *Andrews v. Pond*, 13 Pet. 65, Chief Justice Taney said: "The general principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance." *Don v. Lippmann*, 5 C. & F. 1; *Fergusson v. Fyffe*, 8 C. & F. 121; *Campbell v. Nichols*, 33 N. J. Law, 81; *Burchard v. Dunbar*, 82 Ill. 450; *Waverly Natl. Bank v. Hall* (1892), 150 Pa. St. 466 (contract for the loan of money made in Pennsylvania, the business to be conducted in New York).

of the contract.¹ Hence, when the parties enter into a contract in one place, to be performed in another, the matters of payment, tender or release will be governed by the *lex loci solutionis*.² If no place of performance is expressly stated or implied from the terms of the contract, the law of the place where it is made will govern.³ When a part of a contract is to be performed in one country and a part in another, each part is to be governed by the law of the place where it is performable.⁴ Where there is a conflict of possible applicatory laws the parties are presumed to have made part of their agreement that law which is most favorable to its performance.⁵

§ 593. Performance governed by what law.—A New York life insurance company issued a policy, the application for which was made and signed in the state of Washington, and transmitted to New York. The policy was written in New York and transmitted to Washington, where it was delivered to the insured, and the first premium was collected. The policy provided that the premiums, and the insurance when it accrued, should be paid in New York, and that proof of death should be made there. The application, which, by the terms of the policy, was made part thereof, declared that it was made subject to the charter of the insurance company and the laws of New York. It was held that the contract, as to all matters relating to its performance, was governed by the law of New

¹ Hyde v. Goodnow, 3 N. Y. 266; Smith v. Smith, 2 John. 235; Story on Conflict of Laws, § 280.

² Harrison v. Edwards, 12 Vt. 648; Thompson v. Ketcham, 4 John. 285; Freese v. Brownell, 35 N. J. Law, 285; Stricker v. Tinkham, 35 Ga. 176.

³ Pomeroy v. Ainsworth, 22 Barb. 118.

⁴ Pomeroy v. Ainsworth, 22 Barb. 118. "It may be said that the contract is partly to be performed in one place and partly in another. In such a case the only certain guide is to be found in applying sound ideas of business, convenience and sense to the language of the contract itself, with a

view to discovering from it the true intention of the parties. * * * Stereotyped rules laid down by judicial writers can not, therefore, be accepted as infallible canons of interpretation in these days when commercial transactions have altered in character and increased in complexity, and there can be no hard-and-fast rule by which to construe the multifarious commercial agreements with which in modern times we have to deal," per Bowen, L. J., in Jacobs v. Crédit Lyonnais (1884), L. R. 12 Q. B. Div. 589; Daniel on Negotiable Instruments, § 879.

⁵ Wharton on Conflict of Laws, § 429.

York, and was therefore subject to a statute of that state, making it a condition of the right of the company to forfeit the policy for non-payment of premiums that a certain notice of the accruing of premiums should be given, notwithstanding the policy contained a waiver of any other notice than the terms of the policy itself.¹ But it seems that a contract of

¹*Phinney v. Mut. Life Ins. Co.* (1895), 67 Fed. Rep. 493, per Hanford, J.: "This subject of the law of the place of contracts has received attention from the Supreme Court of the United States in a number of cases, and the difference between cases where the law of the contract is the law of the place where the contract is entered into and those in which the contract is governed by the law of the place of performance is illustrated in a number of decisions—in some of the older decisions as well as the late ones. One of the clearest expositions of the law is to be found in the opinion of Mr. Justice Hunt in the case of *Sudder v. Union Nat. Bank*, 91 U. S. 406. In the course of the opinion, Justice Hunt makes this statement: 'The rule is often laid down that the law of the place of performance governs the contract. Mr. Parsons, in his treatise on Notes and Bills, uses this language: "If a note or bill be made payable in a particular place, it is to be treated as if made there, without reference to the place at which it is written or signed or dated." Page 324. For the purpose of payment and the incidents of payment, this is a sound proposition. Thus the bill in question is directed to parties residing in St. Louis, Mo., and contains no statement whether it is payable on time or at sight. It is, in law, a sight draft. Whether a sight draft is payable immediately upon presentation, or whether days of grace are allowed, and to what extent, is differently held in different states. The

law of Missouri, where this draft is payable, determines that question in the present instance. The time, manner, and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill, are points connected with the payment of the bill; and are also instances to illustrate the meaning of the rule that the place of performance governs the bill. The same author, however, lays down the rule that the place of making the contract governs as to the formalities necessary to the validity of the contract. Thus, whether a contract shall be in writing, or may be made by parol, is a formality to be determined by the law of the place where it is made. If valid there, the contract is binding, although the law of the place of performance may require the contract to be in writing. *Dacosta v. Davis*, 24 N. J. Law, 319. So when a note was indorsed in New York, although drawn and made payable in France, the indorsee may recover against the payee and indorser upon a failure to accept, although by the laws of France such suit can not be maintained until after default in payment. *Aymar v. Sheldon*, 12 Wend. 439. So if a note, payable in New York, be given in the state of Illinois, for money there lent, reserving ten per cent. interest, which is legal in that state, the note is valid, although but seven per cent. interest is allowed by the law of the former state. *Miller v. Tiffany*, 1 Wall. 298; *Depau v. Humphreys*, 8 Mart. (N. S.) 1; *Chapman*

subscription to capital stock, made in Maryland, but to be performed in the state where the corporation is chartered and domiciled, is to be governed by the laws of such other state.¹ And a life insurance policy issued in Pennsylvania, which contains a stipulation that it "is a contract made and to be executed in the state of New York, and shall be construed only according to the laws" of that state, will be construed as though actually executed and delivered in New York.²

v. Robertson, 6 Paige, 627; *Andrews v. Pond*, 13 Pet. 65. Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought. A careful examination of the well-considered decisions of this country and of England will sustain these positions.' That case has been referred to, and the distinction is further brought out in a later decision of the supreme court in *Pritchard v. Norton*, 106 U. S. 124; 1 Sup. Ct. Rep. 102. The case of *Scudder v. Bank* is cited with approval by the supreme court in the opinion of the supreme court in *Coghlan v. South Car., etc., R. Co.*, 142 U. S. 101; 12 Sup. Ct. Rep. 150. The syllabus reads: 'When a contract for the payment of money at a future day, with interest meanwhile payable semi-annually, is made in one place, and is to be performed in another, both as to interest and principal, and the interest before maturity is payable according to the legal rate in the place of performance, the presumption is, in the absence of attendant circumstances to show to the contrary, that the principal bears interest after maturity at the same

rate.' And that is shown to be so, because the law of the place of performance governs the contract as to the manner of performance. The opinion is by Mr. Justice Harlan, and he reviews a great many decisions, and squarely recognizes the doctrine laid down by Judge Hunt and by Judge Matthews in the cases above referred to, and shows that it is in harmony with the decision of the supreme court by Judge Gray in the case of *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397."

¹ *Fear v. Bartlett*, 81 Md. 435; 32 Atl. Rep. 322, *Robinson, C. J.*: "In dealing with the defendant's subscription, we have treated it as a Virginia contract. The company was chartered by that state, with its office and place of business in that state, and, although the subscription was made in this state, the contract was to be performed in Virginia, and, this being so, the rights and liabilities of the parties under it are to be determined by the law of that state; and what we have said as to the right of the defendant to repudiate his subscription on the ground that it was procured through the fraud of the company is strictly in accord with the decision of the court of appeals of that state in *Weisiger v. Richmond, etc., Machine Co. (Va.)*, 20 S. E. Rep. 361."

² *Griesemer v. Mut. Life Ins. Co.*, 10 Wash. 202; 38 Pac. Rep. 1031, followed in *Griesemer v. Mut. Life Ins. Co. (1894)*, 38 Pac. Rep. 1034.

§ 594. **The same subject continued.**—A written contract for the sale of lumber, to be cut by the seller in Mississippi, and to be inspected, paid for, delivered, and received there, is governed by the laws of that state, both as to its obligation and execution, although made and subscribed in Tennessee.¹ And where a note secured by mortgage on land in Illinois is executed in Missouri, and is payable there, and both maker and payee live in Missouri, the right to recover damages on protest of the note, and to include these damages in the foreclosure decree, is governed by the law of Missouri.² The validity of a contract between citizens of the United States, valid by the laws of the United States and of the state where made, is not affected by the customs or laws of the Indians in whose territory it is to be carried out.³ But in the enforcement of a mortgage on land, the usury law of the state in which the land is situated will govern, the security having been given for the money to be used in the state, although payment of the loan in another state was provided.⁴

§ 595. **Lex fori.**—Matters respecting the remedy, such as the character of actions to be instituted, the admissibility of evidence and the mode of redress, depend upon the law of the place where the suit is brought, for matters of process must

¹Hart v. Livermore Mach. Co., 72 Miss. 809; 17 So. Rep. 769, Cooper, C. J.: "Ordinarily, the validity of a contract is determinable by the '*lex loci contractus*,' but where, by the contract, a different place of performance is fixed, the presumption is that the parties, as they lawfully may do, contract with reference to the law of such place. Dalton v. Murphy, 30 Miss. 59; Bank of La. v. Williams, 46 Miss. 618; Shacklett v. Polk, 51 Miss. 378; Osgood v. Bauder, 75 Iowa, 550; 39 N. W. Rep. 887; 1 Lawyers' Rep. Ann. 655, and note."

²Guignen v. Union Trust Co., 156 Ill. 135; 40 N. E. Rep. 556; South Mo. Land Co. v. Rhodes, 54 Mo. App. 129. In Lachman v. Block (La. Ann.), 17

So. Rep. 153; 47 La. Ann., it is held that the obligation of a surety claimed to arise on a paper executed, and, if there is any obligation, to be performed here by him is a Louisiana contract, governed by our law, although the paper is designed to be used by a merchant residing here to obtain credit from a California merchant, the law of which state is claimed to differ from that of Louisiana on the subject of suretyship. Story on Conflict of Laws, §§ 233, 234, 280, 284; Pritchard v. Norton, 106 U. S. 124; 1 Sup. Ct. Rep. 102.

³Anheuser, etc., Ass'n v. Bond (1895), 66 Fed. Rep. 653.

⁴Meroney v. Atlanta Loan Ass'n (N. C. 1895), 21 S. E. Rep. 924.

be uniform in the courts of the same country. No forum, in which a remedy is given to foreigners, or upon foreign contracts, is expected to adopt the forms of trial of the foreign country.' Where a contract is made in one country, to be performed in a second, and is enforced in a third, the law of the last alone will govern the case as to the remedy.² The laws of the country where the contract was made can only have a reference to the nature of the contract, not to the mode of enforcing it. Whoever comes into a country voluntarily subjects himself to all the laws of that country, and therein to all the remedies directed by those laws, on his particular engagements.³ It is a general principle, admitting of few exceptions, that in construing contracts made in a foreign country or sister state the courts are governed by the *lex loci contractus*, as respects the essence of the contract; that is, the rights acquired and the obligations created by it, but the remedy or mode of enforcing it is to conform to the laws of the country or state where the action is instituted.⁴ A statute of Massachusetts, providing that in a suit on a usurious contract recovery must be limited to the original demand, less three times the amount of the usurious reserve, applies to the remedy only, and has no force in Vermont.⁵ A contract void by the law of the place

¹ Scudder v. Union Nat. Bank, 91 U. S. 406; Pritchard v. Norton (1882), 106 U. S. 124; Harrison v. Edwards, 12 Vt. 648.

² Davis v. Morton, 5 Bush, 160; Campbell v. Stein, 6 Dow, 116.

³ Melan v. De Fitz James, 1 Bos. & P. 138; De la Vega v. Vianna, 1 B. & Ad. 284; Bank of United States v. Donnelly, 8 Pet. 361.

⁴ Roosa v. Crist (1856), 17 Ill. 450; Everett v. Herrin, 46 Maine, 357; Walters v. Whitlock, 9 Fla. 86; Hefnerlin v. Sinsinderfer, 2 Kan. 401; Ivey v. Lalland, 42 Miss. 444; Trasher v. Everhart, 3 Gill & J. 234. The *lex fori* governs in determining the mode of trial, including the form of pleading, the quality and degree of evidence, and the mode of redress. Harrison v. Edwards, 12 Vt. 648; Mc-

Allister v. Smith, 17 Ill. 328; Kanaga v. Taylor, 7 Ohio St. 134, enforcement of chattel mortgage in foreign jurisdiction, the property before breach of condition having been removed to Ohio, and beyond the jurisdiction of the state in which the mortgage was given.

⁵ Suffolk Bank v. Kidder, 12 Vt. 464. "We can not, in respect to the remedy, notice the statutes of the state in which the contract was made;" per Bennett, J. "A contract, so far as concerns its normal making, is to be determined by the place where it is solemnized, unless the *lex situs* of property disposed of otherwise requires; so far as concerns its interpretation, by the law of the place where its terms are settled, unless the parties had the usages of another place in

where made, even though it is to be performed in another state, by the laws of which it would be valid, is by the just principles of international law void everywhere, as the courts of no state will enforce the void contracts of another state.¹ Foreign laws can not be taken notice of judicially, but must be proved as facts, and with respect to this subject the several states of the Union are to be considered in relation to each other as foreign nations.²

§ 596. The same subject continued—Statutes of limitation.

—The nature, effect and *modus operandi* of statutes of limitations have given rise to much discussion in the courts, and to some conflict of opinion, but in respect to one distinction there has been a pretty general concurrence of sentiment. It is said that such statutes act upon the remedy merely, and not upon the debt, barring the remedy, but not extinguishing the rights.³ All suits must be brought within the time prescribed by the *lex fori*, although the law of the country where the contract was entered into may allow a much longer time in which to bring an action.⁴ The citizens of one state can not be

view; so far as concerns the remedy by the law of the place of suit, and so far as concerns its performance by the law of the place of performance.” Wharton on Conflict of Laws, § 401.

¹Hyde v. Goodnow, 3 N. Y. 266; Andrews v. Herriot, 4 Cow. 508; Story on Conflict of Laws, § 243.

²Brackett v. Norton, 4 Conn. 517, where the services of an attorney were rendered in the state of New York and it was held that the laws of New York were the standard by which the case must be determined.

³Anson on Contracts, 317. The statute of 21 James 1, c. 16, provided that, “All actions of account, and upon the case * * and all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent * * shall be commenced and sued within * * six years next after the cause of such action or suit and not after.”

The statute of 3 and 4 William IV, c. 42, limited the bringing of actions upon any contract under seal to a period of twenty years from the cause of action arising. The statutes of limitation of the different states are founded on the English statutes, but are not uniform in their provisions. They will be found in Wood on Limitation of Actions. Quantock v. England, 5 Burr. 2628; Waltermire v. Westover, 14 N. Y. 16; Billings v. Hall, 7 Cal. 1; Jones v. Jones, 18 Ala. 248; Briscoe v. Anketell, 28 Miss. 361; Ruckmaboye v. Mottichund, 8 Moore, P. C. 4; Ruggles v. Keeler, 3 John. 263; Power v. Hathaway, 43 Barb. 214; Miller v. Brenham, 68 N. Y. 83; Le Roy *et al.* v. Crowninshield, 2 Mason, 151, the principles arising from the statute of limitations discussed by Story, J.

⁴Paine v. Drew, 44 N. H. 306; Mineral Point R. Co. v. Barron, 83 Ill. 365.

barred by the statute of limitations of another state, unless they bring themselves within its jurisdiction.¹ But when the statute of the place where the contract was made operates to extinguish the contract or debt itself, and the contract is sued upon in another state, the statute of the *lex loci contractus*, and not of the *lex fori*, controls.²

§ 597. Valid contract not enforceable everywhere.—A contract valid where it is made is valid everywhere, but it is not necessarily enforceable everywhere. It may be contrary to the policy of the law of the forum.³ If the law of the forum requires a certain mode of proof, the contract, although valid, can not be enforced in that jurisdiction without the proof required there. This is as true between the states of the Union as it is between Massachusetts and England.⁴ Under the Mas-

¹Field v. Dickinson, 3 Ark. 409. In Townsend v. Jemison, 9 How. 407, the question was presented whether a cause of action having accrued in Mississippi, and been completely barred there, the bar of the Mississippi statute might not be pleaded in a court of Louisiana, and the decision was that it could not. "The rule is that the statute of limitations of the country in which the suit is brought may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the limitation of the *lex loci contractus* can not be." Justice Wayne said further: "It has become the fixed rule of the *jus gentium privatum*, unalterable, in our opinion, either in the states of the United States, or England, except by legislative enactment." "The only statute of limitations which can be relied on to bar an action, whether brought to enforce a contract or otherwise, is the statute in operation at the time and place when and where the remedy is sought," per Shaw, C. J., in Brigham v. Bigelow, 12 Metc. 268; Putnam v. Dike, 13 Gray, 535. Where the statute was held no bar to an

action on a debt contracted forty years ago in another state, without proof that the defendant had ever been in the state of Massachusetts. Drake v. Found Treasure Min. Co. (1892), 53 Fed. Rep. 474.

²McMerty v. Morrison (1876), 62 Mo. 140; Gans v. Frank, 36 Barb. 320; Perkins v. Guy, 55 Miss. 153. In Baker v. Stonebaker, 36 Mo. 338, it was held that after the twelve years had expired in Maryland after the rendition of the judgment no recovery could be had upon it in Missouri because the Maryland statute did not merely affect the remedy, but it absolutely extinguished the debt.

³Van Reimsdyk v. Kane, 1 Gall. (U. S.) 371, 375; Fed. Cas. No. 16,871; Greenwood v. Curtis, 6 Mass. 358; Fant v. Miller, 17 Gratt. 47, 62.

⁴Hoadley v. Northern Transportation Co., 115 Mass. 304, 306; Pritchard v. Norton, 106 U. S. 124, 134; 1 Sup. Ct. Rep. 102; Downer v. Chesebrough, 36 Conn. 39; Kleeman v. Collins, 9 Bush, 460; Fant v. Miller, 17 Gratt. 47; Hunt v. Jones, 12 R. I. 265, 266; Yates v. Thomson, 3 Clark & F. 544, 586, 587; Bain v. Whitehaven, etc., R. Co., 3 H. L. Cas. I,

sachusetts statute requiring agreements to make wills to be in writing; an oral agreement, made in Maine by defendant's testatrix, to the effect that if plaintiff would leave Maine, and take care of her, she would leave the plaintiff all her property at her death, can not be enforced in Massachusetts, where testatrix died, although the plaintiff has furnished the stipulated consideration.²

19; *Leroux v. Brown*, 12 C. B. 801. When the law involved is a statute, it is a question of construction whether the law is addressed to the necessary constituent elements or legality of the contract on the one hand, or to the evidence by which it shall be proved on the other. In the former case, the law affects contracts made within the jurisdiction wherever sued, and may affect only them (*Drew v. Smith*, 59 Maine, 393); in the latter, it applies to all suits within the jurisdiction wherever the contracts sued upon were made, and again may have no other effect. It is possible, however, that a statute should affect both validity and remedy by express words, and, this being so, it is possible that words which in terms speak only of one should carry with them an implication also as to the other. For instance, in a well known English case, Maule, J., said: "The fourth section of the statute of frauds entirely applies to procedure;" and on this ground it was held that an action could not be maintained upon an oral contract made in France. But he went on: "It may be that the words used, operating on contracts made in England, render them void." *Leroux v. Brown*, 12 C. B. 801, 805, 817.

¹ L. 1888, c. 372.

² *Emery v. Burbank*, 163 Mass. 326; 39 N. E. Rep. 1026, Holmes, J. "The words of the statute before us seem in the first place, and most plainly, to deal with the validity and form of the contract. 'No agreement * * shall

be binding, unless such agreement is in writing.' If taken literally, they are not satisfied by a written memorandum of the contract; the contract itself must be made in writing. They are limited, too, to agreements made after the passage of the act—a limitation which perhaps would be more likely to be inserted in a law concerning the form of a contract than in one which only changed a rule of evidence. But we are of opinion that the statute ought not to be limited to its operation on the form of contracts made in this state. The generality of the words alone, 'no agreement,' is not conclusive. But the statute evidently embodies a fundamental policy. The ground, of course, is the prevention of fraud and perjury, which are deemed likely to be practiced without this safeguard. The nature of the contract is such that it naturally would be performed or sued upon at the domicile of the promisor. If the policy of Massachusetts makes void an oral contract of this sort made within the state, the same policy forbids that Massachusetts testators should be sued here upon such contract without written evidence, wherever it is made. If we are right in our understanding of the policy established by the legislature, it is our duty to carry it out so far as we can do so without coming into conflict with paramount principles. 'If oral evidence were offered which the *lex fori* excluded, such exclusion, being founded on the desire of preventing perjury, might claim to over-

§ 598. **Matters affecting the remedy.**—The statute of frauds, like the statutes of limitation, is a matter affecting the remedy merely, and if by the law of the forum no action can be maintained on a particular oral contract, if made in that country, the like rule will obtain as to a contract made abroad, although it was valid by the law of the place where made.¹ The law of set-off belongs rather to remedy than to substance, and is therefore regulated by the laws of the state in which the action is brought, and not by the law of the place where the obligation sued on was made.²

ride any contrary rule of the *lex loci contractus*, not only on the ground of its being a question of procedure, but also because of that reservation in favor of any stringent domestic policy, which controls all maxims of private international law.' Westlake on Private International Law (3d ed.), § 208; Wharton on the Conflict of Laws (2d ed.), § 766. The law of the testator's domicile is the law of the will. A contract to make a will means an effectual will, and therefore a will good by the law of the domicile. In a sense the place of performance, as well as the forum for a suit in case of breach, is the domicile. We do not draw the conclusion that, therefore, the validity of all such contracts, wherever sued on, must depend on the law of the domicile. That would leave many such contracts in a state of indeterminate validity until the testator's death, as he may change his domicile so long as he can travel. But the consideration shows that the final domicile is more concerned in the policy to be insisted on than any other jurisdiction, and justifies it in framing its rules accordingly. There would be no question to be argued if the law were in terms a rule of evidence. It is equally open for a state to declare, upon the same considerations which dictate a rule of evidence, that a contract must have certain form, if it is to be en-

forced against its inhabitants in its courts. Legislation of this kind, for contracts which thus necessarily reach into the jurisdiction in their operation, hardly goes as far as statutes dealing with substantive liability, which have been upheld." Commonwealth v. Macloon, 101 Mass. 1.

¹ Leroux v. Brown, 12 C. B. 801; 14 Eng. L. & Eq. 247, where the plaintiff sued upon a contract not to be performed within a year, made in France and not reduced to writing, the French law not requiring writing in such a case. Story on Conflict of Laws, § 576a.

² In Story on Conflict of Laws, § 575, it is said: "As to set-off or compensation, it is held in the courts of common law that a set-off to any action allowed by the local law is to be treated as part of the remedy; and that therefore it is admissible in claims between persons belonging to different states or countries, although it may not be admissible by the law of the country where the debt which is sued was contracted." 2 Parsons on Notes and Bills, 375; Davis v. Morton, 5 Bush, 160; Bank of Gallipolis v. Trimble, 6 B. Mon. 599, holding that a set-off not allowed by the laws of Kentucky, where the suit was brought, though allowed by the laws of Ohio, where the contract was made, could not be legally set up by

§ 599. **As to real estate.**—It appears to be well settled by the laws of every state or country, that the transfer of lands or other heritable property, or the creation of any interest in or lien or incumbrance thereon, must be made according to the *lex situs* or the local law of the place where the property is situated. And it has been decided that the *lex loci rei sitæ* must also be resorted to for the purpose of determining what is or is not to be considered as real or heritable property, so as to have locality within the intent and meaning of this principle.¹ The law of the *situs* conclusively governs as to all questions relating to rights, titles and interests in and to the real estate.² The *lex loci rei sitæ* determines the validity of mortgages of real property;³ and it has been held that a foreclosure in one state of a mortgage upon lands in another has no validity.⁴ The effect of a conveyance in effect a mortgage made in New York of lands in West Virginia is to be determined by the laws of

way of defense. *Second Nat. Bank v. Hemingray*, 31 Ohio St. 168; *Peck v. Hibbard*, 26 Vt. 698; *Wharton on Conflict of Laws*, § 788. In *Vermont State Bank v. Porter*, 5 Day, 316, a bank incorporated under the laws of Vermont, was, by its charter, bound to receive its own notes in payment of its debts. To avoid the effect of this provision it brought suit in Connecticut against a party who claimed that he might have the benefit of this provision. The court held that the contract being made with reference to the laws of Vermont the right of set-off given by the Vermont law applied. It would appear that the weight of authority is against this doctrine.

¹ *Chapman v. Robertson*, 6 Paige, 627. "In all the books it is conceded that real property must be transferred according to the law of its locality, because it is subject to the exclusive jurisdiction of the government of its locality, and because every legal remedy in regard to it must be sought there." Per *Peckham, J.*, in *Guilander v. Howell* (1866), 34 N. Y. 657. "Real property can not attend the

person of the owner as he goes from one jurisdiction to another. It is fixed, immovable and necessarily under the law of the place where it lies." *Baum v. Birchall*, 150 Pa. St. 164.

² *Richardson v. DeGiverville*, 107 Mo. 422. International comity has nothing to do with titles to real estate. They are regulated exclusively by the government where the real estate is situated. *White v. Howard*, 46 N. Y. 144. Where a resident of Connecticut died leaving real estate in New York, held that the validity of the devise and all questions relating to the title must be determined by the laws and courts of New York irrespective of the domicile of the testator.

³ *Fessenden v. Taft* (1888), 65 N. H. 39.

⁴ *Farmers' Loan and Trust Co. v. Postal Telegraph Co.* (1887), 55 Conn. 334, where there had been a foreclosure in New York of a mortgage upon lands in Connecticut. *Lindley v. O'Reilly* (1888), 50 N. J. Law, 636.

the latter state; but a contract also made in New York between citizens of that state, for the loan of money, to secure the payment of which such conveyance was executed, is to be governed, as to its nature, construction and validity by the laws of New York.¹

§ 600. As to personal property.—It is said that personal property or merchandise has no *locus sitæ*, but follows the person of the owner, and the generally recognized rule is that his alienation of it is governed by the law of his domicile or of the place where the sale is made, and that such contracts should have in any other state the same interpretation, binding force and validity.² This proposition is true in general, but not to its utmost extent, nor without several exceptions.³ A distinction has been made between debts and movables, the latter being capable of having a *situs*, while the former, it is said, follow the domicile of the owner.⁴

¹ *Klinck v. Price*, 4 W. Va. 4. Where money was borrowed and the note made payable in New York but dated in Nebraska where a mortgage to secure it was executed on land, the contract being usurious by the New York law, was held void. *Sands v. Smith*, 1 Neb. 108.

² *Dacosta v. Davis*, 24 N. J. Law, 319. "It is a clear proposition not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner, both with respect to the disposition of it and with respect to the transmission of it either by succession or by the act of the party. It follows the law of the person." *Sill v. Worswick*, 1 H. Black, 665, per Lord Loughborough; *Thomson v. Advocate General*, 12 C. & F. 1. "Our American decisions of inter-confederated law fully sustain this principle." *Hoffman v. Carow*, 22

Wend. 285; *Born v. Shaw*, 29 Pa. St. 288, question of a sale of personal property which took place in Virginia; *VanBuskirk v. Hartford Fire Ins. Co.*, 14 Conn. 583. "The law of the domicile of the owner of personal property, as a general rule, determines the validity of every transfer made of it by him." Per Folger, Ch. J., in *Edgerly v. Bush*, 81 N. Y. 199. "The principle is well settled that a voluntary conveyance of personal property, good by the law of the place where it was made, passes title wheresoever the property may be situated." Per Miller, J., in *Nichols v. Mase* (1883), 94 N. Y. 160.

³ *Milne v. Moreton*, 6 Binn. 353. "In one sense, personal property has locality, that is to say, if tangible it has a place in which it is situated, and if invisible, consisting of debts, it may be said to be in the place where the debtor resides." Per Tilghman, C. J.

⁴ *People v. Commissioner of Taxes*, 23 N. Y. 224. "It is a general principle that debts have no *situs*. For pur-

§ 601. **Exceptions to the general rule as to personal property.**—The general principle that a transfer of personal property, valid by the law of the domicile, is valid everywhere, is subject to exception. It rests on a principle of comity, which yields when the laws and policy of the state where the property is situated has prescribed a different rule of transfer from that of the state where the owner lives. How far the transfer of personal property, lawful in the owner's domicile, will be respected in the courts of the country where the property is located, and a different rule of transfer prevails, is a question on which courts have differed.¹ Every state has a right to regulate the transfer of property within its limits, and whoever sends property to it impliedly submits to the regulations concerning its transfer in force there.² But the fiction of law that the domicile of the owner draws to it his personal estate, wherever it may happen to be located, yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined. It yields to laws for attaching the estate of non-residents, because such laws necessarily assume that property has a *situs*, distinct from the owner's domicile.³ When a sale, mortgage or pledge of goods within the jurisdiction of a certain state is made elsewhere, it is not only competent, but reasonable, for the state which has the goods within its power to require them to be dealt with in the same way as would be necessary in a domestic transaction, in order to pass a title which it will recognize as against domestic creditors of the vendor or pledgor.⁴ Where a party residing in the state of New York executed and delivered a chattel mortgage on

poses of administration and attachment in cases of foreign creditors, and possibly for some other, they are regarded as located where the debtor resides. But for most purposes, especially for the purposes of assignment by the creditor, they follow the residence of the creditor." Per Carpenter, J., in *Egbert v. Baker* (1890), 58 Conn. 319; *Caskie v. Webster*, 2 Wallace Jr. 131.

¹ *Green v. Van Buskirk*, 7 Wall. 139.

² *Edgerly v. Bush*, 81 N. Y. 199;

Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, holding that the liability of property to be sold under legal process, issuing from the courts of the state where it is situated, must be determined by the law of that state rather than the law of the jurisdiction where the owner lives.

³ *Warner v. Jaffray* (1884), 96 N. Y. 248; *Clark v. Tarbell*, 58 N. H. 88.

⁴ *Hallgarten v. Oldham*, 135 Mass. 1, per Holmes, J.

property in Illinois, and a creditor, before the mortgage was recorded and the property delivered, both record and delivery being necessary under the laws of Illinois, sued out a writ of attachment in Illinois and obtained judgment, and the property was levied upon and sold, it was held that the attachment on the property in Illinois took precedence of the unrecorded mortgage executed in New York, where record was not necessary, although the owner of the chattels, the attaching creditor and the mortgage creditor were all residents of New York.¹

§ 602. Voluntary assignments for the benefit of creditors.—

The general principle is that an owner has the power which is recognized by all civilized, and especially by all commercial, nations, to transfer his property, for a good and valuable consideration; and the general disposition of all friendly governments is to give effect to such contracts when not opposed by some great considerations of public policy, or manifestly injurious to their own citizens. *A fortiori* is this true of the several states of the American Union, which, though foreign to some purposes, are united for many others.² A voluntary assignment of property for the benefit of creditors, valid by the laws of the state where made, has been held to operate to convey personal property, not already subject to liens, in every state where it might be found. In Pennsylvania an assignment made in New York where the assignor and assignee were domiciled which contained preferences in favor of cer-

¹Green v. Van Buskirk, 7 Wall. 139. Personal property situated in New Jersey was held subject to the local laws of that state, though the owner thereof resided in the state of New York. A general assignment with preferences for the benefit of creditors, which was void under the laws of New Jersey, was made in New York, of property situated in New Jersey. Subsequently such property was taken in New Jersey under a foreign attachment and sold; *held*, that no title to property in New Jersey passed by such assignment and the same was subject to the attachment proceedings.

"As to property actually situate in New Jersey, that state has the conceded right to legislate; she may declare what alone shall transfer the title as against her citizens, creditors of the assignor. The property is within her exclusive jurisdiction," per Peckham, J. *Guillander v. Howell*, 34 N. Y. 657.

²Means v. Hapgood, 19 Pick. 105. In the absence of any bankrupt or insolvent law, a debtor may lawfully give a preference to one of his creditors, if he does not thereby intend to defraud the others. *Jewell v. Knight* (1887), 123 U. S. 426.

tain creditors, which preferences were valid by the law of New York, but illegal in Pennsylvania, was held to pass the title to personalty in Pennsylvania fully for all purposes.¹ An assignment, with preferences, made in Utah of personal property in Idaho, which forbids preferences, was held by the United States Supreme Court in a recent decision, valid in Idaho against an attaching creditor, a corporation existing under the laws of Minnesota.² Such assignments have been held, however, ineffectual to pass title to personal property situate in another state, when in contravention of the laws of that state and inconsistent with its policy.³

¹Smith's Appeal (1887), 117 Pa. 30, Paxson, J., citing Smith's Appeal, 104 Pa. 381, said: "It is settled by abundant authority that an assignment by a citizen of one state of personal property located in another state passes the title fully for all purposes. The law of the domicile regulates the transfer of personal property." *Baltimore and Ohio R. v. Glenn*, 28 Md. 287 (an assignment executed by a Virginia corporation in the state of Virginia of property in Maryland sustained); *Schuler v. Israel* (1886), 27 Fed. Rep. 851 (a voluntary assignment in Texas held valid in Missouri, save as it conflicts with the rights of resident creditors); *Woodward v. Brooks*, 18 Ill. App. 150; *In re Paige*, 31 Minn. 136; *Cook v. Van Horn*, 81 Wis. 291; *Eddy v. Winchester*, 60 N. H. 63 ("the rights of our own citizens not being involved"); *Fay v. Jenks*, 78 Mich. 304; *Hanford v. Paine*, 32 Vt. 442, *Ockerman v. Cross*, 54 N. Y. 29 (voluntary assignment made by a debtor in Canada); *Vanderpoel v. Gorman* (1894), 140 N. Y. 563; 35 N. E. Rep. 933 (validity of assignment made by a New Jersey corporation doing business in New York); *Burlock v. Taylor*, 16 Pick. 335 (an assignment by an insolvent debtor in New York held valid in Massachusetts against a subsequent attachment by a citizen of New York

of property in Massachusetts, although such assignment was invalid under the laws of that state); *Train v. Kendall* (1884), 137 Mass. 366 (an assignment made in another state upheld as against an attaching creditor of the assignor domiciled in Massachusetts); *Frank v. Bobbitt*, 155 Mass. 112 (a voluntary assignment made in North Carolina valid as against a subsequent attaching creditor in still another state and not a party to the assignment); *Butler v. Wendell*, 57 Mich. 62; *Egbert v. Baker*, 58 Conn. 319; *Chafee v. Fourth Nat. Bank*, 71 Maine, 514; *Weider v. Maddox*, 66 Texas, 372; *Thurston v. Rosenfield*, 42 Mo. 474; *Halsted v. Straus*, 32 Fed. Rep. 279; *Van Wyck v. Read* (1890), 43 Fed. Rep. 716.

²*Barnett v. Kinney* (1892), 147 U. S. 476.

³*Warner v. Jaffray* (1884), 96 N. Y. 248; 30 Hun, 326; *Varnum v. Camp*, 13 N. J. Law, 326. "The true rule of law and public policy is this: that a voluntary assignment made abroad, inconsistent, in substantial respects, with our statute, should not be put in execution here to the detriment of our citizens, but that for all other purposes, if valid by the *lex loci*, it should be carried fully into effect." *Beasley, C. J.*, in *Bentley v. Whittemore*, 19 N. Y. Eq. 462. In Illinois a voluntary

§ 603. Involuntary assignments under bankrupt and insolvent laws.—There is a distinction between involuntary transfers of property, such as work by operation of law under foreign bankrupt assignments and insolvent laws, and a voluntary conveyance.¹ The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his property, while an assignment by operation of law has no legal operation out of the state in which the law was passed.² It seems to be a pretty well settled doctrine in this country that a conveyance under foreign bankrupt and insolvent laws can not affect property outside of the state or country in which the law is enacted, and will not prevail against the rights of attaching creditors where the property is situated.³ The principle was laid down in a case in New York that the statutes of foreign states can have no recognition in other states solely by virtue of the foreign statute, but by comity the statutory title of foreign assignees in bankruptcy is recognized and enforced in other states, when it can be done

assignment, with preferences, made in another state by a resident thereof, is not operative to convey the title to property in Illinois as against creditors of the assignor residing in Illinois, who are seeking by attachment in the courts there to subject such property to payment of their debts. *Henderson v. Schaas* (1889), 35 Ill. App. 155.

¹ Burrill on Assignments, § 276.

² *Cole v. Cunningham*, 133 U. S. 107; *Paine v. Lester*, 44 Conn. 196; *Barth v. Backus* (1893), 140 N. Y. 230; 35 N. E. Rep. 425; *Hanford v. Paine*, 32 Vt. 442.

³ In *Holmes v. Remsen*, 20 John. 229, Platt, J., held that a statutory assignment of a debtor's property under the laws of a foreign country is not equivalent to a voluntary assignment by the debtor and that such an assignment will not hold good to the prejudice of the rights of domestic creditors pursuing their remedy by attachment under our laws. *Felch v.*

Bugbee, 48 Me. 9; *Hoyt v. Thompson*, 5 N. Y. 320, opinion of Paige, J.; *Willits v. Waite*, 25 N. Y. 577; *Hibernia National Bank v. Lacombe*, 84 N. Y. 367; *Barth v. Backus* (1893), 140 N. Y. 230; 35 N. E. Rep. 425, Wharton on Conflict of Laws, §§ 390, 390a. Judge Story in Conflict of Laws, § 414, lays down the American doctrine in relation to assignments under bankrupt proceedings as follows: "National comity requires us to give effect to such assignments only so far as may be done without impairing the remedies or lessening the securities which our laws have provided for our citizens." Chief Justice Marshall in *Harrison v. Sterry*, 5 Cranch, 289, said: "Foreign bankrupt laws do not operate to transfer the property of bankrupts within the United States." *Booth v. Clark*, 17 How. U. S. 322; *Zipcey v. Thompson*, 1 Gray, 243; *City Ins. Co. v. Commercial Bank*, 68 Ill. 351.

without injustice to the citizens thereof and without prejudice to creditors pursuing their remedies under the local statutes, and provided such titles are not in conflict with the laws or public policy of the state.¹

§ 604. Promissory notes and bills of exchange.—A promissory note payable generally, that is, where no specified place of payment is mentioned, is treated as a note of the place where it is executed, and the rights, duties and obligations growing out of it are to be determined by the laws of that place.² When a note was given in Canada, payable on demand, in consideration of an antecedent debt contracted in New York, of which state both parties to the note were inhabitants, but were at the time the note was executed and delivered temporarily in Canada, it was held that the laws of Canada must govern as to the note.³ If a bill or note is payable in a particular place it is to be treated as if made there, without reference to the place where it is written, or signed or dated.⁴ The naming of a bank

¹Matter of Accounting of Waite (1885), 99 N. Y. 433, where the authorities upon the subject of the rights of foreign statutory trustees are collated and discussed. *Upton v. Hubbard*, 28 Conn. 274, a contest between a Massachusetts assignee and a creditor who was also from that state. The court held that although a foreign assignee may be allowed to sue in our courts as a matter of courtesy, yet the courtesy will be denied in all cases where there are claims upon the property adverse to the assignment, whether the claimants be citizens of that or of some other state. In *Cole v. Cunningham*, 133 U. S. 107, Chief Justice Fuller said: "Great contrariety of state decisions exist upon this general topic, and it may be fairly stated that, as between citizens of the state of the forum, and the assignee appointed under the laws of another state, the claim of the former will be held superior to that of the latter by the courts of the former. While as be-

tween the assignee and citizens of his own state and the state of the debtor, the laws of such state will ordinarily be applied in the state of the litigation, unless forbidden by, or inconsistent with, the laws or policy of the latter." See article in 7 Harvard Law Rev. 281, entitled "An Assignment in Insolvency, and its Effect upon Property and Persons out of the State," by Hollis R. Bailey.

²*Peck v. Hibbard*, 26 Vt. 698; *Trimbe v. Vignier*, 1 Bing. N. C. 151 (note made in Paris, no place of payment being named); Story on Conflict of Laws, § 278.

³*Smith v. Mead*, 3 Conn. 253. The note was not made payable in New York, but by legal consequence in Canada, and was immediately after its execution suable in the courts of that country. The preceding contract was extinguished, and the insolvent laws of New York held not to apply.

⁴*Cutler v. Wright*, 22 N. Y. 472. A note made in New York, but dated in

in another state for payment of a note does not always characterize the contract as to be governed by the laws of that place. The arrangement may be simply for the convenience of the maker, and have no peculiar effect.¹ In determining the place where an accommodation note is made, the place where it was delivered and negotiated controls, and not the place where it was written, signed or dated.² Where a draft was drawn and dated in Illinois, and accepted and made payable in New York by the drawees residents of New York, and returned by the acceptors to the drawer in Illinois for the purpose of being negotiated there by him, the understanding being that the draft was to be discounted by a bank in Illinois, it was held that it

Florida, and payable there, is governed by the laws of that place. *Everett v. Vendryes*, 19 N. Y. 436, holding that the law of the place where the bill was payable controlled as to the liability of the drawer to the indorsee. 1 *Parsons on Notes and Bills*, 324; *Shoe, etc., Bank v. Wood*, 142 Mass. 563; *Rouquette v. Overmann*, L. R. 10 Q. B. 525. A note executed and delivered in Michigan on Sunday in payment of goods sold and delivered although payable in Ohio, was held governed by the laws of Michigan and void. "Parties can not be allowed to defy our laws, and recover upon a contract void from its inception under our statute, by making the place of payment out of the state." Per Long, J., in *Arbuckle v. Reaume*, 96 Mich. 234; 55 N. W. Rep. 808. Artifice is sometimes resorted to in the making of contracts, with a view of evading the laws against usury. To this end a false or fictitious place of performance is sometimes inserted in the writing. Whenever such attempt is made to appear, the courts refuse to lend their sanction to it. *Falls v. United States Savings, Loan and Building Co.*, 97 Ala. 417; 13 So. Rep. 25.

¹ *Staples v. Nott* (1891), 128 N. Y.

403. Where in an action upon a promissory note, dated in Washington, D. C., made payable at a bank in New York, which bore interest at a legal rate where dated but illegal in New York, it appeared that the note was given to take up another note dated in Washington and payable there, which bore the same rate of interest. The arrangement for renewal was made in Washington, where the note in suit was drawn and handed to the maker to execute, who took it to his home in New York, where he signed it and the defendant indorsed it. The note was then mailed to plaintiff at Washington. The indorser set up usury as a defense. It was held untenable, and that the contract was made in the District of Columbia, and to be governed by the laws there, and that the engagement of the indorser did not affect the local character of the contract. Opinion by Gray, J., citing *Wayne, etc., Bank v. Low*, 81 N. Y. 566; *Western, etc., Co. v. Kinderhouse*, 87 N. Y. 430 and *Sheldon v. Haxtun*, 91 N. Y. 124.

² *Connor v. Donnell*, 55 Texas, 167; 1 *Daniel on Negotiable Instruments*, §§ 191, 868.

was an Illinois contract, and the rights and liabilities of the parties were to be determined by the law of that state.¹

§ 605. The same subject continued.—More than one law will apply to the same bill of exchange, which it has been held is to be construed according to the laws of each place at which the contract contemplated that something was to be done by either of the parties.² Each successive indorser is liable according to the law of the place where he indorses, every indorsement being treated as a new substantive contract.³ In an action upon a bill of exchange payable in New York, but drawn and indorsed in New Granada, it was held that the drawer was liable under the law of the place of performance, and the indorser under the law of the place of contract, that is where the indorsement was made.⁴

¹ *Tilden v. Blair*, 21 Wall. 241. "The place of payment was doubtless designated for the convenience of the acceptors, or to facilitate the negotiation of the draft. But it is a controlling fact that before the acceptance had any operation, before the instrument became a bill, the defendants sent it to Illinois for the purpose of having it negotiated in that state, negotiated it must be presumed, at such a rate of discount as by the law of that state was allowable." Per Strong, J. A bill drawn in Indiana and accepted in Michigan to be discounted in Indiana, and to be paid in Michigan, held to be an Indiana contract. *Farmers' Nat. Bank v. Sutton Mfg. Co.*, 52 Fed. Rep. 191.

² *Hibernia, etc., Bank v. Lacombe*, 84 N. Y. 367; *Horne v. Rouquette*, L. R. 3 Q. B. Div. 514.

³ *Potter v. Brown*, 5 East, 124; *Powers v. Lynch*, 3 Mass. 77, where Judge Sedgwick held "that the indorser contemplates performance as to himself, according to the law of the place where he makes the indorsement." *Prentiss v. Savage*, 13 Mass. 20. *Artisans' Bank v. Park Bank*, 41 Barb.

599; *Freese v. Brownell*, 35 N. J. Law, 285. "Every indorsement, accommodation or otherwise, is essentially an original contract, equivalent to a new note or bill, in favor of the holder and the acceptor or obligor." *Trabue v. Short*, 18 La. Ann. 257. In *Daniels' Negotiable Instruments*, it is said: "Therefore each of several and successive indorsers of a bill or note may contract several and different liabilities, each being bound according to the law of the place where his indorsement was made. § 899. It is a general rule, that the drawer, indorser and acceptor of a bill are respectively liable for damages, according to the law of the place of drawing, indorsing or accepting, wherever the bill may be payable. *Carnegie v. Morrison*, 2 Metc. (Mass.) 381; *Hicks v. Brown*, 12 John. 142; *Downer v. Chesebrough*, 36 Conn. 39, promissory note indorsed in blank; *Baxter National Bank v. Talbot*, 154 Mass. 213, promissory note indorsed in another state.

⁴ *Everett v. Vendryes*, 19 N. Y. 436. In *Lee v. Selleck*, 33 N. Y. 615, the note in question was made and dated in New York payable in Illinois and

§ 606. **Interest.**—It is well settled, as a general rule, that the *lex loci contractus* must govern the rate of interest where the contract does not provide for its payment in another jurisdiction, or when the contract has nothing on its face, and there is nothing attending the making of it indicating that it is to be performed in another jurisdiction.¹ As a contract is to be governed, in respect to its construction and validity, by the law of the place where it is to be performed, if a security is made in one country or state, but is payable in another, the rate of interest, if nothing is said on the subject, is to be regulated by the law at the place of payment.² Where a promissory note was drawn in Montreal, payable to parties residing in England, “with interest until paid in England,” it was held that the plaintiff, on a judgment obtained in New York, was entitled to the English rate of interest, and not to the rate in

indorsed there. The indorser was sued in New York and the question was whether the Illinois or New York laws were to control. It was held that under the general rule governing contracts the maker was by the contract to perform it in Illinois, but that the indorser was bound by an independent contract to pay in New York. “The engagement of the indorser, though auxiliary in its character, was an independent contract, and could only be fulfilled by direct payment to the plaintiffs who were residents of the city of New York. The maker reserved the right to pay the note when it matured, at the bank of the appellant in Illinois. A qualified indorsement would have secured a similar right to the appellant; but as he made no such stipulation, in respect to the performance of his own conditional engagement, he was bound by the general rule of commercial law to fulfill it at the residence of the plaintiffs unless he could find them elsewhere,” per Porter, J.

¹ Austin v. Imus, 23 Vt. 286.

² Cutler v. Wright, 22 N. Y. 472;

Fanning v. Consequa, 17 John. 511; Campbell v. Nichols, 33 N. J. Law, 81, where the chief justice (Beasley) declared the rule to be now entirely indisputable, when the contract was made in one state, and the place of payment, in good faith, made in another. “The elementary principle undoubtedly is that the rate of interest, whether stipulated in the contract or given by way of damages for the non-performance, is the interest of the place of payment.” Redfield, J., in Peck v. Mayo, 14 Vt. 33, where the notes sued on were made at Montreal, Canada, where the makers resided, payable in Albany, New York. Chancellor Kent, 2 Kent’s Commentaries, 461, declared that this elementary principle was the received doctrine at Westminster Hall, citing Thompson v. Powles, 2 Simons, 194. In Depau v. Humphreys, 8 Martin La. (N.S.) 1, it was decided that where a contract is made in one country, to be performed in another, where the rate of interest is higher than at the place of contract, it may stipulate the higher rate of interest.

Lower Canada.¹ When, at the place of contract, the rate of interest differs from that of the place of payment, the parties may stipulate for either rate, and the contract will govern, the parties having the right of election as to the law of which place their contract is to be governed.² Any rate of interest authorized by the *lex loci contractus* or *lex loci solutionis* will be recognized and enforced in the courts of other governments whose laws would make such rate usurious.³ Where the borrower resided in Ohio, the laws of which state, at the time, allowed parties to contract for any rate of interest not exceeding ten per cent., and the lender resided in Pennsylvania, where six per cent. was the legal rate, it was held that the parties, on a loan of money made in Ohio, had the right to stipulate in the note for interest at ten per cent. per annum, and make the note payable in Pennsylvania without thereby rendering the contract usurious.⁴ This rule is subject to the qualification that the

¹Scofield v. Day, 20 John. 102; Chapman v. Robertson, 6 Paige, 627, where the debtor borrowed money in England upon a bond and mortgage executed in New York, on lands in New York, at the New York rate of interest; it was held that the usury law of England was no defense. If the contract was made in New York, upon a mortgage there, it was not a violation of the English usury law, though the money was made payable to a creditor in England. Chancellor Walworth concurring in the decision of Depau v. Humphreys, 8 Martin, La. (N.S.) 1. A contract is not void for usury which is made in Wisconsin with a New York bank, for the payment in Wisconsin to said bank of a sum of money, with interest at ten per cent., though the New York law avoids all contracts which provide for payment of more than seven per cent. interest, if the Wisconsin law makes no such provision—the law of the place of performance governing in determining the validity of the contract. Kennedy v. Knight, 21 Wis. 340.

²Cromwell v. County of Sac, 96 U. S. 51; Andrews v. Pond, 13 Pet. 65; Miller v. Tiffany, 1 Wall. 298; Bullard v. Thompson, 35 Texas, 313; Arnold v. Potter, 22 Iowa, 194; Daniel on Negotiable Instruments, § 922; Dugan v. Lewis, 79 Texas, 246. "I apprehend that a contract made, *bona fide*, in one country and to be performed in another, and stipulating the higher rate of interest of the latter, is not usurious with reference to the laws of the former country. A contract to be usurious, by our law, must not only be made here, but to be performed here." Per Redfield, J.; Peck v. Mayo, 14 Vt. 33.

³McAllister v. Smith, 17 Ill. 328; 65 Am. Dec. 651. In Georgia a note payable in Massachusetts which is usurious under the laws of Georgia will not be enforced in Georgia to the extent of the usury. Kilcrease v. Johnson, 85 Ga. 600.

⁴Kilgore v. Dempsey (1874), 25 Ohio St. 413.

parties act in good faith, and that the form of the transaction is not adopted to disguise its real character. If the contract is void by the law of the place where it is entered into, it is void everywhere.¹ Where a resident of New York made a note there, dated, payable, and intended to be discounted there, specifying no rate of interest, and the note was first negotiated in another state, at a rate of interest lawful there, but unlawful in New York, it was held invalid for usury.²

§ 607. Days of grace.—The days of grace to be allowed on notes or bills of exchange are to be computed according to the usage of the place where they are to be paid, and not of the place where drawn.³ Where a draft drawn and indorsed in New York on a bank in Connecticut was by its terms payable on a specified day, and it was presented and protested for non-payment on that day, it was held in a suit in New York that the law of Connecticut governed, according to which it was payable without grace when due.⁴

§ 608. Insurance policies.—A contract of insurance is to be governed by the law of the place where its execution was completed, and it became a binding and operative contract, and not necessarily by the law of the place where dated.⁵ Where an insurance policy is issued from the office of the company in one state on the life or property of a person in another, and sent to the local agent in such other state for delivery, containing a clause that it is not binding until countersigned and delivered there and the premium paid, the contract is completed in such other state; and its validity must be determined by the laws of that state.⁶

¹ *Miller v. Tiffany*, 1 Wall. 298; *Akers v. Demond*, 103 Mass. 318.

² *Dickinson v. Edwards* (1879), 77 N. Y. 573; *Jewell v. Wright*, 30 N. Y. 259.

³ *Vidal v. Thompson*, 11 Mart. (La.) 23; *Bank of Washington v. Triplett*, 1 Pet. 25; *Kilgore v. Buckley*, 14 Conn. 362; *Bryant v. Edson*, 8 Vt. 325; *Blodgett v. Durgin*, 32 Vt. 361; *Daniel on Negotiable Instruments*, § 634.

⁴ *Bowen v. Newell*, 13 N. Y. 290.

⁵ *Beach on Insurance*, § 533; *Wood on Fire Insurance*, § 93.

⁶ *Cromwell v. Royal Canadian Ins. Co.*, 49 Md. 366; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. 416, where the insurance was effected upon property situated in Massachusetts by a New York company which had its office and principal place of business at Waterford, in that state. The policy was signed by the president and sec-

§ 609. **The same subject continued.**—Where the defendant, a New York corporation, doing business in Missouri, set up as grounds of defense in an action upon a life insurance policy that the contract of insurance was to be governed by the laws of the state of New York, and that therefore, because of non-payment of premium, the insured was entitled to only the surrender value named in the policy, whereas, if the Missouri law applied, the holder of the policy would be entitled to a much larger amount, under the provisions of the Missouri statute, it was held that it being provided in the application that the contract should not take effect until actual payment of first premium, the contract did not become a completed contract until the payment of the premium and the delivery of the policy, and that as these acts were done in Missouri the policy was a Missouri contract and governed by the laws of that state.¹ Do-

retary of the company at Waterford, but the negotiation was had by an agent in Massachusetts, and by the terms of the instrument it was not to be valid unless countersigned by the agent. The court, per Shaw, C. J., said: "There can be no doubt that this is a contract made in Massachusetts and to be governed and construed by the laws of this state, for though it was dated in New York and signed by the president and secretary there, yet it took effect as a contract from the counter-signature and delivery of the policy in Massachusetts." *Heebner v. Eagle Ins. Co.*, 10 Gray, 131. In *Hyde v. Goodnow*, 3 N. Y. 266, where the policy was forwarded by mail from the office of the company in New York to the assured in Ohio, it was held that the contract was made in New York and not in Ohio. *Huntley v. Merrill*, 32 Barb. 626. In *Western v. Genesee Mutual Ins. Co.*, 12 N. Y. 258, where the application for insurance was signed in Canada, and contained a provision that, if approved by the company, the policy should bear the same date as the application and take effect from

that time, the policy signed by the company at its place of business in New York, and sent to the mutual agent of the parties in Canada, to be delivered, was held to be a contract made in New York. "The contract was consummated by the final assent on the part of the company, and upon that event and not upon delivery to the assured, became operative," per Johnson, J. *In re Insurance Co.* (1884), 22 Fed. Rep. 109, where the agents of an insurance company doing business in Buffalo, N. Y., at the request of an agent in Canada insured a Canadian vessel. The policy containing a receipt for the premium note was delivered in Canada. It was held that the contract was made in Canada and the case was governed by the Canadian law. See also, §§ 593, 594, *supra*.

¹ *Equitable, etc., Society v. Clements* (1891), 140 U. S. 226; Gray, J., in delivering the opinion said: Upon this record, the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first

ing business in a state brings the policy within the operation of its laws notwithstanding it may be signed, and the loss made payable in another state. Accordingly a foreign insurance company can not withdraw itself from the operation of the statutes of a state in which it does business by the insertion of clauses in the policies.¹

§ 610. Contracts of carriers.—The rule that contracts are to be construed according to the laws of the state where made, unless it is presumed from their tenor that they were entered into with a view to the laws of some other state, applies to the contract of a carrier to transport goods to a party residing in a different state.² Where a railroad company received in Indiana

premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri. * * * It follows that the insertion, in the policy, of a provision for a different rule of commutation from that prescribed by the statute, in case of default of payment of premium after three premiums have been paid, as well as the insertion, in the application, of a clause by which the beneficiary purports to "waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any state or not," is an ineffectual attempt to evade and nullify the clear words of the statute."

¹ *Berry v. Knights, etc., Indemnity Co.*, 46 Fed. Rep. 439; *Knights, etc., Indemnity Co. v. Berry*, 50 Fed. Rep. 511; 1 C. C. A. 561. In this case a clause in the policy declared in most unequivocal terms that the policy should become null and void "in case of self-destruction of the holder of the policy whether voluntary or involuntary, sane or insane;" while the Missouri statute provided that it should be no defense that the insured committed suicide "unless the assured contemplated suicide at the time he made the application for the policy; and

any stipulation in the policy to the contrary is void." Judge Shiras, speaking for the court of appeals, says: "When, therefore, the policy sued on in the present case was issued and delivered to [the assured] in Missouri, the clause found therein touching the liability for death by suicide was nugatory, under the provisions of the statutes of Missouri then in force, provided the policy or contract of insurance is of such a nature as to be subject to the section of the statute in question." *Fletcher v. New York, etc., Ins. Co.*, 13 Fed. Rep. 526 (decided in *New York, etc., Co. v. Fletcher*, 117 U. S. 519, on a different question); *Mutual Benefit Life Ins. Co. v. Robison* (1893), 54 Fed. Rep. 580, where the application signed by the defendant stated that the "contract shall at all times and places be held and construed to have been made in the city of Newark, New Jersey," it was held that as the policy did not take effect until the first premium had been paid, the contract was to be governed by the law of Iowa, "anything in the application or policy to the contrary notwithstanding." See also, §§ 593, 594, *supra*.

² *Hale v. New Jersey Steam Navigation Co.*, 15 Conn. 539; *First Nat. Bank v. Shaw*, 61 N. Y. 283. "The true inquiry is, what was the intent of the parties?"

goods consigned to Leavenworth, in Kansas, and carried them to Chicago, in Illinois, and there delivered them to another railroad company, in whose custody they were destroyed by fire, the supreme court of Illinois held that the case must be governed by the law of Indiana, by which the first company was not liable for the loss of goods after they passed into the custody of the next carrier in the line of transit.¹ In an action brought in New York to recover for the loss of a trunk and its contents, where the baggage was delivered to the carrier in Pennsylvania to be transported to New York, the question was whether the statute of Pennsylvania, defining the liability of railroad corporations upon contracts entered into by them for the transmission of baggage, formed a part of the contract, and it was held that the rights of the parties were to be determined by the laws of New York where the delivery was to be made.²

¹ *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Western, etc., R. Co. v. Exposition Cotton Mills*, 81 Ga. 522. Machinery was shipped from Boston to Atlanta. The contract in the bill of lading limiting the liability of the carrier was a good contract under the laws of Massachusetts, but not a good contract in Georgia. It was held that it could be enforced in Georgia. *Talbott v. Merchants' Transportation Co.*, 41 Iowa, 247. Goods were shipped from Connecticut to Iowa and lost in Illinois, for which the carrier was sued in Iowa, where the statute prohibited a common carrier from restricting his liability by contract. It was held that as the exceptions limiting liability were valid in the state where the contract was made, and valid in Illinois, where the loss occurred, the contract was valid, and there could be no recovery for the loss. *McDaniel v. Chicago, etc., R.*, 24 Iowa, 412. Shipment of cattle from a place in Iowa to Chicago. The contract was held to be governed by the law of Iowa as to its validity and interpretation, and the restriction as to liability was valid. *Hazel v.*

Chicago, etc., R. Co. (1891), 82 Iowa, 477, validity of a contract made in another state, but void under the laws of Iowa.

² *Curtis v. Delaware R. Co.* (1878), 74 N. Y. 116, per Miller, J.: "The place of final performance of the contract being in the city of New York, although the transportation was mostly through other states, no reason exists why a failure to deliver the baggage should not be controlled by the laws which prevail at the place of delivery. * * No reason exists why a contract to deliver baggage should not be governed by the laws of the place where the baggage is to be delivered." Where a passenger who had purchased a ticket from a station in New York to New York city, riding on the Erie Railway, a railroad corporation created by the laws of New York, was injured in consequence of an accident on a portion of the railway which runs through Pennsylvania, it was held that the contract of carriage was made with reference to the laws of New York, and that the statute of Pennsylvania, limiting the

§ 611. Connecting lines of carriers—The English rule.—A common carrier has power to make a contract to carry to a place beyond the terminus of his own route and thereby render himself liable as such for the whole distance.¹ When a carrier contracts to carry goods to a point beyond the terminus of his own line, and there deliver them, he is liable not only for his own negligence, but also for the connecting carriers throughout the route. The connecting carriers are, in such

amount of recovery in similar cases, had no effect upon the damages recoverable. "The performance was to commence in New York, and to be fully completed in the same state, but liable to breach, partial or entire, in the states of Pennsylvania and New Jersey, through which the road of the defendant passed, but whether the contract was broken, and if broken, the consequences of the breach should be determined by the laws of this state. It can not be assumed that the parties intended to subject the contract to the laws of the other states, or that their rights and liabilities should be qualified or varied by any diversities that might exist between the laws of those states and the *lex loci contractus*." Per Allen, J., in *Dike v. Erie Ry. Co.* (1871), 45 N. Y. 113.

¹*Swift v. Pacific Mail Steamship Co.* (1887), 106 N. Y. 206; *Weed v. Saratoga, etc., R. Co.*, 19 Wend. 534; *Railroad Co. v. Pratt*, 22 Wall. 123; *Farmers', etc., Bank v. Champlain Trans. Co.*, 23 Vt. 186; *Pennsylvania R. Co. v. Berry*, 68 Pa. St. 272; *Lawson's Contracts of Carriers*, § 235; *Redfield on Carriers*, §§ 190-197, The supreme court of Connecticut has held the contrary doctrine; *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468; *Elmore v. Naugatuck R. Co.*, 23 Conn. 457. Waite, C. J., in delivering a dissenting opinion, said: "The main question involved is, whether a railroad corporation has power to make a valid contract for the transportation

of goods, to any place beyond the termination of their road. * * * If the present railroad corporations do not possess the power to make such a contract, as incidental to their general powers, in my opinion, the business wants of the community, and especially of mercantile men, must soon demand legislative interference and a grant of the requisite authority. Indeed I do not see how the great business operations of the country can safely be carried on without it." In *Root v. Great Western R. Co.*, 45 N. Y. 524, in speaking of the contract to transport over other lines, the court say: "Such an undertaking may be established by express contract, or by showing that the company held itself out as a carrier for the entire distance, or received freight for the entire distance, or other circumstances indicating an understanding that it was to carry through." The way bill showing the destination of the goods furnishes evidence, whether looked upon as a contract, or as a declaration, or an admission simply. *Railroad Co. v. Pratt*, 22 Wall. 123. "As a general rule the bill of lading given by a carrier to and accepted by the shipper of goods contains the contract for carriage, and in the absence of fraud, imposition or mistake, the parties are concluded by its terms as there expressed." Per Bradley, J. *Jennings v. Grand Trunk Railway of Canada* (1891), 127 N. Y. 438.

cases, regarded as his agents, for whose acts he is held responsible.¹ In England it has been uniformly held that the receipt of goods marked for a place beyond the line of the carrier who receives them, implies a contract on his part to carry them to their final destination, although no connection in business is shown with other carriers beyond, and although the price for the through transportation is not paid in advance.²

§ 612. **The American rule.**—Some of the states in this country have adopted the English rule,³ but the general doc-

¹Nashua Lock Co. v. Worcester, etc., R. Co., 48 N. H. 339; Newell v. Smith, 49 Vt. 255; Galveston, etc., Ry. Co. v. Allison, 59 Texas, 193; Bryan v. Memphis, etc., R. Co., 11 Bush, 597; Missouri Pacific Ry. Co. v. Twiss (1892), 35 Neb. 267; Beard v. St. Louis, etc., Ry. Co. (1890), 79 Iowa, 527; Atchison, etc., v. Roach, 35 Kan. 740; Baltimore, etc., R. Co. v. Campbell, 36 Ohio St. 647 (suit to recover the value of baggage lost); Thompson on Carriers of Passengers, 431; Hutchinson on Carriers, § 145.

²Muschamp v. Lancaster, etc., Ry. Co. (1841), 8 M. & W. 421 (leading case). Where a parcel was delivered at Lancaster to the Lancaster and Preston Junction Railway Company, directed to a person in Derbyshire, the person who brought it to the station offered to pay the freight charges, but the clerk said they had better be paid at the other end on receipt of the parcel. The Lancaster and Preston Junction Railway Company was known to be the proprietor of the line only as far as Preston. The parcel was lost after it was forwarded from Preston. *Held*, that the Lancaster and Preston Company was liable. In the court below the learned judge stated to the jury in summing up "that where a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the

distance, that is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed; and that the same rule applied, although that place were beyond the limits within which he in general professed to carry on his trade of a carrier." On a rule *nisi* for a new trial on the ground of misdirection it was held in the court of exchequer that there was no misdirection. Lord Abinger, C. B., said: "The carriage money being in this case one undivided sum rather supports the inference that, although these carriers carry only a certain distance with their own vehicles, they make subordinate contracts with the other carriers, and are partners *inter se* as to the carriage money; a fact of which the owner of the goods could know nothing, as he only pays the one entire sum at the end of the journey, which they afterwards divide as they please." *Collins v. Bristol and Exeter R. Co.*, 11 Exch. 790; *Bristol, etc., R. Co. v. Collins*, 7 H. L. Cas. 194; *Mytton v. Midland Ry. Co.*, 4 H. & N. 615. The same rule applied to a through contract for the carriage of a passenger and his baggage. *Watson v. Ambergate, etc., Ry. Co.*, 3 Eng. L. & Eq. 497; *Scothorn v. South Staffordshire Ry. Co.*, 8 Exch. 341; *Coxon v. Great Western Ry. Co.*, 5 H. & N. 274; *Crouch v. London & N. W. Ry. Co.*, 25 Eng. L. & Eq. 287.

³The supreme court of Illinois

trine as to transportation by connecting lines approved by the United States Supreme Court and by a majority of the state courts, amounts to this: that each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely deliver to the next succeeding carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach.¹ The owner of goods lost or

would seem to hold that a railroad company which receives goods to carry, marked for a particular destination, although beyond its own line, is *prima facie* bound to carry them to that place and deliver them there, and that an agreement to that effect is implied by the reception of the goods thus marked. *Illinois Central R. Co. v. Frankenberg*, 54 Ill. 88; *Illinois Central R. Co. v. Johnson*, 34 Ill. 389; *Erie Ry. Co. v. Wilcox*, 84 Ill. 239. The courts of Alabama, Florida, Georgia, New Hampshire, South Carolina and Tennessee also hold that in the absence of a special contract, limiting his liability to his own line, the initial carrier remains liable for the safe carriage to and delivery of the goods at their final destination. *Mobile, etc., R. Co. v. Copeland*, 63 Ala. 219; 35 Am. Rep. 13; *Bennett v. Filyaw*, 1 Fla. 403; *Hawley v. Screven*, 62 Ga. 347; 35 Am. Rep. 126 (trunk lost); *Nashua Lock Co. v. Worcester, etc., R. Co.*, 48 N. H. 339; 2 Am. Rep. 242; *Bradford v. South Carolina Railroad*, 7 Rich. L. 201; 62 Am. Dec. 411; *Louisville, etc., R. Co. v. Weaver*, 9 Lea, 38; 42 Am. Rep. 654 (loss of baggage). "The mere acceptance of goods by a common carrier, marked to a destination beyond the terminus of its line, as a matter of *law* imports no absolute undertaking upon the part of the carrier beyond the end of its road, but is a matter of evidence to be submitted to the jury,

from which, in connection with other evidence produced, they are to determine, as a question of *fact*, the real engagement entered into." Per Day, J., in *Mulligan v. Illinois Central Ry. Co.*, 36 Iowa, 181.

¹ *Myrick v. Michigan Central R. Co.* (1882), 107 U. S. 102. "A railroad company is a carrier of goods for the public, and, as such, is bound to carry safely whatever goods are entrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line, the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it." Per Field, J. *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318; *Railroad Co. v. Pratt*, 22 Wall. 123 (the contract there was to carry through the whole route); *Elmore v. Naugatuck R. Co.*, 23 Conn. 457; 63 Am. Dec. 143; *Pittsburgh, etc., Ry.*

damaged while in the custody of the carrier may, in this country, seek his remedy against the intermediate carrier in fault, as well as against the carrier with whom the contract for through carriage was in the first place made.¹

§ 613. "Contract tickets."—Where a passenger on a steamer from Liverpool to Boston purchased a ticket entitled "Passenger Contract Ticket," on which was a stipulation that the owners of the ship did not hold themselves responsible for loss or damage to baggage, it was held in Massachusetts that the contract was a British contract, and, being valid where made, would be enforced in Massachusetts, although, if made in the latter place, it would be void as against public policy. A passenger ticket of this kind, containing stipulations de-

Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682; *Berg v. Atchison, etc., R. Co.*, 30 Kan. 561, *Burroughs v. Norwich, etc., R. Co.*, 100 Mass. 26; 1 Am. Rep. 78; *Grover, etc., Co. v. Missouri Pacific Ry. Co.*, 70 Mo. 672; 35 Am. Rep. 444; *Van Santvoord v. St. John*, 6 Hill, 157; *Root v. Great Western R. Co.* (1871), 45 N. Y. 524; *Illinois Central R. Co. v. Kerr*, 68 Miss. 14; *Harris v. Grand Trunk Ry. Co.*, 15 R. I. 371; *Hunter v. Southern, etc., Ry. Co.*, 76 Texas, 155 (express exemption); *Knott v. Raleigh, etc., R. Co.*, 98 N. C. 73; *Hill v. Burlington, etc., R. Co.*, 60 Iowa, 196; *Clyde v. Hubbard*, 88 Pa. St. 358; *Nutting v. Connecticut, etc., R. Co.*, 1 Gray, 502; *McConnell v. Norfolk, etc., R. Co.*, 86 Va. 248 (express exemption). See cases cited in extended note to *Wells v. Thomas*, 72 Am. Dec. 232; and *Miller v. South Carolina R. Co.*, 9 Lawyers' Rep. Ann. 833; *Hutchinson on Carriers*, §§149, 149a; *Lamson's Contract of Carriers*, §§ 238, 240. "If it be true that an 'initial carrier,' by which expression we understand the carrier first receiving the goods, is bound for the default of connecting carriers, it is because of a contract binding him to that effect. Such a contract may be expressed or implied from the facts connected with the

transaction. If the 'initial carrier' enters into no contract to that effect he is not so bound. If he does so bind himself he is liable for the default of the connecting carriers." Per Beck, J., in *Beard v. St. Louis, etc., Ry. Co.* (1890), 79 Iowa, 527. In Missouri the act of issuing a receipt or bill of lading for property to be carried beyond its line is evidence of such a contract. *Dimmitt v. Kansas City, etc., R. Co.*, 103 Mo. 433 (statutory regulation). "There is really no great difference between the English and American doctrine on this subject. The one holds that to exempt a carrier from liability beyond its terminus there must be a special contract to that end. The other that to make the first carrier responsible there must be a special contract to that end. Both admit that the carrier is not bound to go beyond the terminus, but that he may do so; and if he undertakes to do so he is bound by his undertaking." Per Simpson, C. J., in *Piedmont Mfg. Co. v. Columbia, etc., Railroad*, 19 S. C. 353.

¹ *Anchor Line v. Dater*, 68 Ill. 369; *Barter v. Wheeler*, 49 N. H. 9; *Southern Express Co. v. Hess*, 53 Ala. 19; *Packard v. Taylor*, 35 Ark. 402; *Halliday v. St. Louis, etc., Ry. Co.*, 74 Mo. 159.

termining the rights of the parties in reference to the carriage of the passenger, stands on the same footing as a bill of lading or a shipping receipt, and the party who accepts the contract and avails himself of its provisions was held bound by the conditions expressed in it, whether he read them or not.¹

§ 614. Maritime contracts.—A ship in the open sea is regarded by the law of nations as a part of the territory whose flag such ship carries. Courts have held in many cases that the validity of maritime contracts was to be determined by the law of the flag, that is, of the nation to which the ship belongs.² This state of facts is presented:³ A French ship, owned by Frenchmen, was chartered by the master, in pursuance of his general authority as such, in a Danish West India island, to a British subject, who knew her to be French, for a voyage from St. Marc, in Hayti, to Havre, London or Liverpool, at the charterer's option, and he shipped a cargo from St. Marc to Liverpool. On the voyage the ship sustained damage from a storm, which compelled

¹ *Fonseca v. Cunard Steamship Co.* (1891), 153 Mass. 553: The "contract ticket" which was purchased by the plaintiff, a steerage passenger, contained elaborate provisions in regard to the rights of the passenger on the voyage, and even went into such detail as to give the bill of fare for each meal in the day for every day in the week. It covered with print and writing the greater part of two large quarto pages, and bore the signature of the company, with a blank space for the signature of the passenger. It was entirely unlike the pasteboard tickets which are commonly sold to passengers on railroads. It was held that the plaintiff, by his acceptance and use of the ticket, assented to its terms, whether he read them or not, and that the fact that it was not signed by the plaintiff was immaterial. *Potter v. The Majestic* (1894 C. C. A.), 60 Fed. Rep. 624, where the contract was for the transportation of passengers and their baggage from Liverpool to

New York. The steamship company claimed that it was not liable to injury to any passenger's baggage arising from perils of the sea, or from negligence in navigation of the steamer or any other vessel. The conditions indorsed on the back of the ticket, attempting to relieve the carrier from liability for perils of the sea, held not binding, since it was an attempt to limit the carrier's common law liability by a mere notice not incorporated into the contract of carriage. At the bottom of the face of the ticket were the words "See Back," referring the purchaser to "Notice to Passengers" modifying the carrier's liability. Not evidence of a special contract.

² Wharton on Conflict of Laws, § 356; Wheeler on Modern Law of Carriers, 188; *Crapo v. Kelly*, 16 Wall. 610.

³ *Lloyd v. Guibert*, L. R. 1 Q. B. 115; 6 B. & S. 100.

her to put into a Portuguese port. There the master lawfully borrowed money on bottomry and repaired the ship, and she carried her cargo safe to Liverpool. The bondholder proceeded in an English court of admiralty against the ship, freight and cargo, which, being insufficient to satisfy the bond, he brought an action at law to recover the deficiency against the owners of the ship, and they abandoned the ship and freight in such a manner as by the French law absolved them from liability. It was held that the French law governed the case, and therefore the plaintiff could not recover.¹

§ 615. Contracts of affreightment.—A contract of affreightment, made in an American port by an American shipper with an English steamship company doing business there, for the shipment of goods there and their carriage to and delivery in England, where the freight is payable in English currency, was held by the United States Supreme Court an American contract, and governed by American law, so far as regards the effect of a stipulation exempting the company from responsibility for the negligence of its servants in the course of the voyage.² Where

¹ The question of the intent of the parties was complicated with that of the lawful authority of the master; and the decision in the Queen's Bench was upon the ground that the extent of his authority to bind the ship, the freight or the owners was limited by the law of the home port of the ship, of which her flag was sufficient notice. That decision was in accordance with an earlier one of Mr. Justice Story, in *Pope v. Nickerson*, 3 Story, 365; as well as with later ones in the privy council, on appeal from the high court of admiralty, in which the validity of a bottomry bond has been determined by the law prevailing at the home port of the ship, and not by the law of the port where the bond was given. The *Karnak*, L. R. 2 P. C. 505, 512; *The Gaetano & Maria*, L. R. 7 P. D. 137. See also, *The Barque Woodland*, 7 Benedict, 110, 118; *The Woodland*, 14 Blatchford, 499, 503, and 104 U. S. 180.

² 1 *Liverpool Steam Co. v. Phenix Ins. Co.* (1889), 129 U. S. 397, affirming *Phenix Ins. Co. v. Liverpool, etc., Co.*, 22 Fed. Rep. 715, affirming *Ins. Co. of N. A. v. Liverpool, etc., Co.*, 17 Fed. Rep. 377. Gray, J., in delivering the opinion of the court referring to *Peninsular and Oriental Co. v. Shand*, 3 Moore P. C. (N. S.) 272, said: "In that case effect was given to the law of England, when the contract was made and both parties were English, and must be held to have known the laws of their own country. In this case the contract was made in this country, between parties, one residing and the other doing business here, and the law of England is a foreign law, which the American shipper is not presumed to know." He summed up his conclusion thus: "Each of the bills of lading is an American and not an English contract, and so far as concerns the obligation to carry the goods in

a contract was made in Massachusetts between an American citizen and a British company of ship-owners, by which the company undertook to carry certain cattle from Boston to England in a British ship, and the contract contained express stipulations exempting the ship-owners from liability for loss or damage arising from negligence of the master or crew, which clause of the contract was valid by the English law but void by the law of Massachusetts as against public policy, and the cattle were lost by the negligence of the master and crew, it was held in a suit for damages in the English courts¹ that the

safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country. By our law as declared by this court, the stipulation by which the appellant undertook to exempt itself from liability for the negligence of its servant is contrary to public policy and therefore void, and the loss of the ship was a breach of the contract, for which the shipper might maintain a suit against the carrier." In *Chartered Bank of India v. Netherlands Steam Navigation Co.*, 9 Q. B. Div. 118; 10 Q. B. Div. 521, the goods were shipped at Singapore, an English port, to be carried to a port in Java, in a vessel carrying the Dutch flag, and the contract was held to be governed by the law of England. A rule of law founded on public policy can not be set aside in our own courts by any stipulation to adopt the law of another country. The stipulation in a bill of lading that the liability of the carrier shall be governed by the law of England, is a device to secure an unlawful exemption. The *Energia* (1893), 56 Fed. Rep. 124. When the British owner of a British ship is proceeded against in an American court by both British and American cargo owners in respect to a loss of cargo occurring in British waters, the extent of his liability is determined by the law of the United States and not of

Great Britain. *In re State Steamship Co.* (1894), 60 Fed. Rep. 1018.

¹ *In re Missouri Steamship Company* (1888), L. R. 42 Ch. Div. 321, affirming the decision of Chitty, J.: Lord Halsbury, L. C., said: "It is absolutely impossible to resist the conclusion that the parties did contemplate being governed by English law in their contracting relations. If I am to assume that the law of the United States is that this particular stipulation now in dispute is of no validity in the United States and can not be enforced, when I find that both the parties to the contract made this stipulation a part of the contract into which they entered which is of validity in England and can be enforced, and can not be enforced in the United States, it seems to me to follow irresistibly that the contract relations into which the parties entered were such that they intended to be governed and regulated by English law." Fry, L. J., said: "The ship was an English ship; the owners were an English company. England was the place to which the goods were to be brought and the place at which the final completion of the contract was to take place, and what is still more important, the forms of the contract and the bills of lading were English forms. According to the law of England, the contract would be good in

English law prevailed, and that the stipulations were valid, on the ground that the contracts were governed by the law of the flag, and on the particular ground that from the special provisions of the contracts themselves it appeared that the parties were contracting with a view to the law of England.

the terms in which it stood, whereas, according to the law of the United States important terms of the contract would be excluded from it. That is, to my mind, a very cogent consideration to show that what must be presumed to have been the intent of the parties was this, that the law which would make the contract valid in all particulars was the law to regulate the conduct of the parties."

CHAPTER XVI.

TIME.

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| <p>§ 616. Time at law generally of the essence of a contract.</p> <p>617. Relative to the sale of goods.</p> <p>618. Conditions precedent.</p> <p>619. When time is not of the essence of a contract.</p> <p>620. Time not generally regarded in equity as of the essence of a contract.</p> <p>621. Illustrations.</p> <p>622. When the property is subject to fluctuations in value.</p> <p>623. Stipulations in regard to real estate.</p> <p>624. Question of damages for delay, penalties or liquidated damages.</p> <p>625. The same subject continued.</p> <p>626. Illustrations.</p> <p>627. Stipulation in building contracts.</p> <p>628. The same subject continued—
Illustrations of penalties.</p> | <p>§ 629. The intention of the parties and nature of the agreement —
Controlling guides.</p> <p>630. Fractions of a day in the computation of time.</p> <p>631. Computation of time from a particular day or a particular event.</p> <p>632. The same subject continued.</p> <p>633. Time of payment of promissory notes.</p> <p>634. Day of performance falling on Sunday.</p> <p>635. Paper maturing on Sundays and holidays where grace is allowable.</p> <p>636. The term "month."</p> <p>637. Constructions of the words "until," "by," "forthwith" and "immediate."</p> <p>638. The words "from and after."</p> |
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§ 616. Time at law generally of the essence of a contract.—

At law, as a general rule, time is deemed of the essence of a contract, and performance is required at the day, or the consequence of default may follow.¹ If the vendor, in a contract for the sale of land, is not ready and able to perform his part of the agreement on the day fixed by the contract, the purchaser may consider the contract at an end, and stand discharged from its obligation.² Where a party contracts to per-

¹ *Cromwell v. Wilkinson*, 18 Ind. 365; *Inman v. Western Fire Ins. Co.*, 12 Wend. 452; *Bank of Columbia v. Hagner*, 1 Pet. 455 (agreement to purchase land); *Ogden v. Kirby*, 79 Ill. 555 (a subscription to aid in the construction of a railroad to be completed to a certain place by a certain time).

² *Stowell v. Robinson*, 3 Bing. N. C. 928; *Inman v. Western Fire Ins. Co.*,

form certain work or labor in a specified manner, and by a specified time, the time is as much the essence of the contract as the manner in which the work or labor is to be performed.¹ In the contracts of merchants, the time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of some material incident, such as the time and place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.² Where a policy of life insurance stipulates for the payment of an annual premium by the insured, with a condition to be void on non-payment, time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, and courts can not with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence.³

12 Wend. 452; Sugden on Law of Vendors, 257.

¹ Warren v. Bean, 6 Wis. 120; Allen v. Inhabitants of Cooper, 22 Maine, 133, where the court declares that "if there was an agreement in the first instance, as to the time within which the contract was to be performed, and no waiver of it then, at law, time was of the essence of the contract." The contract in that case was for laying out and building a public road, and the work was to be done within that and the next year. Morrison v. Wells (1892), 48 Kan. 494, where the parties to a written contract conditioned the payment of money upon the completion of certain work upon a building by a time fixed therein. Pickering v. Greenwood, 114 Mass. 479. "The time being stated in the contract when the work should be finished, it was of the essence of the

contract, and the work must be performed within that period."

² Norrington v. Wright, 115 U. S. 188; Filley v. Pope, 115 U. S. 213; Pope v. Porter, 102 N. Y. 366. When the contract fixes the time within which it is to be performed, and it appears from its nature, or the circumstances connected with its performance, that the parties intended to make the time an essential element of the agreement, time will be deemed of the essence of the contract, and strict compliance therewith will be compelled. Carter v. Phillips (1887), 144 Mass. 100.

³ New York Life Ins. Co. v. Statham (1876), 93 U. S. 24. "Both at common law and in chancery, there are exceptions to this rule, growing out of the nature of the thing to be done and the conduct of the parties. The familiar case of part performance, pos-

§ 617. **Relative to the sale of goods.**—Time is usually of the essence of an executory contract for the sale and subsequent delivery of goods, where no right of property in the same passes by the bargain from the vendor to the purchaser, and the rule in such a case is, that the purchaser is not bound to accept and pay for the goods unless the same are delivered or tendered on the day specified in the contract.¹ A party in New York wrote to parties in Boston, offering to sell them coal, and stating that he had a vessel of 375 tons which he could load on Monday. The Boston parties telegraphed in reply: "Ship that cargo, 375 tons, immediately." The party in New York did not begin to load till nine days afterward, and then shipped a cargo of 392 tons. The Boston parties were not bound to take it. Both the quantity and time of delivery were essential elements of the contract.² In the absence of a stipulated time for delivery, the law prescribes a reasonable time, and what is a reasonable time is a question of fact for the jury to be determined by the circumstances of each case.³ If from

session, etc., in chancery, where time is not of the essence' of the contract, or has been waived by the acquiescence of the party, is an example of the latter; and the case of contracts for building houses, railroads, or other large and expensive constructions, in which the means of the builder and his labor become combined and affixed to the soil, or mixed with materials and money of the owner, often afford examples at law." Phillips, etc., *Co. v. Seymour*, 91 U. S. 646, per Miller, J.

¹ *Jones v. United States*, 96 U. S. 24. This was upon a contract for the supply of cloth. By the terms of the contract the cloth was to be delivered in installments of a certain number of yards per month. Several installments of the cloth were delivered on time and paid for. The mill then burned down. Jones got other parties to make the cloth for him, but his delivery was delayed beyond the time specified in the contract. In the meantime cloth of like kind and quality

had declined in price, and the quartermaster refused to accept and pay for the balance of the cloth. The court held that time was of the essence of the contract, and the quartermaster was not bound to accept and pay for the cloth. *Gath v. Lees*, 3 H. & C. 558; *Coddington v. Paleologo*, L. R. 2 Exch. 193. The plaintiffs contracted to supply the defendants with goods, "delivering on April 17, complete 8th May." The plaintiffs made no delivery on the 17th, and the defendants on the following day rescinded the contract, and refused subsequent tender of the goods. Held that, if on the true construction of the contract, the plaintiffs were bound to commence delivery on the 17th of April, the defendants were entitled to rescind for the failure to deliver on that day, but *quære*, whether the contract bound the seller to commence delivery on the 17th of April.

² *Rommel v. Wingate*, 103 Mass. 327.

³ *Smith on Personal Property*, 187; *Tiedeman on Sales*, § 100; *Kellam v.*

the facts found, or undisputed, in a particular case, the court can draw the conclusion as to whether the time is reasonable or not, by the application of any general principle or definite rule of law, the question is one of law for the court.¹

§ 618. Conditions precedent.—Where time is of the essence of the contract there can be no recovery at law in case of failure to perform within the time stipulated.² It is an elementary principle that a party bound to perform a condition precedent can not sue on the contract without proof that he has performed that condition. An offer to perform conditions precedent is not sufficient.³ In a contract to aid the construction of a railroad by a subscription, a condition that the road should be put under contract by a certain time was a condition precedent to the right of the company to recover on the contract.⁴

McKinstry, 69 N. Y. 264; Pinney v. First Div., etc., R. Co., 19 Minn. 251.

¹ Cochran v. Toher, 14 Minn. 385; Pinney v. First Div., etc., R. Co., 19 Minn. 251; Starkie on Evidence, 769, 770. In Mellish v. Rawdon, 9 Bing. 416, relative to a bill of exchange, Tindal, C. J., said: "Whether there has been in any particular case reasonable diligence used, or whether unnecessary delay has occurred, is a mixed question of law and fact, to be decided by the jury acting under the direction of the judge, upon the particular circumstances of each case."

² Slater v. Emerson, 19 How. 224. The language of the contract was, "in consideration, etc., the said Emerson will complete all the bridge work to be done by him for the Boston and Central Railroad Company, ready for laying down the iron rails for one track, by the 1st day of December next." That time was an essential part of this contract, was clear from the circumstances under which it was made, and the intent of the parties, as expressed. Justice McLean said: "It is said by some writers that it is impossible to make time of the essence

of the contract where damages may compensate for the delay. But this is not correct as a general proposition." Hill v. School District, 17 Maine, 316. "In an action at law, when the question is whether a party has performed a contract requiring that performance shall be made within a certain time, the courts can not say that is immaterial which the parties, by their contract, have made material."

³ Gouverneur v. Tillotson, 3 Edw. (N. Y.) Ch. 348; Jones v. United States, 96 U. S. 24; Dermott v. Jones, 23 How. 220, an action upon a special contract to build a house by a certain day, which was not fulfilled. By the terms of the contract, the performance of the work was a condition precedent to the payment of the money sued for. The case was remanded to the circuit court to be tried upon the common counts for work and labor done and materials furnished. Cincinnati, etc., R. Co. v. Bensley (1892), 51 Fed. Rep. 738.

⁴ Burlington, etc., R. Co. v. Boestler, 15 Iowa, 555. "For the principle is laid up among the fundamentals of

In determining whether stipulations as to the time of performing a contract of sale are conditions precedent, the court seeks to discover the intention of the parties, and if time appears, from the language used and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent.¹ Silence on the part of a party to a contract may amount to a waiver of the performance of a condition precedent in cases in which such silence is inconsistent with any other explanation.² Where one party to a contract demands a strict performance as to time, he must perform, on his part, all the conditions requisite to enable the other party to perform his part, and a failure to do so operates as a waiver of the time provision.³

§ 619. When time is not of the essence of a contract.—In contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to

the law that, when a time for the performance of an act, or of a condition precedent, is fixed by the contract, the act or condition must, at least in a court of law, be performed within or at the time." Per Dillon, J. *Memphis, etc., Ry. Co. v. Thompson*, 24 Kan. 170, an action upon certain bonds issued by the city of Parsons in aid of the construction of a railroad, subject to a condition that the plaintiff should "have its road constructed and in operation * * on or before the 1st day of July, 1878." It was held that time was of the essence of the contract, and that the failure of the plaintiff to complete the road by the day named was fatal to a recovery, notwithstanding that the road was completed shortly after, and the city received the benefit of it. On a contract where time does not constitute its essence, there can be no recovery at law on the agreement, where the performance was not within the time

limited, but a subsequent performance and acceptance will authorize a recovery on a *quantum meruit*. *Slater v. Emerson*, 19 How. 224.

¹ *Higgins v. Delaware R. Co.*, 60 N. Y. 553; *Benjamin on Sales*, § 593.

² *Burlington, etc., R. Co. v. Boestler*, 15 Iowa, 555. No parol assent or silent acquiescence can destroy the effect of an express condition contained in a deed. *Jackson v. Crysler*, 1 John. Cas. 125. In case of default in a building contract, absolute performance may be waived by allowing the party in default to go on so as to render the other party liable for the contract price of the work when completed. *Phillips, etc., Co. v. Seymour*, 91 U. S. 646. When silence imports assent to a contract, see § 644.

³ *Dannat v. Fuller* (1890), 120 N. Y. 554; *Standard Gas Light Co. v. Wood* (1894), 61 Fed. Rep. 74; *Gallagher v. Nichols*, 60 N. Y. 438; *Grube v. Schultheiss*, 57 N. Y. 669.

perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation.¹ A contract by a lithographing company to make and furnish, "in the course of the year," designs of certain buildings of a manufacturing company, with sketches of its trade-marks, to execute engravings, and to embody same on large amounts of stationery, etc., is one for work and labor requiring artistic skill; and the stipulation as to time was held not of the essence of the contract so as to justify a repudiation thereof, because of a delay in delivery of six or eight days after the expiration of the year.² It has been held that an express stipulation in a contract for the construction of a house that it should be completed on a day certain, and that, in case of failure to complete it within the time limited, the builder would forfeit \$1,000, would not justify the owner of the land on which the house was constructed in refusing to accept it for a breach of this stipulation, when the house was completed shortly after the time fixed, nor even in retaining the penalty stipulated in the contract, but that he must perform his part of the contract, and that he could retain from or recover of the builder the damages he sustained by the delay and those only.³ The court may ordinarily compensate for delay in the payment of money by the allowance of interest; hence from mere designation of time for the payment of money there can be no necessary implication that time was intended to be of the essence of the contract.⁴ Time can not be made essential in a contract merely by so declaring, if it would be unconscionable to allow it. Parties may stipulate to make it so, where the stipulation is reasonable; but, if the stipulation is not reasonable, courts will not regard it.⁵

¹ *Taylor v. Sandiford*, 7 Wheat. 13; *Hambley v. Delaware, etc.*, R. Co., 21 Fed. Rep. 541.

² *Beck, etc., Co. v. Colorado, etc.*, Co. (1892), 52 Fed. Rep. 700.

³ *Taylor v. Sandiford*, 7 Wheat. 13.

⁴ *Dynan v. McCulloch* (1889), 46 N. J. Eq. 11.

⁵ *Richmond v. Robinson*, 12 Mich. 193, where, by the terms of the contract, it was "expressly understood and declared that time is and shall be deemed and taken as the very essence of this contract."

§ 620. Time not generally regarded in equity as of the essence of the contract.—The time fixed for performance is not generally considered of the essence of the contract in equity, unless the parties have expressly so treated it, or it necessarily follows from the nature or circumstances of the contract.¹ If it clearly appears to be the intention of the parties to an agreement that time shall be deemed of the essence of the contract it must be so considered in equity.² And when parties have deliberately by their agreements or covenants fixed the time for the performance of an act, a court of equity will not interfere unless essential justice demands the exercise of its jurisdiction.³

¹ Brett's Leading Cases on Modern Equity, 245; *Shinn v. Roberts*, 1 Spencer (N.Y.), 435; 43 Am. Dec. 636; *Dynan v. McCulloch*, 46 N. J. Eq. 11.

² *Cheney v. Libby*, 134 U. S. 68; *Oakden v. Pike*, 34 L. J. Ch. (N. S.) 620; *Seton v. Slade*, 7 Ves. 265; *Parkin v. Thorold*, 16 Beav. 59; *Quinn v. Roath*, 37 Conn. 16; *Baldwin v. Van Vorst*, 10 N. J. Eq. 577; *Missouri, etc., R. Co. v. Brickley*, 21 Kan. 275; *Stow v. Russell*, 36 Ill. 18; *Reynolds v. Burlington, etc., R. Co.*, 11 Neb. 186; *Benedict v. Lynch*, 1 John. Ch. 370, specific performance denied; opinion by Chancellor Kent which has been often cited; note to case in 7 Am. Dec. 484; *Brown v. Guarantee Trust Co.*, 128 U. S. 403. "But it must affirmatively appear that the parties regarded time or place as an essential element in their agreement, or a court of equity will not so regard it." *Secombe v. Steele*, 20 How. 94.

³ *Potter v. Tuttle*, 22 Conn. 512; *Bullock v. Adams*, 20 N. J. Eq. 367. "This equitable doctrine often causes great injustice and positive wrong, and ought not to be extended further than established. But parties aware of this doctrine can always provide that time shall be of the essence of the contract, by stipulating that if not performed within the time it shall not bind the party," per Chancellor

Zabriskie. "A court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract," per Lord Cairns, L. J., in *Tilley v. Thomas*, L. R. 3 Ch. App. 61. In *Hipwell v. Knight*, 1 You. & C. (Exch.) 401, *Alderson, B.*, said: "I do not see, therefore, why, if the parties choose even arbitrarily, provided both of them intended so to do, to stipulate for a particular thing to be done at a particular time, such stipulation is not to be carried, literally, into effect in a court of equity. That is the real contract; the parties had a right to make it. Why, then, should a court of equity interfere to make a new contract, which the parties have not made?" In *Grey v. Tubbs*, 43 Cal. 359, the contract contained this covenant: "In the event of failure to comply with the terms hereof by the

§ 621. Illustrations.—Where a contractor agrees “not to delay the work any time after the stone is delivered,” he can not be held responsible for a delay caused by the failure to deliver him the stone.¹ When a building contract provides that, in case of delay in the completion of the structure by a certain fixed date, the builder shall pay a forfeit of a certain sum daily during the period of default, other provisions of the contract must be examined and compared, in order to determine upon whom, from the general tenor and provisions of the contract, the fault is imposed in causing the delay in the completion of the building. When those other provisions disclose that the builders are to furnish the materials and perform the work, and the architects are to furnish the plans and specifica-

parties of the second part (the purchaser), the party of the first part shall be released from all obligations, in law or equity, to convey said property, and said party of the second part shall forfeit all right thereto.” Referring to the stipulation, Rhodes,

J., said: “It would be difficult to express with greater clearness and certainty than the parties did in this contract, that time is of the essence of the contract. * * Courts of equity

have not the power to make contracts for parties, nor to alter those which the parties have deliberately made; and whenever it appears that the parties have in fact contracted that if the purchaser make default in the payments, as agreed upon, he shall not be entitled to a conveyance, and shall lose the benefit of his purchase; and when it also appears that the purchaser is without excuse for his delay, the courts will not relieve him from the consequences of his default.”

“Time is originally of the essence of the contract in view of a court of equity whenever it appears to have been part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract.” Fry on Specific Performance, § 1075. Time

may be essential. It is so, whenever the intentions of the parties is clear that the performance of its terms shall be accomplished exactly at the stipulated day.” Pomeroy’s Equity, § 1408; 2 Beach on Equity Jurisprudence, 662. In England the judicature act (36 and 37 Vict., c. 66, § 25) provides as follows: “Stipulations in contracts as to time or otherwise, which would not before the passing of this act have been deemed to be, or to have become, of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity.”

¹Taylor v. Netherwood (Va. 1895), 20 S. E. Rep. 888. In Drumm Seed Co. v. McFarland Co. (Texas App. 1895), 30 S. W. Rep. 93, where the plaintiff agreed to print catalogues of nursery stock for defendant by January 1st, upon condition that defendant would furnish the manuscript by December 1st, and the manuscript was not furnished until December 21st, plaintiff was released from his original contract as to time; but, having elected to proceed, plaintiff was bound to do the work with reasonable dispatch, in the absence of a new contract fixing a specific date.

tions and superintend the work, it is an easy matter to show by evidence whether the delay in the completion of the work was caused by the fault of the builders or the architects.¹ The general rule of equity is that time is not of the essence of the contract, unless it clearly appears from the terms of the contract, in the light of all the circumstances, that such was the intention of the parties.²

§ 622. Where the property is subject to fluctuations in value.—Time may become of the essence of a contract for the sale of property, not only by the express stipulation of the parties, but from the very nature of the property itself, and especially when it is subject to sudden, frequent or great fluctuations in value, as in the case of mining property.³ Contracts for the purchase of stock are of this description, and the reason assigned is, that the daily fluctuations in the price renders a punctual performance of the essence of the contract.⁴ “If, therefore,” said Alderson, B., “the thing sold be of greater or less value according to the effluxion of time, it is manifest that time is of the essence of the contract; and a stipulation as to time must then be literally complied with in equity as well as in law.”⁵

¹ *Mahoney v. Rector, etc.*, of St. Paul’s Church (1895), 47 La. Ann. —; 17 So. Rep. 484.

² *Steele v. Branch*, 40 Cal. 3. In *Beverly v. Blackwood*, 102 Cal. 83; 36 Pac. Rep. 378, defendant traded 840 acres of land to plaintiff for 95 acres: plaintiff giving a mortgage of \$9,000 on the 840 acres to secure a guaranty that the 95 acres would sell for \$23,000. Defendant agreed to place the property with certain persons to sell; the mortgage for \$9,000 to be held “as collateral security until the” \$23,000 was paid defendant from sales, and to be released “at any time” he received said \$23,000. The agreement also provided that “the time of such sale is to be made on or before the first day of December, 1890.” It was held that time was not of the essence of

the contract, so that a failure to make sale of the 95 acres by December 1, 1890, would relieve defendant from any obligation to thereafter release the mortgage of \$9,000.

³ *Waterman v. Banks* (1892), 144 U. S. 394; *Brown v. Covillaud*, 6 Cal. 566.

⁴ *Edgerton v. Peckham*, 11 Paige, 352; *Macbryde v. Weekes*, 22 Beav. 533; *Doloret v. Rothschild*, 1 Sim. & St. 590.

⁵ *Hipwell v. Knight*, 1 Y. & C. Ex. 401; *Weston v. Savage*, L. R. 10 Ch. Div. 736; *Withy v. Cottle*, T. & Russ. 78; *Pollard v. Clayton*, 1 K. & J. 462. In *Taylor v. Longworth*, 14 Pet. 172, Story, J., says: “In the first place, there is no doubt that time may be of the essence of a contract for the sale of property. It may be so by the ex-

§ 623. Stipulations in regard to real estate.—The doctrine that time is not of the essence of a contract is generally applied in equity to stipulations for the payment of money upon an agreement for the sale and purchase of real estate. The principal grounds of the doctrine are that the rule of common law, requiring performance of every contract at the appointed day, is often harsh and unjust in its operation; and although some time of performance by each party is usually named in any agreement for the sale of land, it is often not regarded by the parties as one of the essential terms of the contract.¹ Time is not to be deemed of the essence of a contract to convey real estate unless made so by its terms, or by implication from the nature of the subject-matter, the object of the contract, or the situation of the parties.² Where a contract for the sale of land contained the provision that “in case of the failure of the vendee to make either of the payments, or perform any of the covenants on his part, the vendors, at their option, might declare a forfeiture, and retain all payments previously made, as liquidated damages,” the court held that these stipulations showed that time was of the essence of the contract.³ In this country

press stipulation of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser.” *Pomeroy on Contracts*, §§384, 385.

¹ *Barnard v. Lee*, 97 Mass. 92. “For the doctrine of courts of equity is, not forfeiture, but compensation.” *Story on Equity Jurisprudence*, § 775.

² *Austin v. Wacks*, 30 Minn. 335. Time is not of the essence of a contract to convey real estate, in the absence of any express provision. *Martindale v. Waas* (1881), 8 Fed. Rep. 854; *Bullock v. Adams*, 20 N. J. Eq. 367; *Green v. Covillaud*, 10 Cal. 317.

³ *Kimball v. Tooke*, 70 Ill. 553. The only payment that was made on the purchase was the sum of \$100, at the date of the execution of the agreement. *Wells v. Smith*, 7 Paige, 22, was a case where the vendee agreed to build a house on the lot purchased,

or pay \$1,000 of the purchase-money as a first payment, on a certain day before the deed was to be given. He neither built the house nor paid the money. He filed his bill for a specific performance. The specific performance was denied, on the ground that it was the intention of the parties to make the building of the house, or the payment of the money at the time specified, an essential part of the contract. “There is no doubt that equity may decree a specific performance of a contract for sale of property, notwithstanding a default in payment upon the day specified. The books are full of instances where such relief has been granted, and in many cases where there is an express stipulation of forfeiture. But this relief has always been afforded upon equitable principles.” Per *Bliss, J.*, in *O’Fallon v. Kennerly*, 45 Mo. 124.

time is regarded as more important in respect to the sale of land than in England, because the value of land is more fluctuating here than there.¹ Although there may not be performance at the day, when time has not been made essential, if the delay is excused, and the situation of the parties or of the property is not changed so that injury will result, and the party is reasonably vigilant, the court will relieve from the consequences of the delay and grant a specific performance. Each case must be judged by its own circumstances.² The parties to a contract may, by its terms, make the time of performance essentially important, and its observance in that respect requisite to relief, and when that is not so, either of the parties to the contract may, by a reasonable notice to the other party for that purpose, render the time of performance as of the essence of the contract and avail himself of forfeiture on default.³

§ 624. Question of damages for delay—Penalties or liquidated damages.—It is competent for the parties, in making a contract, to leave the damages, arising from a breach of its provisions, to be determined in a court of law, or to specify the amount of such damages in the contract itself.⁴ The controversy in the courts as to whether the particular language of a contract in regard to damages is to be construed as a penalty, or liquidated damages, arises mainly from a desire to relieve parties from what, under a different construction, is assumed to be an improvident and absurd agreement.⁵ Where the damages are in their nature wholly indefinite and uncertain, and the parties have mentioned a specific sum as liquidated damages, it will be so regarded, unless it be greatly disproportioned to any probable estimate of the actual damages.⁶

¹ *Goldsmith v. Guild*, 10 Allen, 239, where the plaintiff agreed to pay for land "within ten days" from the date of the contract, it was held that time was of the essence of the contract. *Hepburn v. Auld*, 5 Cranch, 262; *Richmond v. Gray*, 3 Allen, 25; *Rogers v. Saunders*, 16 Maine, 92.

² *Per Allen, J., in Hubbell v. Von Schoening*, 49 N. Y. 326.

³ *Schmidt v. Reed* (1892), 132 N. Y. 108; *Myers v. De Mier*, 52 N. Y. 647.

⁴ *Dwinel v. Brown*, 54 Maine, 468; *Wolf v. Des Moines, etc., R. Co.*, 64 Iowa, 380 (contract to construct railroad).

⁵ *Dwinel v. Brown*, 54 Maine, 468; *Bagley v. Peddie*, 16 N. Y. 469.

⁶ *Cotheal v. Talmage*, 9 N. Y. 551; *Texas, etc., Ry. Co. v. Rust* (1883), 19

§ 625. The same subject continued.—The parties may agree upon any sum as compensation for the breach of a contract which does not manifestly exceed the amount of the injury suffered, but when it is manifestly above that sum and the damages such as can readily be shown, such sum so inserted in the contract will be regarded merely as a penalty to insure prompt payment or performance.¹

Fed. Rep. 239. Contract to build a railroad bridge, providing that the sum of \$1,000 per week should be deducted from the contract price if its completion or provision for crossing trains was delayed beyond a given date, held a stipulation for liquidated damages. "The general principle upon which the law awards damages is compensation for the loss suffered. The amount may be fixed by the parties in advance, but where a lump sum is named by them the court will always look into the question whether this is really liquidated damages or only a penalty, the presumption being that it is the latter. The name by which it is called is of but slight weight, the controlling elements being the intent of the parties, and the special circumstances of the case. The subject has always presented difficulties in the formulation of a general rule, and especially in its application. The books are full of inharmonious decisions." Per Mitchell, J., in *Keck v. Bieber* (1892), 148 Pa. St. 645; *King Iron Bridge, etc., Co. v. St. Louis*, 43 Fed. Rep. 768; 10 Lawyers' Rep. Ann. 826, cases collected in note. "Where the sum is agreed to be paid for a single breach of the contract, and the damages are wholly uncertain in amount, and the sum is not apparently disproportionate to the injury, all the cases agree that the sum should be recovered as the damages liquidated by the parties themselves for the breach. Where the sum is agreed to be paid for any of several breaches of the con-

tract, and the damages resulting from any are certain in amount, or there is a fixed rule for measuring them, all the cases agree that the sum should be held as a penalty and the recovery limited to actual damages." *Lyman v. Babcock*, 40 Wis. 503. "In considering whether a stipulation to pay a sum of money on breach of condition is to be treated as a penalty or as liquidated damages, the test appears to be whether the loss which will accrue to the plaintiff from an infringement of the contract can, or can not, be accurately or reasonably calculated in money, antecedently to the breach. If it can be so calculated, then the fixing of a larger sum of money will be treated as a penalty." *Mayne on Damages*, 5th ed., 148. Rules determining between liquidated damages and penalties, *Pomeroy's Equity Jurisprudence*, §§ 441-445.

¹ *Schofield v. Tompkins*, 95 Ill. 190, where the defendants agreed to buy land of the plaintiff and pay for it by a given day, and that, if they made default, the plaintiff should retain the land and recover the stipulated price as liquidated damages; the court held that the stipulation must be treated as a stipulation for a penalty. "The fact that the parties fix a sum to be paid, and call it liquidated damages, does not always control the question as to the measure of the recovery for the breach of the contract. Courts will look to see the nature and purpose of fixing the amount of damages to be paid. And, if the clause fixing

§ 626. Illustrations.—Calling the sum named a penalty or liquidated damages is not conclusive, if the intention appears otherwise, from the consideration of the whole agreement; if it be doubtful, from the whole agreement, whether it is in-

the amount of the damages appears to have been inserted to secure prompt performance of the agreement, it will be treated as a penalty, and no more than the actual damages proved can be recovered." * * * * "To give the language in this case the construction that it is absolute and must be carried out literally, would work the same wrong and oppression that was originally produced by enforcing payment of penal bonds; and for the same reasons this should not be enforced. But appellant should be left to recover such damages only as he can prove he has sustained by reason of the breach of the contract." *Myer v. Hart*, 40 Mich. 517; *Basye v. Ambrose*, 28 Mo. 39; *Morse v. Rathburn*, 42 Mo. 594; *Sanders v. Carter* (1893), 91 Ga. 450. In *Greer v. Tweed*, 13 Abb. Pr. (N. S.) 427, defendant agreed to furnish his biography to plaintiff for publication, within a time fixed, and, for every day's delay beyond that time, to pay \$165. On a suit to recover for a delay to furnish the biography for one hundred and sixty-one days, held that the plaintiff could recover only his actual loss. The court said the contract was "so extortionate and unjust that it raises the presumption of deceit and fraud in its inception." 1 *Sutherland on Damages*, 475, *et seq.* "The question whether a sum named in a contract, to be paid for a failure to perform, shall be regarded as stipulated damages or a penalty, has been frequently before the courts, and has given them much trouble. The cases can not all be harmonized, and they furnish conspicuous examples of judicial efforts to make for parties wiser and more prudent contracts than they

had made for themselves. Courts of law have in some cases assumed the functions of courts of equity, and have relieved parties by forced and unnatural constructions from stipulations highly penal. Where an amount stipulated as liquidated damages would be grossly in excess of the actual damages, they have learned to hold it a penalty. Where the actual damages were uncertain and difficult of ascertainment, they have leaned to hold the stipulated amount to have been intended as liquidated damages. No form of words has been regarded as controlling; but the fundamental rule, as often announced, is that the construction of these stipulations depends, in each case, upon the intent of the parties, as evinced by the entire agreement, construed in the light of the circumstances under which it was made." *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45, per Earl, J. *Robeson v. Whitesides*, 16 S. & R. 320. "Stipulated damages can only be when there is a clear, unequivocal agreement which stipulates for the payment of a certain sum as a liquidated satisfaction fixed and agreed upon between the parties for the doing or not doing certain acts particularly expressed in the agreement. * * The contract should be express, or it should be a necessary implication from the nature of the transaction itself. When, however, the non-performance can be compensated with money, of which a jury may judge, it is most consonant to reason, and best comports with the understanding of the parties, that the damages should be commensurate with the loss actually sustained."

tended to be a penalty or stipulated damages, it will be construed as a penalty, and if it is called a penalty it will be held to be such, unless that construction is overcome by a very clear intention to the contrary, derived from other parts of the agreement.¹ Unless the intent of the parties is very clearly expressed, a forfeiture named for non-fulfillment of a contract, where excessive will not be construed as intended to be liquidated damages. Thus when a contract for doing a piece of work in building a vessel stipulated for its completion by a specified time, "under a forfeiture of one hundred dollars a day for each and every day after the above date, until the same is completed," it was held a penalty.² If the contract provides

¹ *Whitfield v. Levy*, 35 N. J. Law, 149; *Cheddick v. Marsh*, 21 N. J. Law, 463; *Shiell v. McNitt*, 9 Paige, 101; *Green v. Price*, 13 M. & W. 701. Chief Justice Marshall in *Tayloe v. Sandiford*, 7 Wheat. 13, said: "In general a sum of money, in gross, to be paid for the non-performance of an agreement, is considered as a penalty.

* * * It will not, of course, be considered as liquidated damages. * *

* Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one." *Durst v. Swift*, 11 Texas, 273, discussion of the rules respecting stipulations for penalties and liquidated damages.

² *Colwell v. Lawrence*, 38 N. Y. 71.

"The word 'forfeiture' which is equivalent to a penalty is used, which manifests that a penalty was intended."

"When the parties to a contract, in which the damages to be ascertained, growing out of a breach, are uncertain in amount, mutually agree that a certain sum shall be the damages in case of a failure to perform, and in language plainly expressive of such agreement, I know of no sound principle or rule applicable to the construction of contracts that will enable a court of law to say that they intended something else. Where the sum fixed is greatly disproportionate to the pre-

sumed actual damage, probably a court of equity may relieve; but a court of law has no right to erroneously construe the intention of parties, when clearly expressed in the endeavor to make better contracts for them than they have made for themselves. In these as in all other cases, the courts are bound to ascertain and carry into effect the true intent of the parties." Per *Wright, J.*, in *Clement v. Cash*, 21 N. Y. 253. The words "liquidated damages" are by no means conclusive. *Wallis v. Smith* (1882), L. R. 21 Ch. Div. 243. It was thought in *Reilly v. Jones*, 1 Bing. 302, that they were conclusive, but *Kemble v. Farren*, 6 Bing. 141, has shown that they are not. In that case the sum of \$1,000 was "declared by the parties to be liquidated and ascertained damages, and not a penalty, or penal sum, or in the nature thereof." Yet, notwithstanding these sweeping words, the court, upon an examination of the contract, decided that the sum must be taken to be a penalty, and that it was for the jury to assess the real damages sustained by reason of the breach of the agreement in suit. If it is doubtful whether the sum is intended as a penalty or liquidated damages it will be construed as a penalty because the law

that a larger sum shall be paid on the failure of the party to pay a less sum, the larger sum is treated as a penalty.¹ In the case of a contract for the payment of money simply, a stipulation to pay a fixed sum in default of performance by the obligor will be regarded as a penalty and not as a covenant for liquidated damages. This rule is based upon the principle that damages for the breach of such contracts are fixed and liquidated by the law, and require no liquidation by the parties.²

favors mere indemnity. *Monmouth Park Assn. v. Wallis Iron Works* (1893), 55 N. J. Law, 132. In *Crisdee v. Bolton*, 3 C. & P. 240, it was held that either phrase "penalty," or "liquidated damages," may be controlled, by some other strong consideration; neither, therefore, is absolutely conclusive. Best, C. J., also said: "The law relative to liquidated damages has always been in a state of great uncertainty. This has been occasioned by judges endeavoring to make for parties a better contract than they have made for themselves." "A court has no more authority to put a different construction on the part of an instrument ascertaining the damages than it has to decide contrary to any other of its clauses." *Nilson v. Jonesboro* (1893), 57 Ark. 168. A contract between a municipal corporation and parties building a street railway, who agreed to "forfeit and pay" \$500 in default of its construction within a certain time, the municipal corporation could not in its corporate capacity suffer any injury by a breach of the contract. The court per Mansfield, J., said. "If an actual loss was contemplated by the situation in question it could only, therefore, have been such as would result to the public; and, as the parties must have known that it was wholly impracticable to measure this by any rule of

damages, it is reasonable to suppose that they intended to fix by the terms of the contract the precise sum recoverable for its breach." See article on "Liquidated Damages," by John Prof-fatt (1877), 12 Am. L. Rev. 286.

¹ *Haldeman v. Jennings*, 14 Ark. 329; *Peine v. Weber*, 47 Ill. 41; *Morse v. Rathburn*, 42 Mo. 594; *Administrators of Smith v. Wainwright*, 24 Vt. 97; *Rutherford v. Stovel*, 12 Up. Can. C. P. 9; *Astley v. Weldon*, 2 B. & P. 354; *Reynolds v. Bridge*, 6 E. & B. 528; 26 L. J. Q. B. 12.

² *Kuhn v. Myers*, 37 Iowa, 351. "Liquidated damages are not applicable to such case. If they were, they might afford a sure protection for usury, and countenance oppression under the forms of law." *Gray v. Crosby*, 18 John. 219; *Wright v. Dobie* (1893), 3 Texas C. App. 194, \$500 paid as a "forfeit;" held that whether the payment was made as a penalty, or as liquidated damages, was a question of intent to be determined by the jury. "Whether the sum mentioned in an agreement to be paid for a breach is to be treated as a penalty or as liquidated and ascertained damages is a question of law, to be decided by the judge upon a consideration of the whole instrument." *Wilde, C. J., in Sainter v. Ferguson*, 7 C. B. 716.

§ 627. Stipulations in building contracts.—The stipulations of parties for specified damages on the breach of a contract to build within a limited time have frequently been enforced by the courts. In a contract to complete a grand-stand for a race-course by a designated day, the contractor agreed to pay the owner one hundred dollars a day for every day that he should be in default after the day stated, which sum was thereby agreed upon, fixed and determined as the damages which the owner would suffer by reason of such default, “and not by way of penalty.” It was also agreed that the owner might deduct and retain the same out of any moneys becoming due to the contractor under the contract. In this case it was held that the sum of one hundred dollars a day was liquidated damages.¹

§ 628. The same subject continued—Illustrations of penalties.—Where a building contract specified that twenty dollars should be paid for every day’s delay in completing a house, the court held the stipulation to be a penalty, and said that only nominal damages could be recovered in the absence of proof that the owner was injured by the delay.² When the damages can

¹*Monmouth Park Association v. Wallis Iron Works* (1893), 55 N. J. Law, 132; in *Fletcher v. Dyche*, 2 T. R. 32, £10 per week for delay in finishing the parish church; in *Duckworth v. Alison*, 1 Mees. & W. 412, £5 per week for delay in completing repairs of a warehouse; in *Legge v. Harlock*, 12 Q. B. 1015, £1 per day for delay in erecting a barn, wagon shed and granary; in *Law v. Local Board* (1892), L. R. 1 Q. B. 127, £100 and £5 per week for delay in constructing sewerage work; in *Ward v. Hudson River Bldg. Co.*, 125 N. Y. 230; 26 N. E. Rep. 256, \$10 a day for delay in erecting dwelling-houses; *O'Donnell v. Rosenberg*, 14 Abb. Pr. (N. S.) 59, a stipulation for \$10 a day for every day’s delay in completing a building contract. In *Pearson v. Williams*, 26 Wend. 630, a purchaser of 14 city lots engaged to erect on the lots two brick buildings by a certain day, or to pay on de-

mand \$4,000; held, liquidated damages. In *Farnham v. Ross*, 2 Hall, 167, the covenant was to finish a building by a certain day, under a “penalty of \$30” a day for every day thereafter that it should remain unfinished, to be paid as “liquidated damages;” held, liquidated damages. *Malone v. Philadelphia* (1892), 147 Pa. St. 416, contract for erection of a bridge, stipulating that the contractors should pay \$50 for each day they were in default, as the damages were uncertain and not capable of being ascertained by any satisfactory rule; held, liquidated damages.

² *Wilcus v. Kling*, 87 Ill. 107; *Condon v. Kemper*, 47 Kan. 126 (erecting a party wall and moving a building); *Brennan v. Clark* (1890), 29 Neb. 385 (building a house). In *Muldoon v. Lynch*, 66 Cal. 536, a statutory rule prevailed. *Lloyd’s Law of Building*, 106.

be really assessed, and they are fixed by the contract itself at an unconscionable sum, it is the plain duty of a court exercising equity powers to relieve against such injustice, and treat the sum named as a penalty merely. A contract to raise a dwelling, the rental value of which was about twenty-five dollars per month, provided that the owner should be paid one hundred and fifty dollars per week after the expiration of the period within which the work was to be completed, the real damage being easily ascertainable, the stipulated sum was unconscionable.¹ In case of failure to complete buildings which are intended to be rented, the amount of damages ordinarily would be the loss of rent.²

§ 629. The intention of the parties and nature of the agreement—Controlling guides.—The question whether a sum stipulated for in a written contract, to be paid on its breach, is a penalty or liquidated damages, is a question for the court, to be determined by the intention of the parties as drawn from the words of the whole contract, examined in the light of its subject-matter and of its surroundings; in this the court will consider the relation which the sum stipulated bears to the extent of the injury which may be caused by the several breaches provided against, the ease or difficulty of measuring a breach in damages, and such other matters as are legally or necessarily inherent in the transaction.³ While the words “forfeit,” or

¹ *Clements v. Schuykill, etc.*, R. Co. (1890), 132 Pa. St. 445.

² *Brennan v. Clark*, 29 Neb. 385. In *Cochran v. People's Ry. Co.* (1892), 113 Mo. 359; a suit at law for a balance on a building contract, where the plaintiff agreed to pay \$50 for every day that the building was delayed after a certain time, the amount fixed not being denominated in the contract, either as penalty or liquidated damages, the court held it a penalty to compel the performance of the contract. There was a delay of sixty-five days in the completion of the building. The court, per Gantt, J., said: “Applying to this case the ordinary tests, is it or not unreasonable as liquidated damages? Viewing it

from the point of an investment, the capital was \$18,000, and for sixty-five days this capital yielded no income. Allowing ten per cent.—a large interest on so large a sum—and we find \$325 would compensate for the use of the money, as a loan or mere investment.” * * * At the rate stipulated the damages would have amounted in a year to a sum almost as large as the capital invested, or total cost of the building.” *In re Newman Ex parte Capper*, L. R. 4 Ch. D. 724 (stipulation held a penalty).

³ *March v. Allabough*, 103 Pa. St. 335; *Colwell v. Lawrence*, 38 N. Y. 71; *Cotheal v. Talmage*, 9 N. Y. 551; *Reynolds v. Bridge*, 37 Eng. L. & Eq. 122; *Magee v. Lavell*, L. R. 9 C. P.

“forfeiture,” “paid sum,” or “penalty,” used by parties in contracts, have sometimes been treated as furnishing a strong, if not conclusive, indication of the intent of the parties, yet it is well settled that the weight to be given to such words will depend on their connection with other parts of the instrument, the nature of the agreement, the intention of the parties, and other facts and circumstances.¹ Where there was an agreement for the sale of real estate which contained this stipulation: “The parties to the above agreement doth severally agree to forfeit the sum of five hundred dollars, say five hundred dollars, in case either party fail to comply with the terms of this agreement,” the word “forfeit” was held to mean “to pay,” and although the jury found the actual damages were fifty dollars, one-tenth the stipulated sum, the court upon the point reserved, “Whether the defendant was liable for the penalty or for only the actual damages,” rendered judgment for the penalty.²

107; *Lansing v. Dodd*, 45 N. J. Law, 525; *Cochran v. People's Railway Company* (1892), 113 Mo. 359. The use by the parties of the expression “penalty” or “liquidated damages” is not conclusive. The distinction between penalties and liquidated damages depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages,” per Lopes, L. J., in *Law v. Local Board* (1892), 1 Ch. 127.

¹ *De Graff, etc., Co. v. Wickham* (1892, Iowa); 52 N. W. Rep. 503; *Chamberlain v. Bagley*, 11 N. H. 234; *McIntire v. Cagley*, 37 Iowa, 676; *Wolf v. Des Moines, etc., Railway Co.* (1884), 64 Iowa, 380.

² *Streeter v. Williams*, 48 Pa. St. 450; *Agnew, J.*, in delivering the

opinion said: “In the earlier cases, the courts gave more weight to the language of the clause designating the sum as a penalty or as liquidated damages. The modern authorities attach greater importance to the meaning and intention of the parties. Yet the intention is not all-controlling, for in some cases the subject-matter and surroundings of the contract will control the intention where equity absolutely demands it. A sum expressly stipulated as liquidated damages will be relieved from, if it is obviously to secure payment of another sum capable of being compensated by interest. On the other hand, a sum denominated a penalty or forfeiture will be considered liquidated damages, where it is fixed upon by the parties as the measure of the damages, because the nature of the case, the uncertainty of the proof, or the difficulties of reaching the damages by proof, have induced them to make the damages a subject of previous adjustment. In some cases the mag-

§ 630. Fractions of a day in the computation of time.—

The general rule of law in the computation of time is that fractions of a day are not reckoned.¹ But this rule does not prevail when it becomes essential for the purpose of justice to ascertain the exact hour or minute.² Like most general rules it

nitude of the sum, and its proportion to the probable consequence of a breach, will cause it to be looked upon as minatory only. Upon the whole, the only general observation we can make is, that in each case we must look at the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract and its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case." *Mathews v. Sharp*, 99 Pa. St. 560; *Pennypacker v. Jones* (1884), 106 Pa. St. 237; *Smith v. Dickenson*, 3 Bos. & Pul. 630; *Astley v. Weldon*, 2 Bos. & Pul. 346; *Kemble v. Farren*, 6 Bing. 141; *Dakin v. Williams*, 17 Wend. 447. The conflict in the decisions on this subject is one to the fact that each case presents new and distinct considerations. *Sanders v. Carter* (1893), 91 Ga. 450. "The subject-matter of the contract, and the intention of the parties, are the controlling guides. If, from the nature of the agreement, it is clear that any attempt to get at the actual damage would be difficult, if not in vain, then the courts will incline to give the relief which the parties have agreed on. But if, on the other hand, the contract is such that the strict construction of the phraseology would work absurdity or oppression, the use of the term liquidated damages will not prevent the courts from inquiring into the actual injury sustained, and doing justice between the parties." *Sedgwick on Damages*, § 396.

¹ *In re Railway, etc., Co.*, L. R. 29 Ch. Div. 204; *Field v. Jones*, 9 East, 151. Sir William Grant, in *Lester v. Garland*, 15 Ves. 248, says: "Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point, so that any act done in the compass of it is no more referable to any one than to any other portion of it; but the act and the day are co-extensive, and, therefore, the act can not properly be said to have passed until the day is passed." *Wright v. Mills*, 4 H. & N. 488; *Queen v. St. Mary*, 1 El. & Bl. 816. It is settled that acts of congress take effect from their date when no other time is specified, and are operative from the first moment of that day. Fractions of the day are not recognized. *Lapeyre v. United States*, 17 Wall. 191; *Arnold v. United States*, 9 Cranch, 104. The question in that case was whether a certain cargo of goods imported into the United States came under the operation of the act of 1812 imposing double duties, and depended upon the time when the act took effect. The act was approved and signed by the president on the 1st day of July, and the goods were imported on the same day. The court held that the day on which the act was approved was to be included in its operation.

² *Combe v. Pitt*, 3 Burr. 1423; *Follett v. Hall*, 16 Ohio, 111; *Westbrook Manufacturing Co. v. Grant*, 60 Maine, 88; *Grosvenor v. Magill*, 37 Ill. 239. Generally the law does not regard fractions of a day, except in cases where the hour itself is material. *Mitchell v. Schoonover*, 16 Ore. 211,

is subject in its application to just and reasonable exceptions. It does not prevail in questions concerning the acts of parties where it becomes necessary to distinguish and ascertain which of several persons has a priority of right, as where a bond and release are executed on the same day.¹

§ 631. Computation of time from a particular day, or a particular event.—In the interpretation of contracts, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period *from* or *after* a day named, the general rule is to exclude the day thus designated and to include the last day of the speci-

citing *Marvin v. Marvin*, 75 N. Y. 240; *Judd v. Fulton*, 10 Barb. 117; *Columbia Turnpike Road v. Haywood*, 10 Wend. 422; *Hughes v. Patton*, 12 Wend. 234; *Blydenburgh v. Cotheal*, 4 N. Y. 418.

¹ *Matter of Welman*, 20 Vt. 653; *Louisville v. Portsmouth Sav. Bank*, 104 U. S. 469. "But this ancient maxim is now chiefly known by its exceptions." Per Lowell, J., in *Maine v. Gilman* (1882), 11 Fed. Rep. 214. In the matter of *Richardson*, 2 Story C. C. 571, Story, J., said: "I am aware that it is often laid down that in law there is no fraction of a day. But this doctrine is true only *sub modo*, and in a limited sense, where it will promote the right and justice of the case. It is a mere legal fiction, and, therefore, like all other fictions, is never allowed to operate against the right and justice of the case. On the contrary, the very truth and facts, in point of time, may always be averred and proved in furtherance of the right and justice of the case; and there may be even a priority in an instant of time; or, in other words, it may have a beginning and an end. The common case put to illustrate the doctrine that there is no fraction in a day is the case when a person arrives at majority. Thus, if a man should be

born on the first day of February, at eleven o'clock at night, and should live to the thirty-first day of January, twenty-one years after, and should, at one o'clock of the morning of that day, make his will, and afterwards die by six o'clock in the evening of the same day, he will be held to be of age, and his will be adjudged good. Here the rule is applied in favor of the party, to put a termination to the incapacity of infancy. * * * * But many cases may easily be put when the real fact is allowed to prevail, and to be conclusive. Thus, for example, if a woman makes a deed of her land in the morning and is afterwards married or dies on the same day, the deed is good. So if my ancestor die at five o'clock in the morning and I enter into his lands at six o'clock of the same day, the lease is good. * * * * So that we see that there is no ground of authority, and certainly there is no reason to assert, that any such general rule prevails, as that the law does not allow of fractions of a day. On the contrary, common sense and common justice equally sustain the propriety of allowing fractions of a day, whenever it will promote the purposes of substantial justice." *Westbrook Manufacturing Co. v. Grant*, 60 Maine, 88.

fied period.¹ In a leading English case in regard to a lease which was to commence from the day of the date, the matter turned upon the question whether the phrase "to commence from the day of the date" was to be construed as excluding, or including, the day on which the lease bore date. The court established the principle that the words when used in an instrument were to receive an inclusive or exclusive sense, according to the intention with which they were used, to be derived from the context and subject-matter, and so as to effectuate, and not destroy, the deed of the parties.² Many early cases made a distinction between computations from a day or a date and computations from an act done, or from an event. But this distinction does not rest upon a sound principle and in most jurisdictions it is no longer recognized. The tendency of recent decisions is very strongly towards the adoption of a general rule which excludes the day as the *terminus a quo* in such cases. But this rule is not inflexible, and in the interpretation of a statute or contract it yields to a manifest purpose or intention in conflict with it.³

¹ *Sheets v. Selden's Lessee*, 2 Wall. 177; *Cornell v. Moulton*, 3 Denio, 12, which was an action on a promissory note payable on demand. The note was dated February 14, 1839, and the question was whether suit commenced on the 14th of February, 1845, saved the operation of the statute of limitations. The court held that it did. *Blackman v. Nearing*, 43 Conn. 56: "No rule, however, is to be enforced so sternly as to defeat the intent of the parties; that is paramount to all other considerations, and is always to be carried into effect, if not contrary to law or public policy." Per Foster, J. *Bemis v. Leonard*, 118 Mass. 502; *Duffy v. Ogden*, 64 Pa. St. 240 (a lease for one year); *Weld v. Barker*, 153 Pa. St. 465; *Phelan v. Douglass*, 11 How. Pr. 193. "Time is not, therefore, computed from the hour of the day on which the event happened, to the corresponding hour of the day of performance, but the computation is from the day when

the act is done, such day being regarded as a point of time. The computation begins with the expiration of such day. It is thus computed literally from such day, that is, from its close, its ending, its expiration." Per Cowles, J.

² *Pugh v. Duke of Leeds*, Cowp. 714, opinion by Lord Mansfield; *Sands v. Lyons*, 18 Conn. 18. In the leading case of *Bigelow v. Willson*, 1 Pick. 485, it was held that under a statute authorizing the owner of an equity of redemption, sold on execution and conveyed by an officer, to redeem it "within one year next after the time of executing" the deed, the day on which the deed was executed was excluded.

³ Per Knowlton, J., *Seward v. Hayden*, 150 Mass. 158. The American cases almost uniformly exclude the first day. *Teucher v. Hiatt*, 23 Iowa, 527; *Rand v. Rand*, 4 N. H. 267; *Snyder v. Warren*, 2 Cow. 518; 14 Am. Dec. 519; *Ex parte Dean*,

§ 632. The same subject continued.—Where goods were sold to be paid for “in two months time,” it was held that the last day was included and the first, the day of the sale, excluded.¹ In the case of a lease granted for twenty-one years from the 25th of March in a particular year, the lease was held to last until the end of the 25th of March of the last year of the lease.² The term “an interval of not less than fourteen days” means that there must be an interval of fourteen clear days.³

§ 633. Time of payment of promissory notes.—A note payable in a certain number of days is payable on the last day, in the same manner as if that had been specified to be the day of payment.⁴ In computing the time when a note, payable at a certain number of months after date, will become due, the rule is to exclude the day of the date from the calculation, and include the day of payment, when no days of grace are allowed.⁵

2 Cow. 605; 14 Am. Dec. 521; Portland Bank v. Maine Bank, 11 Mass. 205; Gillespie v. White, 16 John. 117. In Iowa the manner of computing time has been regulated by statute, § 4121. “Unless the terms ‘clear days’ are used, the mode of computing time is by excluding the first day and including the last.” Other states have also made similar provision.

¹ Webb v. Fairmaner, 3 M. & W. 473.

² Ackland v. Lutley, 9 Ad. & E. 879. Atkins v. Sleeper, 7 Allen, 487. A lease for a term of years “from the first day of July” was held to begin on the 2d of July. It was stated that the general rule was to include the day where time was computed from an act done, and to exclude the day where it was computed from the day of the act done. Perry v. Provident Life Insurance, etc., Co., 99 Mass. 162, where the policy of insurance required that the computation be made from the time of the act done, viz., the accident. Where a bond had to be given within six months after the testator’s decease, the day of the

death of the testator was not reckoned. Lester v. Garland, 15 Ves. 248.

³ In re Railway Sleepers Supply Co. (1885), L. R. 29 Ch. Div. 204. In Young v. Higgon, 6 M. & W. 49, a calendar month’s notice was required to be given. Alderson, B., said: “Where there is given to a party a certain space of time to do some act, which space of time is included between two other acts to be done by another person, both the days of doing those acts ought to be excluded, in order to insure to him the whole of that space of time.” In Chambers v. Smith, 12 M. & W. 2, the words were “not being less than fifteen days.” The court held that the words meant fifteen all days or clear days. In The Queen v. Justices of Shropshire, 8 Ad. & E. 173, the statute required a notice of fourteen days at least before a given event. Both the day of the act and that of the event must be excluded.

⁴ Avery v. Stewart, 2 Conn. 69.

⁵ Roehner v. Knickerbocker Life Insurance Co. (1875), 63 N. Y. 160; citing Bellasis v. Hester, 1 Lord Ray. 280; Campbell v. French, 6 T. R. 200.

When a promissory note is dated on a day of any month, and made payable at a specified number of months after date, without days of grace, it accrues due and payable on the same day in the stipulated number of months afterward with the day of the date of the note.¹ If there be several notes of the same date, some payable in six months, some in six months from date, and some in six months after date, they all have the same pay-day. In all of them the day of date is excluded. If dated December 9, they would, with the grace, become payable June 12.² And if paper is payable at so many days after sight, after demand, or after a particular event, the day of sight, demand, or of the happening of the event, is likewise excluded.³ If the paper was dated January 1st, and payable thirty days after date, it would fall due, grace included, on the 3d of February, and if the paper was dated February 1st, it would be due, grace included, on the 6th of March, except in leap-year, when the date of payment would be the 5th of March.⁴

§ 634. Day of performance falling on Sunday.—For the purpose of performance of a contract, Sunday is considered *dies non*, and hence, if the last day happens to be Sunday, it is to be regarded as stricken from the calendar, although intervening Sundays are to be counted. Performance of a contract which matures on Sunday may be exacted on the following day.⁵ This is conformable to a general principle of law,

¹ *Roehner v. Knickerbocker Life Ins. Co.*, 63 N. Y. 160, citing *Hartford Bank v. Barry*, 17 Mass. 94; *Ripley v. Greenleaf*, 2 Vt. 129.

² *Ammidown v. Woodman*, 31 Me. 580.

³ *Sturdy v. Henderson*, 4 B. & Ald. 592; *Loring v. Halling*, 15 John. 120; *Daniel on Negotiable Instruments*, § 626.

⁴ *Tiedeman on Commercial Paper*, § 316; *Serrell v. Rothstein* (1892), 49 N. J. Eq. 385, a bill to foreclose a mortgage. The mortgage contained a proviso that if the interest should at

any time remain unpaid and in arrears for the space of thirty days after it should be payable, the principle should become due at the option of the mortgagee. Six months' interest became due July 29, 1891. Payment was tendered on the 29th of August and refused. The thirty days of grace expired August 28th and the defendant's miscalculation, being the result of carelessness, could not be regarded in equity as a mistake.

⁵ *Dies non* is an abbreviation of the phrase *dies non juridicus* used to denote non-judicial days. *Porter v. Pierce*

that where the obligor can not perform a contract according to the literal terms of it, he shall perform it as nearly as possible.¹ The weight of the authorities support the proposition that in case of a non-negotiable note, or a negotiable one without days of grace, falling due, according to its face, upon Sunday, payment can not be required on the preceding Saturday. The following Monday is the proper date for presentment and protest, unless that is also a legal holiday.² In the case of a bank check falling due on Sunday, it was held that that day should not be counted, and a compliance with the stipulations of the contract on the next day was deemed in law a performance.³ In an action upon a policy of life insurance, which was to terminate in case the premium charged should not be paid in advance on or before the day at noon on which the same should become due and payable, it was held that the premium when it became due on Sunday was not payable till Monday.⁴

§ 635. Paper maturing on Sundays and holidays where grace is allowable.—When days of grace are allowable on a bill or note and the third day falls on Sunday the bill or note is payable on the previous Saturday. It is said in such case the note

(1890), 120 N. Y. 217; *Howard v. Ives*, 1 Hill, 263; 2 Wharton on Contracts, 897. No one is bound to do any work in performance of his contract on Sunday, unless the work by its very nature, or by express agreement, is to be done on that day, and can be then done, without a breach of the law. 2 Parsons on Contracts, 666.

¹ *Avery v. Stewart*, 2 Conn. 69.

² *Hirshfield v. Fort Worth National Bank* (1892), 83 Tex. 452; *Avery v. Stewart*, 2 Conn. 69, which was an action on a note not negotiable which fell due on Sunday, and the court held that a tender on Monday was a good bar to the action. *Barrett v. Allen*, 10 Ohio, 426, promissory note payable in woolen cloth falling due on Sunday. *Sanders v. Ochiltree*, 5 Porter, 73; 30 Am. Dec. 551, a note made

on Saturday and payable one day after date. *Commercial Bank v. Varnum*, 49 N. Y. 269. In *Patrick v. Faulke*, 45 Mo. 312, holding that this rule was not applicable to a mechanic's lien expiring on Sunday, and that such lien must be strictly construed against the lien holder, and hence that it would not continue over till Monday. In *Kilgour v. Miles*, 6 Gill & J. 268, which was a case of a non-negotiable note payable in merchandise and falling due on Sunday, the court held the same rule should be applied as to notes upon which days of grace are allowed.

³ *Salter v. Burt*, 20 Wend. 205; 32 Am. Dec. 530; 3 Ames's Cases on Bills and Notes, 294.

⁴ *Hammond v. American Mutual, etc., Co.*, 10 Gray, 306.

by its terms would be due and payable two days earlier than Saturday, and that what was originally a mere indulgence to casualty or oversight should not be extended, and that it was more reasonable to take from than to add to a period of time originally allowed as mere grace and favor.¹ The law of the place of payment determines the question of legal holidays. It is generally provided by statute, in the United States, that bills and notes maturing on a holiday shall become due and shall be presented for payment on the day preceding the holiday.² What days are legal holidays are determined by statute law and by the decisions of the courts in the various states.³ Commencement day at Harvard college is not a holiday, but a usage of any bank, in respect to notes falling due on that day, to make a demand on the maker and give notice to the indorser on the day preceding was held to be binding on an indorser of a note discounted for him at the bank, who is conversant of such usage; and whether the note is made payable at such bank or not is immaterial.⁴ If grace expires on Sunday, and the Saturday previous is a holiday, such as Christmas day, the note would fall due on the Friday preceding.⁵

§ 636. The term "month."—The term "month," when used in contracts or deeds, must be construed, where the par-

¹Farnum v. Fowle, 12 Mass. 92; Hirschfield v. Fort Worth Nat. Bank (1892), 83 Texas, 452; Bussard v. Levering, 6 Wheat. 102; Kuntz v. Tempel, 48 Mo. 71; Irwin v. Brown, 2 Cranch C. C. 314; Sheppard v. Spates, 4 Md. 400; Fleming v. Fulton, 7 Miss. 473; Jackson v. Richards, 2 Cai. R. 343; Ontario Bank v. Petrie, 3 Wend. 456; West v. Lee, 50 How. Pr. 313; Tassell v. Lewis, 1 Lord Ray. 743. The days of grace upon a bill or note nominally payable on Sunday are computed from that day, and not from the preceding Saturday. Wooley v. Clements, 11 Ala. 220.

²Randolph on Commercial Paper, §§ 1031, 1032; Barlow v. Gregory, 31 Conn. 261 (New Year's Day); Lewis

v. Burr, 2 Cai. Cas. 195 (July 4); Sheldon v. Benham, 4 Hill, 129 (July 4).

³Christmas is universally regarded as a legal holiday. The Fourth of July is everywhere regarded so in the United States; and in many of them the twenty-second of February, Decoration Day, Thanksgiving Day and New Year's Day. In most of the states there are statutes specifying the legal holidays and prescribing the practice with respect to them; but, independent of them, usage would determine whether any day was to be so regarded, and also the regulations concerning it. 1 Parsons on Notes and Bills, 403.

⁴City Bank v. Cutter, 3 Pick 414.

⁵Daniel on Negotiable Instruments, § 627.

ties have not themselves given to it a definition and there is no legislative provision on the subject, to mean calendar, and not lunar months.¹ A different rule rests in England with reference to other than mercantile contracts. In the absence of special circumstances, which may lead to a contrary conclusion, a month is usually held in that country to mean a lunar month, and not calendar month. Such was the general rule in the common law.²

§ 637. Construction of the words "until," "by," "forthwith" and "immediate."—The word "until" may be construed either exclusive or inclusive of the day to which it applied, according to the context and subject-matter.³ Its more obvious meaning requires the exclusion of the day named, but the circumstances and subject-matter of each case presented must determine. Where an act continued the charter of a corporation "until the first day of January," it was held that the charter expired on the 31st day of December.⁴ In an action on a policy of insurance for six months from the 14th day of February until the 14th day of August, the question was whether the 14th day of August was included so as to cover a fire which occurred on that day, and it was held that it was.⁵ A contract to complete work "by" a certain time means that it shall be done before that time. Where parties agreed to build a saw-mill and "to have it completed by November next," it was held that the month of November was excluded.⁶

¹ *Sheets v. Selden's Lessee*, 2 Wall. 177; *Churchill v. Merchant's Bank*, 19 Pick. 532; *Bishop on Contracts*, § 1339.

² 1 *Wood on Limitations*, 130; *Rex v. Peekham*, Carth. 406; *Rex v. Ad-derley*, Doug. 462; *Lacon v. Hooper*, 6 T. R. 224; *Simpson v. Margitson*, 11 Q. B. 23; *Strong v. Birchard*, 5 Conn. 357; *Bishop on Written Laws*, § 105. It is now provided that in all statutes the word "month" shall be deemed and taken to mean calendar month unless words be added showing lunar month to be intended. 13 & 14 Vic., c. 21.

³ *King v. Stevens*, 5 East, 244.

⁴ *People v. Walker*, 17 N. Y. 502.

The provision requiring books containing the record of assessed valuation of real and personal estate to be open for examination and correction from the second Monday of January until the first day of May, does not include the last day mentioned. *Clarke v. Mayor* (1889), 111 N. Y. 621.

⁵ *Isaacs v. Royal Insurance Co.*, 5 L. R. Ex. 296. "If the 14th of February was included, the 14th of August was not. Otherwise the period of more than six months would be covered by the policy." Per Martin, B.

⁶ *Rankin v. Woodworth*, 3 P. & W.

The words "immediate" or "forthwith" mean a reasonable time in view of the circumstances. Where a policy of insurance required notice of loss by fire to be given to the secretary "forthwith," it was held that the rule meant due diligence under all the circumstances and notice after eighteen days was not, in that case, deemed sufficient.¹ Where a policy of insurance required immediate notice to be given by the assured in case of a loss, and in the great fire in Chicago, on October 9, 1871, the plaintiff's property was burned, notice of the loss given November 13, 1871, was held to have been given in sufficient time, in view of the great derangement in all kinds of business caused by the fire.² In giving a construction to terms of this description, some regard must undoubtedly be had to the nature of the act or thing to be performed, and the circumstances of the case. Nothing more is imposed upon the party than what is called due diligence, under all the circumstances of the case. There must be no unnecessary procrastination or delay, nothing which the law calls laches.³

§ 638. The words "from and after."—In the construction of the words "from and after," as applied in a contract to a

(Pa.) 48. "Where a thing is ordered by a particular day, it is with a view of having the use of it on the day. Thus a coat is ordered by Sunday with a view of wearing it to church."

¹ *Edwards v. Lycoming, etc., Ins. Co.* (1874), 75 Pa. St. 378.

² *Knickerbocker Ins. Co. v. McGinnis*, 87 Ill. 70. "Forthwith" in all such policies means without unnecessary delay, or with reasonable diligence, under the circumstances of the particular case. *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; 49 Am. Dec. 74, where the fire occurred on the 15th and the plaintiffs hearing of it on the 18th gave notice by mail on the 23d, this was held to be a sufficient compliance with a condition requiring notice to be given "forthwith." *New York Central Ins. Co. v. National Ins. Co.*, 20 Barb. 468.

The settled rule is to construe such requirements liberally in favor of the assured, and strictly against the insurer. *Piedmont & A. Ins. Co. v. Young*, 58 Ala. 476; 29 Am. Rep. 770; *Alabama Gold Life Ins. Co. v. Johnston*, 80 Ala. 467; 60 Am. Rep. 112; *Hydraulic Engineering Co. v. McHaffie*, L. R. 4 Q. B. Div. 670 C. A. (construction of the words "as soon as possible"); *Roberts v. Brett*, 11 H. L. C. 337, and 34 L. J. C. P. 241 (as to interpretation of "forthwith"); *Strauton v. Wood*, 16 Q. B. 638, where the contract was to deliver goods "forthwith," the price being made payable within fourteen days from the making of the contract.

³ Per Sutherland, J., in *Inman v. Western Fire Ins. Co.*, 12 Wend. 452.

period of time, if the time is computed from an act done, it includes the day on which the act is done; if from a day specified, it excludes the day.¹ Under a contract to pay plaintiff a certain price for all stamps ordered and delivered by a certain date, which amount is to be full compensation for everything done under the contract, plaintiff agreeing to keep on hand stamps sufficient to meet all orders, the United States is not liable for stamps remaining on hand after expiration of the period, although manufactured and stored under supervision of a government agent.²

¹ *Chicago Title Co. v. Smyth* (Iowa, 1895), 62 N. W. Rep. 792. "We next inquire as to the proper construction to be given to the words 'from and after April 1, 1893,' as written in this contract. The learned district judge, after noting that the courts have differed in their construction of the words 'from and after,' correctly states the rule to be as sustained by the weight of authority, 'that if it is from an act done it is inclusive, but if from a day it is exclusive.' This statement of the rule is based upon reason as well as authority. If it is from an act done, the time commences immediately upon the act being done. We have a familiar illustration in legislative enactments which are to take effect from and after their passage, or from and after publication. In the case of *Arnold v. United States*, 147 U. S. 494; 13 Sup. Ct. Rep. 406, the question was whether the additional duties imposed by an act passed and which took effect on July 1, 1812, were chargeable upon the cargo of a ship that came within the jurisdiction of the United States, and within one of its collection districts, on the 1st day of July, 1812. The court says: 'The statute was to take effect from its passage, and it is a general rule that, where the computation is to be made from an act done, the day on which the act is done is to be included.' It was held that the goods were subject to the additional duty.

In *Arrowsmith v. Hamering*, 39 Ohio St. 573, a petition in error was filed on April 18, 1883, without leave of court. On that day an act was passed, and took effect, amending the statute so as to require leave to be first granted. It was held that, by presumption of law, the act took effect from the commencement of that day, but that such presumption would not prevail where it is in conflict with any right required in actual points of time, or on that day before that act took effect, and that, in such case, the exact time in the day may be shown; that, in the absence of proof that the case was pending on that day before the act was passed and took effect, the presumption of law will prevail that the act took effect from the commencement of the day. Mr. Bishop, in his work on Contracts (§ 1343), states the rule thus: 'Where time is computed from an act done, the general rule is to include the day. Where it is computed from the day of the act done, the day is excluded.' He adds: 'But it is believed that not all courts will, and none should, adhere to this or any other like technical distinction, in a case where, by disregarding it, they can better carry into effect what, all the consideration being taken into account, is reasonably plain the parties meant.' "

² *Continental Bank Note Co. v. United States*, 154 U. S. 671; 14 Sup. Ct. Rep. 1194.

CHAPTER XVII.

IMPLIED CONTRACTS.

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| § 639. Distinction between express and implied contracts. | § 655. Parent and child—Rule as to services rendered. |
| 640. <i>Quasi</i> -contracts or contracts implied in law. | 656. Case of a person standing <i>in loco parentis</i> . |
| 641. The same subject continued. | 657. Exception to the general rule that a child is not entitled to compensation for services to a parent. |
| 642. Illustrations. | 658. Contract for services where skill is required. |
| 643. Further illustrations. | 659. Implied contracts of professional men. |
| 644. When silence imports assent. | 660. Recovery of money paid under a mistake of fact. |
| 645. Where the law will not imply a contract. | 661. Effect of negligence upon the right of recovery. |
| 646. The same subject continued. | 662. Recovery of money paid under mistake of law. |
| 647. Waiver of tort and suing in <i>assumpsit</i> . | 663. <i>Ignorantia juris neminem excusat</i> —Exception in the case of ignorance of a foreign law. |
| 648. Liability of corporations on implied contracts. | 664. Recovery of money paid under duress or compulsion. |
| 649. Acceptance of benefits—Gratuitous services. | 665. Voluntary payment of taxes. |
| 650. Acceptance of benefits where a promise to pay is implied. | 666. Recovery of illegal taxes paid under compulsion. |
| 651. The same subject continued—Illustrations. | 667. Effect of a protest. |
| 652. Request without benefit. | |
| 653. Where the law will not imply a promise owing to relationship. | |
| 654. The same subject continued—Illustrations. | |

§ 639. Distinction between express and implied contracts.—The term “implied contract” is generally used to denote a promise which the law, from the existence of certain facts, presumes that a party has made.¹ An implied contract is where the intention of the parties may be gathered from their acts and from surrounding circumstances, as distinguished from an express contract, where a party stipulates in direct

¹ Swift's Digest, 182.

terms, verbally or in writing.¹ Implied contracts, it has been said, are such as reason and justice dictate, and which the law presumes that every man has contracted to perform, and, upon this presumption, makes him answerable to such persons as suffer by his non-performance.² But all true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed the contract is called an express one. When it is not expressed, it may be inferred, implied or presumed, from circumstances as really existing, and then the contract, thus ascertained, is called an implied one.³ Both express and implied contracts are founded upon the actual agreements of the parties, the only distinction being in the character of the evidence by which the contract is proved.⁴ An express contract is proved by an actual agreement; an implied contract by circumstances and the general course of dealing between the parties.⁵

¹ People, etc., v. Speir, 77 N. Y. 144. See 20 Am. Jur. 5. "The intention of the parties to any particular transaction may be gathered from their acts and deeds, in connection with the surrounding circumstances, as well as from their words; and the law therefore implies from the silent language of men's conduct and actions, contracts and promises as forcible and binding as those that are made by express words, or through the medium of written memorials." 1 Addison on Contracts, 23. "A great mass of human transactions depends upon implied contracts; upon contracts which are not written, but which grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations, which, as honest, fair, and just men, they ought to have made." Marshall, Ch. J., in Ogden v. Saunders, 12 Wheat. 213, 341.

² 3 Blackstone's Commentaries, 150; People v. Bennett, 6 Abb. Pr. (N. Y.) 343; Brackett v. Norton, 4 Conn. 517. A promise will be implied when equity

and good conscience require one, even though none was expressly made. Turner v. Jones, 1 Lans. 147.

³ Hertzog v. Hertzog, 29 Pa. St. 465, per Lowrie, J.; Woods v. Ayres, 39 Mich. 345. The consent of the parties is of the essence of a contract. But this consent may be manifested in different ways. When it is manifested by words, the contract is styled express. When it is manifested by conduct, or by signs which are not words, the contract is styled *implied*, or more properly, *tacit*. 3 Austin on Jurisprudence, 223.

⁴ Keel v. Larkin, 72 Ala. 493; Chilcott v. Trimble, 13 Barb. 502; City Council of Montgomery v. Montgomery Water Works Co. (1884), 77 Ala. 248; (action by water-works company against municipal corporation for breach of contract).

⁵ Marzetti v. Williams, 1 B. & Ad. 415, per Lord Tenterden, C. J.; Story on Contracts, § 11; Keener on Quasi Contracts, 5. An implied promise or

§ 640. **Quasi-contracts or contracts implied in law.**—There is a distinction between contracts which may be implied from the acts of parties where there was an intention to contract, although not expressed, which have been called “contracts implied in fact,” and contracts implied in law, where there is no intention to create a contract, and no agreement of the party, but where the law has imposed an obligation which is enforced as if it were an obligation arising *ex contractu*.¹ In this class of cases the law prescribes the rights and liabilities of persons between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability similar to the rights and liabilities in certain cases of express contract. Thus, if one man has obtained money from another, through the medium of oppression, imposition, extortion or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrong-doer to restore it to the rightful owner, although it is obvious that this is the opposite of his intention.² Implied or constructive contracts of this class are more properly called *quasi-contracts*.³

contract is but an express promise proved by circumstantial evidence, per Allen, J., in *McCoun v. New York, etc., R. Co.*, 50 N. Y. 176. “The difference between express and implied contracts is merely a difference in the mode of proof.” *Church v. Imperial Gas Light and Coke Co.*, 6 Ad. & E. 846, per Lord Denman, C. J. “The expression ‘implied contract’ is perhaps open to objection in that it seems to admit that an entire contract in all its parts may be implied. The parties to a contract can never be implied, nor the subject-matter, nor the consideration. These must be shown. But the promise which is necessary to complete a contract may be implied,” per Andrews, J., in *Davis v. Town of Seymour* (1890), 59 Conn. 531.

¹ *Inhabitants of Milford v. Commonwealth*, 144 Mass. 64. Obligations having a lawful source other than agree-

ment were designated by the Roman jurists as *quasi ex contractu*, as springing neither from a contract nor delict and yet making a nearer approach to the former character than the latter. Hare on Contracts, 103.

² *People v. Speir*, 77 N. Y. 144.

³ “It has been usual with English critics to identify the *quasi-contracts* with implied contracts; but this is an error, for implied contracts are true contracts, which *quasi-contracts* are not. In implied contracts, acts and circumstances are the symbols of the same ingredients which are symbolized, in express contracts, by words.

* * But a *quasi-contract* is not a contract at all. The commonest sample of the class is the relation subsisting between two persons, one of whom has paid money to the other through mistake. The law, consulting the interests of morality, imposes an obli-

§ 641. **The same subject continued.**—The term “implied contract” is sometimes used to designate legal obligations, which, in fact, are not contracts at all, but are considered so only by a legal fiction for the sake of the remedy.¹ A judgment for damages, estimated in money, is sometimes called a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered, and, by a fiction of law a promise to pay is implied where such legal obligation exists. It is on this principle that an action *ex contractu* will lie upon a judgment.² If the party obtain the money of another by mistake, it is his duty to refund it, not from any agreement on his part, but from the general obligation to do justice, which rests upon all persons.³ As it has been customary to regard all obligations as arising *ex contractu* or *ex delicto*, it is readily seen why obligations created by law should have been treated as contracts.⁴

gation on the receiver to refund; but the very nature of the transaction indicates that it is not a contract, inasmuch as the convention, the most essential ingredient of contract, is wanting.” Maine’s Ancient Law, 3d Am. ed., 332. “In contracts it is the consent of the contracting parties which produces the obligation, in *quasi*-contracts there is not any consent. The law alone, or natural equity, produces the obligation by rendering obligatory the fact from which it results. Therefore, these facts are called *quasi*-contracts, because without being contracts, they produce obligations in the same manner as actual.” 1 Pothier on Obligations, [114]. Prof. Keener in substituting the term “*quasi*-contract” for the term “contract implied in law” has followed the lead of Sir Frederick Pollock and Sir William Anson. He states that *quasi*-contracts may be said in general to be founded: 1. Upon a record; 2. Upon a statutory, or official, or customary duty; 3. Upon the doctrine that no one shall be allowed to enrich

himself unjustly at the expense of another. Keener on *Quasi*-Contracts, 16.

¹ Bixby v. Moor, 51 N. H. 402. “The idea of a contract implied in law is a legal fiction, invented and used for the sake of the remedy, to enforce the performance of a legal duty.” Commercial Bank v. Pfeiffer, 22 Hun, 327.

² Louisiana v. Mayor, 109 U. S. 285.

³ Steamship Co. v. Joliffe, 2 Wall. 450.

⁴ Prof. J. B. Ames on “Implied Assumpsit,” 2 Harvard Law Rev. 64. “A statute liability wants all the elements of a contract, consideration and mutuality as well as the assent of the parties.” Per Allen, J., in McCoun v. New York, etc., R. Co., 50 N. Y. 176. “In the action of assumpsit, as the word assumpsit implies, whether it be special or *indebitatus assumpsit*, a promise must always be alleged, and at one time it was an allegation which had to be proved. It was only natural, therefore, that the courts in using a purely contractual remedy to give relief in a

§ 642. **Illustrations.**—Where one person renders services for another, which are known to and accepted by him, the law ordinarily implies a promise to pay therefor.¹ Where one person employs another to labor for him, or to render him other services, or where a guest enters an inn and takes refreshment or lodging, although nothing is stipulated concerning price or payment, the law is said to imply a contract and a promise to pay a reasonable sum for the refreshments or services received.² The possession and beneficial enjoyment of real prop-

class of cases possessing none of the elements of contract should have resorted to fictions to justify such a course. This was done in the extension of assumpsit to *quasi*-contract, and the insuperable difficulty of proving a promise where none existed was met by the statement that 'the law implied a promise.' The statement that the law imposed the obligation would not have met the difficulties of the situation, since the action of assumpsit presupposed the existence of a promise. The fiction of a promise was adopted then in this class of cases solely that the remedy of assumpsit might be used to cover a class of cases where, in fact, there was no promise." Keener on *Quasi-Contracts*, 14. In *Sceva v. True*, 53 N. H. 627, Ladd, J., said: "There is a class of legal rights, with their correlative legal duties, analogous to the *obligationes quasi ex contractu* of the civil law which seem to lie in the region between contracts on the one hand, and torts on the other, and to call for the application of a remedy not strictly furnished either by actions *ex contractu*, or actions *ex delicto*. The common law supplies no action of *duty*, as it does of assumpsit and trespass; and hence the somewhat awkward contrivance of this fiction to apply the remedy of assumpsit where there is no true contract, and no promise to support it."

¹ *McGarvy v. Roods*, 73 Iowa, 363; *Cowan v. Musgrave*, 73 Iowa, 384; *Blount v. Guthrie*, 99 N. C. 93; *McMillan v. Page*, 71 Wis. 655; *Johnson v. The Frank S. Hall*, 38 Fed. Rep. 258; *Alabama, etc., R. Co. v. Hill*, 76 Ala. 303. Where a railroad company has been carrying the mails and receiving pay therefor, no express contract being proven, the law implies a contract. *Railroad Co. v. United States*, 101 U. S. 543. Where services are rendered by one person to another and knowingly accepted, unless there is something in the relation of the parties, the nature of the services rendered, or other circumstances to rebut the presumption, the law will presume an obligation to pay therefor. *Hood v. League* (1894), 102 Ala. 228; 14 So. Rep. 572.

² 20 Am. Jour. 5. Sir William Blackstone gives this example of an implied contract: "If I employ any person to do any business for me or to perform any work, the law implies that I undertook or contracted to pay him as much as his labor deserves." 2 Com. 443; *Lewis v. Trickey*, 20 Barb. 387; *Weston v. Davis*, 24 Maine, 374. An acceptance of beneficial services raises an implied assumpsit. *Donovan v. Halsey, etc., Engine Co.*, 58 Mich. 38. One who employs another to perform certain services for his benefit, without any agreement as to terms, impliedly agrees to pay reasonable com-

erty with the permission of the owner is ordinarily sufficient to sustain an action upon an implied agreement for use and occupation.¹ On a purchase of goods, upon which no price is fixed, the law implies that the buyer will pay a reasonable price for them.² Where the government, in emergencies, takes private property into its use, a contract to re-imburse the owner is implied.³ Where a telephone was left on premises by parties, who sold the business conducted on said premises, and the telephone was used by the purchasers of the business, a duty to make compensation arose from the circumstances, and a contract to do so will be implied.⁴ Where an invalid woman not a relative was received into a family, and furnished a room with board and nursing, the law raised an implied contract that she was to pay the reasonable value of the boarding and nursing.⁵ Ordinarily it is enough for a party claiming compensation for services rendered without any express contract, to show them to have been performed with the knowledge and assent of the defendant, and their value, in order to recover such value.⁶

§ 643. Further illustrations.—There is an implied contract with a common carrier, wharfinger, warehouse keeper, or other bailee, to be answerable for the goods intrusted to their care, and with builders and their workmen that they perform their business in a workman-like manner.⁷ The law implies a

pensation for the services. *Humes v. Decatur, etc., Co.* (1893), 98 Ala. 461; 13 So. Rep. 368.

¹ *Osgood v. Dewey*, 13 Johns. 240; *Coit v. Planer*, 4 Abb. Pr. (N. S.) 140; *Baxter v. West*, 5 Daly, 460; *Collyer v. Collyer*, 113 N. Y. 442.

² *Hoadly v. McLaine*, 10 Bing. 482. "It is clear that a contract for the sale of a commodity, in which the price is left uncertain, is, in law, a contract for what the goods shall be found to be reasonably worth," per Tindal, C. J.

³ *United States v. Russell*, 13 Wall. 623 (seizure of steamers under a military emergency during the rebellion);

United States v. Gill, 20 Wall. 517 (where the government used hay belonging to a person); *Schillinger v. United States*, 24 Ct. Cl. 278.

⁴ *McSorley v. Faulkner* (1892), 18 N. Y. Supl. 460.

⁵ *McQueen v. Wilson, Admr.* (1892), 51 Mo. App. 138.

⁶ *Page v. Marsh*, 36 N. H. 305.

⁷ *Boster v. Chesapeake and Ohio Ry. Co.* (1892), 36 W. Va. 318 (contract of common carrier in transporting passengers); *Bank of Orange v. Brown*, 3 Wend. 158 (contract of common carrier to carry goods); 1 *Comyn on Contracts*, 6.

promise on the part of a principal to indemnify a surety.¹ Where one person, at the request of another, becomes surety for a third, the law raises an implied promise of indemnity on the part of the one at whose request the contract was entered into.² Whenever necessities are supplied to a person who, by reason of disability, can not himself contract, as in case of a lunatic, the law implies an obligation on the part of such person to pay for such necessities out of his own property.³ An infant is held liable for necessities furnished in the absence of an express contract. The law implies a promise to pay, from the necessity of his situation, just as in the case of a lunatic.⁴ If a person furnishes necessities to a wife, the law implies a promise on the part of the husband to pay therefor.⁵

¹ *Martin v. Ellerbe's Adm'r*, 70 Ala. 326; *Brandt on Suretyship*, § 205. "When courts of law, a long time since, fell in line with a part of the jurisdiction of chancery, and substituted the equitable remedy of an action of assumpsit upon the common money counts for the more dilatory and expensive proceeding by a bill in equity in certain cases, they permitted the person thus standing in the situation of surety, who had been compelled to pay money for the principal debtor, to recover it back again from the person who ought to have paid it, in this equitable action of assumpsit as for money paid, laid out and expended for his use and benefit." *Hunt v. Amidon*, 4 Hill, 345.

² *Konitzky v. Meyer*, 49 N. Y. 571. The law implies a contract between cosureties to contribute ratably towards discharging any liability incurred on behalf of the principal. *Bradley v. Burwell*, 3 Den. 61; *Johnson v. Harvey*, 84 N. Y. 363. In *Tobias v. Rogers*, 13 N. Y. 59, the surety was held not liable to contribute because relieved from liability by a discharge in bankruptcy. While the court held that contribution was not founded on

contract, it was said that the law following equity will imply a promise to contribute in order to afford a remedy.

³ *Rhodes v. Rhodes* (1890), L. R. 44 Ch. Div. 94. "It is asked, Can there be an implied contract by a person who can not himself contract in express terms? The answer is, that what the law implies on the part of such a person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessities. I think that the expression 'implied' contract is erroneous and very unfortunate." *Per Cotton, L. J.*

⁴ *Trainer v. Trumbull*, 141 Mass. 527; *Parsons v. Keys*, 43 Texas, 557; *Gay v. Ballou*, 4 Wend. 403; *Epperson v. Nugent*, 57 Miss. 45.

⁵ *Cunningham v. Reardon*, 98 Mass. 538; *Eiler v. Crull*, 99 Ind. 375. A man under a duty to supply his wife with necessities, and who fails to perform it, can not escape liability to one who does furnish her with necessities upon the ground that he gave notice that he would not be responsible for them. *Watkins v. De Armond* (1883), 89 Ind. 553. When a parent is willing to support his infant child, and a relative, without his request but with his

§ 644. When silence imports assent.—In the case of contracts which are made by the acts of the parties, and not by proposal and acceptance in words, silence, to give consent, must be silence under such circumstances as amounts to acquiescence.¹ Whether the silence of a person, with a knowledge that another was doing valuable work for his benefit, and with the expectation of payment, indicates that consent which gives rise to the inference of a contract, must be determined by the circumstances of each case. In an action to recover the value of one-half of a party wall, erected partly on the estate of the plaintiff and partly on that of the defendant, the jury might infer a promise on the part of the defendant to pay, if the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him to so act without objection.² There are some cases so free from ambiguity that a court can legally presume the intention of the parties by their actions; but in all cases of doubt it is well settled to be a matter proper for the determination of a jury to determine from the evidence whether a promise can be inferred or not.³

assent, receives the child into his family and supports it as a child of his own, no agreement of the father to pay for such support can be implied. *Chilcott v. Trimble*, 13 Barb. 502. In the case of *Van Valkinburgh v. Watson*, 13 John. 480, it is said that when the infant is *sub potestate parentis*, there must be a clear and culpable omission of duty on the part of the parent to afford support, in order to authorize any other person to act for and charge the expense to the parent.

¹ *Anson on Contracts*, 16. The silence of either party will import assent to the terms of a contract, whenever it would have been incumbent on him to express his dissent, if he did not agree thereto, or where his silence is explicable only by the presumption of his assent. 1 *Story on Contracts*, § 491.

² *Day v. Caton*, 119 Mass. 513. In *Bailey v. Rutjes*, 86 N. C. 517, it is said: "It is unquestionably true that if, in the absence of all express understanding, one stands by in silence (and much more if he actively encourages) and sees work done, or material furnished for work upon premises belonging to him, and of which he must necessarily get the benefit, and afterwards he does accept and enjoy it, a promise to pay the value thereof may be inferred, and ordinarily will be." And whether the circumstances are or are not sufficient to justify the inference of an implied contract, is a fact to be determined by the jury. *Campbell v. Day*, 90 Ill. 363; *Tascott v. Grace*, 12 Ill. App. 639.

³ *Hart v. Hart's Adm'r*, 41 Mo. 441; *Godfrey v. Haynes*, 74 Maine, 96; *Keel v. Larkin* (1882), 72 Ala. 493;

Each case must be governed by the facts and circumstances developed.¹

§ 645. When the law will not imply a contract.—The law will not imply a promise when there is a subsisting express agreement covering the same subject, whether such agreement be verbal or in writing. Lord Kenyon, C. J., said in *Cutter v. Powell*:² “That where parties have come to an express contract none can be implied has prevailed so long as to be reduced to an axiom in the law.” If a written contract exists it takes precedence of all others, and forms the only contract between the parties during the time of its existence.³ There can be no implied contract to pay rent for use and occupation of premises where there is a written lease.⁴ Where services have been performed under an express contract an action to recover compensation for such services must be founded on that contract and on that only, unless in consequence of the fault or consent of the defendant.⁵ The existence of an express con-

Oatfield v. Waring, 14 John. 188; *Hart v. Boller*, 15 S. & R. 162; 2 Greenleaf on Evidence, § 519.

¹ *Botkin v. McIntyre*, 81 Mo. 557. When the conduct of the parties is ambiguous, or the testimony conflicting, it is always a question for the jury to determine whether or not there was a mutual agreement or understanding. *Seals v. Edmondson*, 73 Ala. 295.

² 6 T.R. 324; *Toussaint v. Martinnant*, 2 T. R. 100; *Draper v. Randolph*, 4 Harr. (Del.) 454; *Brown v. Fales*, 139 Mass. 21; *Mass. General Hospital v. Fairbanks*, 129 Mass. 78; *Ford v. McVay*, 55 Ill. 119; *Galloway v. Holmes*, 1 Doug. (Mich.) 330; *Lynch v. Onondaga Salt Co.*, 64 Barb. 558; *Vandekarr v. Vandekarr*, 11 Johns. 122; *Creighton v. City of Toledo*, 18 Ohio St. 447; *Preston v. Yates*, 24 Hun, 534; *Lindersmith v. South Missouri Land Co.*, 31 Mo. App. 258; *Work v. Beach* (1889), 53 Hun, 7. “As in physics, two solid bodies can not

occupy the same space at the same time, so in law and common sense, there can not be an express and an implied contract for the same thing, existing at the same time. This is an axiomatic truth.” *Walker v. Brown*, 28 Ill. 378. Where the parties have made an express contract the law will not imply and raise a contract different from that which the parties have entered into, except upon some farther transaction between the parties. *Britton v. Turner*, 6 N. H. 481.

³ *North v. Nichols*, 37 Conn. 375. “For there can be but one contract at the same time between the same parties touching the same thing,” per Park, J.

⁴ *North v. Nichols*, 37 Conn. 375.

⁵ A member of the society of Shakers who rendered services to said society for twelve years, having signed a covenant on becoming a member that he would contribute his services to the society and not make any claim therefor, can not recover on an im-

tract for hire for one year, at a stated weekly compensation, excluded any implied agreement or understanding about wages, and the contract price can not be increased without a further agreement to that effect between the parties.¹

§ 646. The same subject continued.—The rule that where there is an express contract the law will not imply one, is only applicable to those cases in which the express contract and that implied by law relate to the same subject-matter, and where the provisions of the express contract are intended to control and supersede those which would otherwise be raised by implication.² When an express promise is the same as the law implies, an action lies on either of them.³ In the case of a surety who had a written promise of indemnity from the principal, and sued on the implied promise, it was held that as the written contract contained nothing more than what the law would imply, the plaintiff might make use of his written promise or sue on his implied promise as he pleased.⁴ Where both parties have departed from the special contract suit can be maintained on the implied promise.⁵ A contract will not be implied when an express contract would for any reason be invalid.⁶ No contract can be implied from the acts of parties, or result by law from benefits received, but such as the same parties were competent expressly to enter into.⁷ A mere moral obligation is not a sufficient consideration to raise an implied promise.⁸

§ 647. Waiver of tort and suing in assumpsit.—Obligations are created in consequence of frauds or negligence, and in either case the law compels reparation and permits the tort to be waived.⁹ A carrier's breach of duty relating to the carriage

implied promise for the value of his services. *Waite v. Merrill*, 4 Greenl. 102.

¹ *Schurr v. Savigny* (1891), 85 Mich. 144.

² *Commercial Bank v. Pfeiffer*, 22 Hun, 327.

³ *Princeton, etc., Turnpike Co. v. Gulick*, 16 N. J. Law, 161; *Maynard v. Tidball*, 2 Wis. 34; *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Cornwall v. Gould*, 4 Pick. 444.

⁴ *Gibbs v. Bryant*, 1 Pick. 118.

⁵ *Goodrich v. Lafflin*, 1 Pick. 57; *Ladd v. Seymour*, 24 Wend. 60.

⁶ *Chase v. Second Ave. R. Co.*, 97 N. Y. 384; 49 Am. Rep. 531.

⁷ *Church v. Imperial Gas Light and Coke Co.*, 6 Ad. & E. 846, per Lord Denman, C. J.

⁸ *Newlin v. Duncan*, 1 Harr. (Del.) 204.

⁹ *People v. Speir*, 77 N. Y. 144. "Thus it is an actionable wrong to retain

of passengers may be treated as a violation of contract and declared as in assumpsit, or may be treated as a tort.¹ One whose goods have been taken from him or detained unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrong-doer sell the goods and receive the money, waive the tort, affirm the sale, and have an action for money had and received for the proceeds.² It has been held by many courts of high authority that assumpsit can not be maintained unless the property of which the plaintiff has been deprived has been converted into money, or an equivalent thereto.³ Other cases hold that if the defendant has in any manner converted the property to his use, suit may be maintained as an implied contract. The weight of authority in this country is in favor of the right to waive the tort, even in such a case.⁴

money paid by mistake, or on a consideration which has failed, and the like, but in the eighteenth century the fiction of a promise 'implied in law' to repay the money so held was introduced, and afforded 'a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex æquo et bono* he ought to refund,' and even to cases where goods taken or retained by wrong had been converted into money. The plaintiff was said to 'waive the tort' for the purpose of suing in assumpsit on the fictitious contract." Webb's *Pollock on Torts*, 659. The doctrine of waiver of tort is simply a question of the election of remedies. Keener on *Quasi-Contracts*, 159; *Cooper v. Cooper*, 147 Mass. 370.

¹ *Boster v. Chesapeake, etc., Ry. Co.* (1892), 36 W. Va. 318; *Bank of Orange v. Brown*, 3 Wend. 158.

² *Jones v. Hoar*, 5 Pick. 285; *Lindon v. Hooper*, Cowp. 414; *Lightly v. Clouston*, 1 Taunt. 112; *Cummings v. Noyes*, 10 Mass. 433; *Putnam v. Wise*, 1 Hill, 234; *Gilmore v. Wilbur*, 12 Pick. 120; *Rodgers v. Maw*, 15 M. & W. 444;

Oughton v. Seppings, 1 B. & Ad. 241; *Buckland v. Johnson*, 15 C. B. 145; 23 L. J. (C. P.) 204; *Smith v. Baker*, L. R. 8 C. P. 350.

³ *Jones v. Hoar*, 5 Pick. 285, leading case in this country; *Barlow v. Stalworth*, 27 Ga. 517; *Saville v. Welch*, 58 Vt. 683; *Emerson v. McNamara*, 41 Maine, 565; *Paine v. McClinchy*, 56 Maine, 50; *Androscoggin, etc., Co. v. Metcalf*, 65 Maine, 40; *Smith v. Smith*, 43 N. H. 536; *Fuller v. Duren*, 36 Ala. 73; *Isaacs v. Hermann*, 49 Miss. 449.

⁴ *Terry v. Munger* (1890), 121 N. Y. 161; *Abbott v. Blossom*, 66 Barb. 353; *Evans v. Miller*, 58 Miss. 120; *Budd v. Hiler*, 27 N. J. Law, 43; *Barker v. Cory*, 15 Ohio, 9; *Tightmeyer v. Monogold*, 20 Kan. 90; *Norden v. Jones*, 33 Wis. 600; *Welch v. Bagg*, 12 Mich. 41; *Lehmann v. Schmidt*, 87 Cal. 15; *Newton Manufacturing Co. v. White*, 53 Ga. 395; *Toledo, etc., R. Co. v. Chew*, 67 Ill. 378; *Morford v. White*, 53 Ind. 547; *Aldine Manufacturing Co. v. Barnard*, 84 Mich. 632; *Logan v. Wallis*, 76 N. C. 416; *Walker v. Duncan*, 68 Wis. 624; *Ferrill v. Mooney*, 33 Texas, 219; *Cooley on Torts*, 95.

The contract implied is one to pay the value of the property, as if it had been sold to the wrong-doer by the owner.¹

§ 648. Liability of corporations on implied contracts.—Chancellor Kent says, the doctrine that corporations can be bound, by implied contracts, to be deduced by inference from corporate acts, without either a vote, or deed, or writing, is generally established in this country with great clearness and solidity of argument.² Thus a contract was implied on the part of a city, which was bound to support its paupers, and which had refused to pay a person who had furnished a pauper with necessities.³ All duties imposed upon a corporation by law, and all services performed at its request, raise implied promises binding on the corporation, if, of course, no statute is thereby infringed.⁴ The general principle of the liability of corporations on an implied contract, where the law presumes a contract to restore money or property obtained by mistake or without authority of law, is supported by a large number of authorities.⁵ In California, where the municipal officers con-

¹ *Berly v. Taylor*, 5 Hill, 577; *Cummings v. Vorce*, 3 Hill, 283; *Spoor v. Newell*, 3 Hill, 307; *Pomeroy's Remedies*, §§ 567, 568, 569. Where defendants were charged with detaching and carrying away from a mill the machinery and using it for themselves it was held upon a perusal of the complaint that the action was of a nature *ex contractu* and not *ex delicto* for the wrong done plaintiff by the conversion of the property. *Goodwin v. Griffis*, 88 N. Y. 629.

² *Kent's Commentaries*, 291; *Peterson v. Mayor*, 17 N. Y. 449; *Bank of Columbia v. Patterson*, 7 Cranch, 299 (1813, leading case). In *The Harlem Gas Light Co. v. Mayor, etc.*, of New York, 3 Robt. 100, affirmed in 33 N. Y. 309, it was held that a municipal body is subject, like an individual, to liability for benefits enjoyed under an executed contract, although voidable or even void. *McCloskey v. City of Albany*, 7 Hun, 472 (wood

furnished an alms-house); *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453, opinion of Field, J.; *Mayor of Nashville v. Toney*, 10 Lea, 643 (care of indigent sick); *Rider v. Union India Rubber Co.*, 28 N. Y. 379 (use of property).

³ *Seagraves v. Alton*, 13 Ill. 366; *Eckman v. Township of Brady* (1890), 81 Mich. 70. In *Tomlinson v. Bentall*, 5 Barn. & Cress. 738, the parish was held liable for a surgeon's attendance upon a pauper, incurred after due notice to the overseer of the poor, and neglect by the parish officers to provide the necessary relief.

⁴ *Mr. Justice Story to Mr. Justice Coleridge*, 2 *Story's Life and Letters*, 335; *Angell and Ames on Corporations*, § 238; *Low v. Connecticut, etc., Railroad*, 45 N. H. 370.

⁵ *Chapman v. County of Douglas*, 107 U. S. 348; *Louisiana v. Wood*, 102 U. S. 294; *Mayor, etc., of Nashville v. Ray*, 19 Wall. 468; *Bank of U. S. v. Dand-*

vayed real estate by virtue of an ordinance which was void, it was held that the sales were absolutely void, that no title passed to the supposed purchasers, and that the corporation was liable in an action brought by them to recover the purchase-money, although that money had already been appropriated for municipal purposes.¹ Where labor has been performed for a corporation with the knowledge of the directors and general manager, the corporation will be bound to pay a *quantum meruit*, in the absence of any express contract under which the labor was performed.² But implied contracts can not be raised against a municipal corporation where, by its charter, it can only contract in a prescribed way, except it be a promise for money received or property appropriated under the contract.³

§ 649. Acceptance of benefits—Gratuitous services.—"A mere voluntary courtesy will not have consideration to uphold an assumpsit."⁴ For it is not reasonable, it has been said, that one man should do another a kindness, and then charge him with a recompense.⁵ The law will not permit what was in-

ridge, 12 Wheat. 64; *Hitchcock v. Galveston*, 96 U. S. 341; *Albany City Nat. Bank v. Albany*, 92 N. Y. 363; *Moore v. Mayor, etc., of New York*, 73 N. Y. 238, and other cases cited in 1 *Beach on Public Corporations*, § 226.

¹ *Pimental v. San Francisco*, 21 Cal. 351; *Grogan v. San Francisco*, 18 Cal. 590.

² *Goodwin v. Union Screw Co.*, 34 N. H. 378; *Donovan v. Halsey Fire Engine Co.*, 58 Mich. 38, where it was held that although the by-laws provided that no debt could be contracted except by order of the board of directors the corporation was liable for services performed for its benefit and with its knowledge.

³ *Dillon on Municipal Corporations*, § 459, citing *McSpedon v. Mayor of New York*, 7 Bosw. (N. Y.) 601; *McCracken v. San Francisco*, 16 Cal. 591; *Dickinson v. Poughkeepsie*, 75 N. Y. 65. In a New York case where sewers were furnished under an unau-

thorized contract, the court held that the contractor could not recover on the express contract, but indicated that "if, as alleged, the city has obtained his property without authority, but has used and received the avails of it, it would seem that independently of the express contract an implied contract would arise to make compensation." *Nelson v. Mayor, etc.*, 63 N. Y. 535. Where a municipal body is required to make certain contracts in a prescribed way, and forbidden to make them in any other way, there is left no room for an implied obligation. *Richardson v. County of Grant*, 27 Fed. Rep. 495. Per Woods, J.

⁴ *Lampleigh v. Brathwait*, Hob. 105b; 1 *Smith's Leading Cases* (9th Am. ed.), 281. Any act done for another without his request is deemed in law a voluntary courtesy, for which no action can be maintained. *Forbis v. Inman* (1892), 23 Ore. 68.

⁵ *Osborne v. Rogers*, 1 Saund. 264.

tended at the time as an act of kindness or courtesy to be subsequently converted into the foundation of a pecuniary demand.¹ Where there is a spontaneous service as an act of kindness and no request, or where the circumstances account for the transaction on some ground more probable than that of a promise of recompense, no promise will be implied.² If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from fire, the law considers the service rendered as gratuitous, and it therefore forms no ground of action.³ The mere acceptance of such beneficial services rendered without a request, and without any subsequent promise to pay for the same, creates no obligation to pay.⁴ No person can make another his debtor against his will,

¹ *Cole v. Clark* (1893), 85 Maine, 336. In *Caldwell v. Eneas*, 2 Mills (S. C.), 348, it was held that work in repairing the fences of another voluntarily done and without the request of such person, could not be recovered for. *Hort v. Norton*, 1 McCord (S. C.), 22. Extra services rendered without the request or knowledge of the employer to be treated as gratuitous. No one is bound to pay for volunteered services rendered under circumstances which do not fairly indicate an expectation of reward. *Coe v. Wager*, 42 Mich. 49; *Covel v. Turner* (1889), 74 Mich. 408 (an old man living with a friend, doing chores, etc. No bargain was made, and nothing said about terms of employment); *St. Jude's Church v. VanDenberg*, 31 Mich. 287 (voluntary services as sexton); *Boston v. District of Columbia*, 19 Ct. of Cl. 31.

² *Woods v. Ayres*, 39 Mich. 345; *Lange v. Kaiser*, 34 Mich. 317; *Otis v. Jones*, 21 Wend. 394; *Ingraham v. Gilbert*, 20 Barb. 151; *Jones v. Woods*, 76 Pa. St. 408; *Cicotte v. Corporation, etc., of Church of St. Anne*, 60 Mich. 552; *Nicholson v. Chapman*, 2 H. Black, 254; *Smart v. Guardians of the Poor*, 36 E. L. & E. 496. If a person invite a stranger to his

house, he can not turn around and make him a debtor for food, attendance, or necessities furnished him. *Mariner v. Collins*, 5 Harr. 290.

³ *Bartholomew v. Jackson*, 20 John. 28. Services rendered voluntarily to preserve another man's property from destruction by flood are presumed to be gratuitous. *New Orleans, etc., R. Co. v. Turcan*, 46 La. 155; 15 So. Rep. 187.

⁴ *Tascott v. Grace* (1883), 12 Ill. App. 639; *Wightman v. United States*, 23 Ct. Cl. 144 (extra services of mail contractor). Where parties were in the habit of rendering mutual services to each other without any agreement as to payment, and although, during the time, they had pecuniary transactions to a considerable amount, their services were not brought, or intended to be brought, into their accounts, the services will be regarded as matters of mutual accommodation, for which neither party intended to make any charge against the other. *Potter v. Carpenter*, 76 N. Y. 157. Where there is no legal obligation a subsequent promise will not make the defendant liable. *Dearborn v. Bowman*, 3 Metc. 155; *Mills v. Wyman*, 3 Pick. 207. If the consideration be

and a voluntary payment of the debt of another, without his knowledge or consent, the party paying being under no legal obligation to pay, will ordinarily be regarded a gratuity, and the money can not be recovered back.¹ If a person renders a service without intending to charge for the same, and this is so understood by the other party, no recovery can be had for such service.² But where one is induced under a mistake of fact, through the fraud or concealment of another, to render valuable services to the latter, he may recover the reasonable value thereof, though they were rendered without any expectation at the time of being paid for.³

§ 650. Acceptance of benefits where a promise to pay is implied.—Where there is no relationship between the parties and one accepts and retains the beneficial results of another's services, which he had no reason to suppose were gratuitous, and which he could or not accept at his option, the law will imply a previous request for the services and a promise to pay what they were reasonably worth.⁴ If a man build a house upon

past, and the party derives no benefit from it, or if he was not legally bound to pay, or if the services were intended to be gratuitous at the time they were rendered, in the absence of a previous request, the subsequent promise would be *nudum pactum*. But if the consideration be past, and the party derives a benefit, or if he is legally bound to pay, the subsequent promise implies a previous request. *Forbis v. Inman* (1892), 23 Ore. 68.

¹ *Beard v. Horton* (1888), 86 Ala. 202; *Breneman's Appeal*, 121 Pa. St. 641. "When one volunteers to pay a debt for another, the latter is under no obligations to reimburse it."

² *Goode v. United States* (1890), 25 Ct. Cl. 261. Where one intrudes his services upon another against his will, and without his assent express or implied, no recovery can be had therefor. *Fox v. Sloo*, 10 La. Ann. 11; *Utica, etc., Ry. Co. v. United States*, 22 Ct. Cl. 265.

³ *Boardman v. Ward* (1889), 40 Minn. 399; *Rickard v. Stanton*, 16 Wend. 25.

⁴ *Linn v. Linderoth* (1890), 40 Ill. App. 320; *Chamness v. Cox* (1891), 2 Ind. App. 485; *Ford v. Ward*, 26 Ark. 360; *Perry v. Bailey*, 12 Kan. 539; *Moreland Township v. Davidson Township*, 71 Pa. St. 371; *Cincinnati, etc., R. Co. v. Bensley*, 51 Fed. Rep. 738; *De Wolf v. City of Chicago*, 26 Ill. 444; *Shelton v. Johnson*, 40 Iowa, 84; *Laude v. Seymour*, 24 Wend. 60; *Lockwood v. Robbins*, 125 Ind. 398; *Nimmo v. Walker*, 14 La. Ann. 581; *Allen's Admx. v. Richmond College*, 41 Mo. 302; *In re Cooper* (1894), 6 Misc. R. (N. Y.) 501; 27 N. Y. Supl. 425; *McQueen v. Wilson* (1892), 51 Mo. App. 138. Although a request to do certain work may not have been satisfactorily proved against a corporation sued upon a *quantum meruit*, yet if the plaintiff in good faith and with full knowledge on the part of the defend-

the land of another, with his assent, the law raises an obligation on his part to pay its value, since he has been benefited to that extent, and, if he did not intend to pay, it was his duty to forbid its construction, or at least to give notice that he would not be chargeable. So, if he had expressly contracted to pay for the house, provided it were built in a certain manner and within a certain time, and he accepted it, although it was not built in the manner or within the time contracted for, he is bound to pay its value, not exceeding the contract price, less any damages he may have suffered by reason of the failure of the other party to comply with the exact conditions of the contract.¹ If a man serves a stranger in the capacity of clerk, or of a menial servant, or servant in husbandry, for a continued period, the law presumes that the service has been rendered in fulfillment of a contract of hiring and service, and if the party has served without anything having been said as to wages, the law presumes that there was a contract for customary and reasonable wages.² If services are rendered in expectation of remuneration by a legacy, and there is nothing in the conduct or language of the person benefited by the services to induce such an expectation, they are deemed voluntary and gratuitous.³ But where, from the circumstances of the case, it is manifest that it was understood by both parties that compensation should be made by will, and none is made, an action lies to recover what the services were reasonably worth.⁴

§ 651. The same subject continued—Illustrations.—Where a publisher of a newspaper forwards his newspaper weekly, by

ant, did the work and the defendant availed itself of the fruits of plaintiffs labor it is liable to the extent of the benefit received. *Thomas v. Walnut Land, etc., Co.* (1890), 43 Mo. App. 653.

¹ *Vanderbilt v. Eagle Iron Works*, 25 Wend. 665.

² If a poor person is taken out of charity and provided with food, lodging, clothing and other necessities, and set to work, no contract of hiring and service is implied therefrom. In

such cases, an express hiring must be proved in order to support a claim for wages. *Bennett v. Stephens*, 8 Ore. 444.

³ *Thompson v. Stevens*, 71 Pa. St. 161; *Osborn v. Governors of Guy's Hospital*, 2 Str. 728; *Swires v. Parsons*, 5 W. & S. 357; *Hartman's Appeal*, 3 Grant's Cas. (Pa.) 271.

⁴ *Graham v. Graham*, 34 Pa. St. 475; *Jones v. Jincey*, 9 Gratt. (Va.) 708; *Shakespeare v. Markham*, 10 Hun, 311.

mail, directed in the usual manner to a party who is not a regular subscriber therefor, and such party takes the newspaper from the post-office, and pays the postage, and the publisher demands payment therefor at the usual times and rates, and the party taking the paper refuses to pay therefor, saying he is not a subscriber, but continues, after such demand, to receive the newspaper as before, the law will imply a promise to pay by such party, according to the usual terms of such publication.¹ A consulting surgeon who, at the request of the attending surgeon, rendered services to a patient with his consent, may recover from the patient, upon an implied promise, the value of such services, notwithstanding an agreement between the patient and the attending surgeon that the latter should pay for such services, if the consulting surgeon did not expressly or impliedly assent to such agreement.² A similar ruling was made in regard to the services of assisting attorneys who were brought into the case by an attorney who had agreed to defend the action and pay all attorney's fees. The parties receiving the benefit of the assisting attorney's services were held liable to pay for the same, on the ground that the services were performed with their knowledge and consent, the assisting attorneys not knowing of the agreement referred to.³

§ 652. Request without benefit.—Even though services are rendered at the request of another, yet, if they are not rendered for his benefit, and there is no legal liability upon him to have such labor performed, and the request, in view of the circumstances, does not necessarily imply an employment or promise to pay by the person making the request, an action can not be predicated against him upon the naked request.⁴ An implied promise to pay is not raised against a person who requests a physician to perform services for a patient, unless the relation of that person to the patient is such as raises a

¹ *Fogg v. Portsmouth Atheneum*, 44 N. H. 115; 82 Am. Dec. 191. "If the defendants would have avoided the liability to pay the plaintiffs, they might reasonably have returned the paper to the plaintiffs, or given them notice that they declined to take the

paper longer." *Ward v. Powell*, 3 Harr. (Del.) 379.

² *Garrey v. Stadler* (1886), 67 Wis. 512.

³ *McCrary v. Ruddick*, 33 Iowa, 521.

⁴ *Wood on Master and Servant*, § 69.

legal obligation on his part to call in a physician and pay for the services. When a husband calls in a physician to attend upon his wife, or where a father calls in a physician to attend upon his minor child, the law implies a promise on his part to pay the reasonable value of the services, because there is a legal obligation on his part to furnish necessities for the patient's benefit, but no such implication arises where one calls in a physician to attend upon a stranger, or upon one to whom he is under no legal obligation to furnish necessities.¹ It has been held that a special request by a father to a physician to attend upon his son, then of full age, but lying sick at the father's house, raised no implied promise on the part of the father to pay for the services rendered.² A master who requests a physician to perform services for his servant does not impliedly promise to pay for them.³

§ 653. Where the law will not imply a promise owing to relationship.—Ordinarily, where services are rendered and voluntarily accepted, the law will imply a promise upon the part of the recipient to pay for them; but where services are rendered by members of a family, living in one household, to each other, or necessities are supplied by one near relation to another, the law will presume that they were gratuitous favors merely, prompted by friendship, kindness and the relationship between them.⁴ And in such case, before the person rendering the service can recover, the express promise of the party served must be shown or such facts and circumstances as will au-

¹ *Meisenbach v. Southern Cooperage Co.* (1891), 45 Mo. App. 232.

² *Crane v. Baudouine*, 55 N. Y. 256; *Boyd v. Sappington*, 4 Watts, 247. In *Smith v. Watson*, 14 Vt. 332, the defendant requested the plaintiff to render medical service to his brother, but it did not appear that he told the plaintiff that he would pay him for the services, or that he said anything to him, or did anything from which the plaintiff could fairly infer that he intended to pay for such services. The court held that the mere fact that the defendant calls upon the plaintiff to

attend his brother would not render him liable to pay for such attendance. *Dunbar v. Williams*, 10 John. 249.

³ *Jesserich v. Walruff* (1892), 51 Mo. App. 270.

⁴ The rule is well settled and repeatedly reiterated by the legal authorities that, as between near relations, board furnished and services rendered do not raise an implied promise to pay for the same, as in the case of strangers. *In re Perris Estate* (1893), 5 Misc. (N. Y.) 149; 25 N. Y. Supl. 716; *Terry v. Bale*, 1 Dem. (N. Y.) 452.

thorize the jury to find that the services were rendered in the expectation by one of receiving, and by the other of making compensation therefor.¹ The relation of parent and child, step-parent and step-child, brother and sister, or the like, existing between persons living together in the same household, creates a strong presumption that no payment or compensation was intended to be made for services rendered by one to the other, beyond that received at the time they were rendered, and the person claiming pay for services, in such a case, must overcome that presumption by clear, direct and positive proof that the relation between the parties was that of debtor and creditor, or servant and master.² Where a party

¹ *Cowan v. Musgrave* (1887), 73 Iowa, 384; *Scully v. Scully*, 28 Iowa, 548. The law is thus aptly stated by Judge Scott, in *Smith v. Myers*, 19 Mo. 433: "The general rule is that, whenever service is rendered and received, a contract of hiring or an obligation to pay will be presumed. This is an undoubted rule between strangers. But a relationship between the parties may exist such as will cause the presumption that the services are acts of gratuitous kindness and affection. The degree of the relationship may strengthen or diminish the implication according to its proximity or remoteness." In *Lantz v. Frey and Wife*, 19 Pa. 366, Lowrie, J., says: "When individuals stand to each other in a family relation, as distinguished from that of master and servant, the law implies no contract for wages." The closer the family relation, the stronger is the presumption that the services are gratuitous. *Woods v. Land*, 30 Mo. App. 176; *Quigly v. Harold*, 22 Ill. App. 269; *Lynn v. Smith*, 35 Hun, 275 (case of husband and wife.)

² In *Havens v. Havens*, 3 N. Y. Supl. 219, cases are cited and the rule reiterated that no recovery can be had for services rendered by and between near relatives living on the

same premises in common, or as members of the same family, without proving an express promise to pay, or proving such facts or circumstances as to make such inference plain. *Davies v. Davies*, 9 C. & P. 87; *Fitch v. Peckham*, 16 Vt. 150; *Davis v. Goodenow*, 27 Vt. 715 (action brought by a grandchild to recover for services rendered to her grandfather); *Keegan v. Estate of Malone*, 62 Iowa, 208 (brother and sister); *Hall v. Finch's Administrator*, 29 Wis. 278 (brother and sister); *Bundy v. Hyde*, 50 N. H. 116 (brother-in-law and sister-in-law); *Collar v. Patterson* (1891), 137 Ill. 403, where a claimant against an estate performed household services for the deceased, who was the husband of the claimant's aunt; *Morris v. Simpson, Executor*, 3 Houst. 568 (suit of a nephew against his uncle for board); *Hays v. McConnell*, 42 Ind. 285 (suit of a niece against an uncle for services); *Cantine v. Phillips*, 5 Harr. 428 (no contract implied for payment of board between father and daughter, or daughter's husband living in the father's house); *Ellis v. Cary, Administrator*, 74 Wis. 176 (services rendered by a step-daughter); *Wall's Appeal*, 111 Pa. St. 460 (services of niece for uncle, claim based on parol promise of uncle to provide for her at his death). Some

went to live in her brother-in-law's family and was received and entertained there, not as a member of the family, but as a boarder, and the board was furnished with the hope of compensation, on the one hand, and the expectation to award it upon the other, a liability was created for payment of such board.¹

§ 654. The same subject continued—Illustrations.—In an action of assumpsit by a party for board and attendance of his wife's mother during sickness, she having been taken sick while on a visit to his house, and furnished with board and attendance for about four or five weeks, and dying soon after her return to her son's house, where she usually resided, it was held that the estate was not liable for food, attendance and necessities furnished, and that if the son-in-law meant to charge her therefor he ought to have given her notice.² Where a girl lived with her grandfather for nine years without any contract as regards compensation, and besides performing household duties rendered assistance in the transaction of his business, claim for compensation made against the estate at her grandfather's death was disallowed, although there was evidence of declarations by the grandfather that she should be

courts speak of the exception to the general rule as restricted to cases where a relationship in blood exists. In *Updike v. Titus*, 2 Beas. (N. J.) 151, Chancellor Green said: "The law implies no promise to pay for services rendered by members of a family to each other, whether by children, parents, grandparents, brother, step-children or other relatives." In *Disbrow v. Durand* (1892), 54 N. J. Law, 343, it was held that the family relation contemplated in the exception is not limited merely by propinquity of kindred, and that the exception stands upon a reason which logically extends it to all members of a household, however remote their relationship, and even to those who, though not of kin, stand in the situation of kindred in one household. In *Horner v. Webster*, 33 N. J. Law, 387, Mr. Justice

Dupue referred to the principle as applying to all cases where the parties stand, in relation to each other, of support on one side and services on the other, citing *Williams v. Hutchinson*, 3 N. Y. 312, and *Robinson v. Cushman*, 2 Denio, 149.

¹ *Huffman v. Wyrick* (1892), 5 Ind. App. 183. In an action to recover for services rendered as nurse to an aunt, who was an invalid for several years immediately preceding her death, and part of the time quite helpless, it was held that it was not to be inferred, simply from the relation which existed between the parties, that the services were intended to be gratuitous, and were rendered with no view of compensation. *Bouie v. Maught* (1892), 76 Md. 440.

² *Mariner v. Collins*, 5 Harr. 290.

well paid for her services.¹ Where persons, having gone through a form of marriage, live together as man and wife, and the woman, after the man's death, learns for the first time that he had a wife living and not divorced from him, she can not recover from his administrator for her services as house-keeper under an implied contract. The relations of the parties, and the circumstances under which the work was performed, negative any implication of an agreement or promise that it should be paid for.² Where a man and woman mutually agreed to live together as husband and wife without being married, and continued the unlawful relation about thirteen years, the woman can not recover on an implied promise for services rendered in keeping house in that relation or for money delivered to the defendant to be used towards paying their family expenses.³

§ 655. Parent and child—Rule as to services rendered.—If a stranger is in the employment of another a contract of hiring is inferred, but if a son is in the employment of his father no such contract is inferred.⁴ The law will not imply an agreement on the part of a parent to pay his daughter, who is living in his family, wages for ordinary services, such as

¹ *Barhite's Appeal*, 126 Pa. St. 404. In regard to these declarations, the court said: "These, however, were but the loose declarations which can almost always be proved in such cases, and refer to future intentions, which may mean a provision by will, or other benefit, to be conferred in some other manner." *Harris v. Smith* (1889), 79 Mich. 54. Where a step-daughter claimed compensation for services rendered in the family for her step-father, a promise by her mother that she should receive compensation made in the presence of the step-father will not bind him unless he knew that she continued her service in reliance upon the promise. That would be such an acquiescence in the arrangement on his part as to

bind him the same as though he had made the promise himself.

² *Cooper v. Cooper*, 147 Mass. 370.

³ *Brown v. Tuttle*, 80 Maine, 162. If there had been an express promise the court would not enforce it as the parties were living together in unlawful relations, and the services rendered and the money furnished were in futherance thereof. *White v. Buss*, 3 Cush. 448; *Gilmore v. Woodcock*, 69 Maine, 118.

⁴ *Hertzog v. Hertzog*, 29 Pa. St. 465; *Guenther v. Birkicht*, 22 Mo. 439, where a step-son continued to reside in the family of his step-father after coming of age. *Sprague v. Waldo*, 38 Vt. 139, where a son-in-law took up his abode with his father-in-law.

house-keeping.¹ Where the relation of parent and child is shown to exist the law will not presume any other.² The parent is not legally entitled to the earnings of his children after they arrive at majority, nor is he legally bound to support them; yet if they live with him as members of his family without any contract or understanding that he shall pay for their services, or receive pay for their maintenance, the law will not imply a promise to pay on either side.³ The presumption is that the child renders the services gratuitously, or in consideration of having a home with his parents, of being furnished with board and clothing, and of receiving care and attention in case of sickness. In order to sustain an action for compensation for services by a child against the father it must be shown by the evidence that a contract existed between the parties to pay for such services.⁴ The declaration of the parent

¹ *Barrett v. Barrett*, 5 Ore. 411; *Dye v. Kerr*, 15 Barb. 444; *Gardner v. Schooley*, 25 N. J. Eq. 150.

² *Munger v. Munger*, 33 N. H. 581. A son or daughter residing with a parent does not cease to be a member of the family when they respectively arrive at the age of twenty-one or eighteen from that fact alone. *Chicago, etc., Ry. Co. v. Chisholm*, 79 Ill. 584; *Putnam v. Town*, 34 Vt. 429, where the child after attaining majority continues to reside in the father's family and work for him, the law will not imply any change in the relation. In order to entitle the son to recover for such services there must be proof either of an express agreement, or that both parties understood that they were to be paid for. *Mosteller's Appeal*, 30 Pa. St. 473; *Pellage v. Pillage*, 32 Wis. 136; *Tyler v. Burrington*, 39 Wis. 376; *Pritchard v. Pritchard*, 69 Wis. 373. Care of an aged and infirm father by a daughter is usually dictated by the better instincts of a common humanity, and is so rarely bestowed upon contract that no implied contract can be predicated upon its

bestowal or receipt. *Wright v. Senn Estate* (1891), 85 Mich. 191.

³ *Williams v. Hutchinson*, 3 N. Y. 312; *Guffin v. First Nat. Bank*, 74 Ill. 259; *Stock v. Stoltz* (1891), 137 Ill. 349; *McCormick v. McCormick* (1891), 1 Ind. App. 594; *Brock v. Cox* (1889), 38 Mo. App. 40 (where a mother, on account of her infirmities, leaves her own home and goes to that of her daughter). In the absence of special statutes to the contrary, the father-in-law is not obliged in this country to maintain his step-children and is not entitled to their earnings. *Schouler's Domestic Relations*, § 237.

⁴ *Hall v. Finch*, 29 Wis. 278; *Murphy v. Murphy* (1890), 1 S. Dak. 316; *O'Kelly v. Faulkner* (1893), 92 Ia. 521; 17 S. E. Rep. 847. In *Titman v. Titman*, 64 Pa. 480, the claim was for services rendered by the plaintiff to her father when she was eighteen years of age. Judge Sharswood said: "The presumption, *prima facie*, was undoubtedly against the plaintiff's claim, and the *onus* was therefore on her to show by clear and distinct evidence, a contract by her father to pay

that his child should be well paid for her services, or that she deserved pay, and that he intended to provide for her is not to be regarded as a contract or evidence that such a contract existed.¹

§ 656. Case of a person standing in loco parentis.—The same rule applies to children by adoption as to children by blood.² Where the services are rendered to one standing *in loco parentis*, there is no implied promise to pay for them, although such presumption may be overcome by the facts and circumstances of the case.³

her wages." *Spitzmiller v. Fisher* (1889), 77 Iowa, 289, where a young woman performed services in her father's family without any contract; *Ionina, etc., Savings Bank v. McLean* (1891), 84 Mich. 625; *Bonney v. Haydock*, 40 N.J. Eq. 513 (son-in-law); *Sawyer Hebard's Estate*, 58 Vt. 375; (the same) *Coe v. Wager*, 42 Mich. 49 (the same); *Zimmerman v. Zimmerman*, 129 Pa. 229 (son); *McGarvy v. Roods*, 73 Iowa, 363 (daughter after becoming of age); *Smith v. Smith's Admr.*, 30 N. J. Eq. 564 (same); *Penter v. Roberts* (1892), 51 Mo. App. 222 (a son living apart from his father performs service, presumption that they are gratuitous); *Wilkes v. Cornelius*, 21 Ore. 348 (claim by a child against the estate of a deceased parent for board and lodgings furnished the latter); *Young's Estate* (1892), 148 Pa. St. 573; 24 Atl. Rep. 124 (a son-in-law's claim against the estate of a decedent based principally upon services rendered by his wife rests upon the same footing as that of any other child or member of the family). The rule that as between parent and child there can be no recovery for services, boarding and the like, in the absence of an express contract to pay therefor, does not apply to a son-in-law who boards his father-in-law. *Perkins v. Hasbrouck, Admr.* (1893), 155 Pa. St. 494. In *Smith v. Milligan*, 43 Pa. 107, it was said by Strong, J.. "Our observation of common usage

does not convince us that fathers-in-law permanently board with sons-in-law without any understanding that compensation shall be made. The case, therefore, is not within the exception."

¹ *Reynolds v. Reynolds* (1892), 92 Ky. 556. In *Dodson v. McAdams*, 96 N. C. 149, the granddaughter sued for services and it was shown that the testator said she was a good girl, and should be paid for her work. The recovery was denied.

² *Mountain v. Fisher*, 22 Wis. 93.

³ *Fross' Appeal*, 105 Pa. St. 258. The weight of authority establishes the doctrine that when a person, through kindness or charity, has received an orphan child into his family, and treats it as a member of his family, he stands towards it *in loco parentis*, so long as it remains in his family, and he is bound for the maintenance, care and education of such child, and entitled to its services without other compensation, unless he has otherwise stipulated. *Schrimpf v. Settegast*, 36 Texas, 296; *Hogg v. Laster* (1892), 56 Ark. 382. The appellee was left an orphan at about the age of ten years, without means, and at the request of a neighbor was taken by the appellant into his family, fed, clothed and sent to school. During her minority she rendered services in household work and continued to do so after she became of age. The suit was brought

§ 657. Exception to the general rule that a child is not entitled to compensation for services to a parent.—If it is manifest from the circumstances that a child ought to receive compensation for his services, and it is not a case in which it was expected that the services should be performed on account of mere filial duty and affection, a promise may be inferred, and the child be entitled to recover the value of the services rendered.¹ The circumstances must be of such a nature and character as to overcome the presumption arising from the relationship of the parties, and justify the inference that compensation was intended.² The presumption as between father and son is only a *prima facie* bar to a recovery, which may be overcome by proof that shows that the presumption does not apply, and that the parties mutually understood that payment was to be made.³ The courts make a distinction between cases where the child has become of age, been away from home, established a business and supported himself, and then returns upon the request of the parent, and one where the child has continued to live with the parent after arriving at age, and has never had any other home.⁴ Circumstances which show an unusual burden assumed by the son, or special advantages reaped by the father, are sometimes favorably construed in the

to recover 39 months' services after she attained her majority. There was no express contract. The jury ought to be instructed that if, under all the circumstances of the case, including the relation the parties bear to each other, the services were of such a nature as to lead to a reasonable belief that the parties understood that they were to be paid for, they should find an implied promise to that effect.

¹ Hilbish v. Hilbish, 71 Ind. 27; Story v. Story (1890), 1 Ind. App. 284.

² Smith v. Denman, 48 Ind. 65. A parent may make a valid contract with a child to pay for support and care, and there is no presumption of law arising from the relationship against the existence of such a contract. Ulrich v. Ulrich (1892), 136 N. Y. 120.

³ Wood on Master and Servant (2d ed.), § 75; Hart v. Hart's Admr., 41

Mo. 441; Seavey v. Seavey, 37 N. H. 125; Ridgway v. English, 22 N. J. Law, 409.

⁴ Marion v. Farnan (1893), 68 Hun, 383; Robnett v. Robnett (1891), 43 Ill. App. 191. As was said in Freeman v. Freeman, 66 Ill. 53. "After leaving, the presumption arises that he thenceforth intended to labor and accumulate property for himself, and when he returned at the solicitation of the father it is but a reasonable presumption the father intended to pay, and he to receive pay for the labor." Wilsey v. Franklin (1890), 57 Hun, 382, where a daughter, for many years after becoming of age, ceased to be a member of her mother's family, and went back to live with her mother, at her mother's solicitation, to do the work of nurse, housekeeper and servant.

child's favor.¹ Where a son breaking up at home and removing himself and family to the residence of his infirm father, upon an express promise by the latter to will him his home-place if he would attend to and take care of him for life, performed his part of the agreement, but the father, having become insane, failed to make his promised will, it was held that the son could recover of the administrator, upon a *quantum meruit*, the actual value of his services.²

§ 658. Contracts for services where skill is required.—If a man undertakes any trust, office or employment, the law raises a promise on his part to perform his undertaking with integrity, diligence and skill, and if he injures his employer by want of either of these qualities, he is liable to an action on his implied contract for reparation.³ Where a man holds himself out to the world as a person of skill and competency in any particular trade or calling, and is employed to perform work in that trade or calling, the law implies a contract on his part to do the work in a skillful and workmanlike manner.⁴ But if the employer has in any manner acquiesced in the improper or inferior work, or has suffered the other party to perform it and taken it off his hands, he is bound to pay for whatever benefit or advantage he has derived from the work.⁵

¹ *Adams v. Adams' Admr.*, 23 Ind. 50, where the son assumed entire control and management of the business, worked the farm, and added largely to the family profits by his successful management. *Brown v. Knapp*, 79 N. Y. 136; *Schouler's Domestic Relations*, § 269.

² The amount must not exceed the value of the home-place, and he must account for and have deducted, from the full amount he was entitled to, all he had received from the property of the father over and above what was necessary for the support and maintenance of the latter during his lifetime. *Hudson v. Hudson* (1891), 87 Ga. 678. It is impossible to lay down precise or accurate rules to govern all the cases which may arise. Each case

will necessarily depend upon its own special circumstances. *Hart v. Hart's Admr.*, 41 Mo. 441; *Guild v. Guild, Admr.*, 15 Pick. 129. Action by a daughter against the administrator of her father's estate. Held competent for the jury to infer a promise from all the circumstances. If the services were of such a nature as to lead to a reasonable belief that it was the understanding of the parties that pecuniary compensation should be made for them, then the jury should find an implied promise, and a *quantum meruit*.

³ *Comyn on Contracts*, 5.

⁴ *Hall v. Cannon*, 4 Harr. 360.

⁵ *Hall v. Cannon*, 4 Harr. 360. If a price was stipulated, the party recovers in proportion to that price, subject to deductions for any defective-

Where a man works by the day he is required to exercise ordinary care and skill, and to do his work in an ordinary, fair, workmanlike manner, and, if he does not, he can not recover as wages the value of work properly done, but the employer is entitled to a deduction for any defect in the labor, or in the manner of its performance.¹ A person contracting to perform services for another agrees to exercise such care and diligence in his employment as men of common care and prudence usually exercise in their own business of a similar kind.² Reasonable skill constitutes the measure of the engagement and responsibility in regard to the work undertaken by him, unless he has professed to the highest degree of skill in regard to it, and expressly engaged to do it in the best manner. If a party is employed in a particular business or work, who is known to the party employing him not to possess any skill in it, or that it is not and never has been his particular art, business or employment, and the employer, with full notice or knowledge of that fact, trusts him with the undertaking, the party so employed is bound only for a reasonable exercise of the skill which he possesses, or the judgment which he can employ in it, and if any loss ensues from his want of due skill in it, he is not in law chargeable with it or liable for it.³ A dentist is required to use a reasonable degree of care and skill in the manufacture and fitting of artificial teeth.⁴

§ 659. Implied contracts of professional men.—The contract of a physician or surgeon, as implied in law, is that he possesses that reasonable degree of learning, skill and experience which is ordinarily possessed by others of his profession, that he will use ordinary care and diligence in the treatment of the case committed to him, and that he will use his best judg-

ness; if not, he recovers on the *quantum meruit*.

¹ Eaton v. Woolly, 28 Wis. 628.

² Leighton v. Sargent, 27 N. H. 460. All persons impliedly undertake, when they engage to do work, that they have a reasonable amount of skill in the employment, and that they will use it, and also engage for a reasona-

ble amount of care, and a failure in these respects prevents them from recovering the contract price, but only what the labor is reasonably worth. Parker v. Platt, 74 Ill. 430.

³ McCombs v. Megratten, 3 Houst. 35.

⁴ Simonds v. Henry, 39 Maine, 155.

ment, in all cases of doubt, as to the best course of treatment.¹ Accordingly an attorney is liable for the want of ordinary skill and care in the management of the business intrusted to him. The want of ordinary care and skill in such a person is gross negligence. But where a given time is allowed by law for the performance of an act, and the attorney performs the act within that time, he can not be held responsible for negligence. It is a fair presumption that he acts according to the instructions of his client, unless in a case of such gross negligence that a violation may be inferred.²

§ 660. Recovery of money paid under a mistake of fact.—

It is a well-settled principle that if a party, through some mistake, misapprehension or forgetfulness of the facts, receives money to which he is not justly and legally entitled, and which he ought not *in foro conscientia*, to retain, the law regards him as the receiver and holder of the money for the use of the lawful owner of it, and raises an implied promise on his part to pay over the amount to such owner, and if the money be withheld from the owner, an action for money had and received may be maintained.³ An error of fact takes

¹Leighton v. Sargent, 27 N. H. 460; Seare v. Prentice, 8 East, 347; Slater v. Baker, 2 Wils. 359; Moore v. Mourgue, Cowp. 479; Grannis v. Brandon, 5 Day, 260; Mertz v. Detweiler, 8 W. & S. 376; Landon v. Humphry, 9 Conn. 209; Hathorn v. Richmond (1876), 48 Vt. 557 (setting a broken limb). A surgeon is responsible for an injury done to a patient through the want of proper skill in his apprentice, but in an action against him the plaintiff must show that the injury was produced by such want of skill, and it is not to be inferred. Hancke v. Hooper, 7 Car. & P. 81, per Tindal, C. J.; Craig v. Chambers, 17 Ohio St. 253 (action against a surgeon for malpractice). In Lanphier v. Phipos, 8 Car. & P. 475, Tyndal, C. J., said: "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable

degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill."

²Holmes v. Peck, 1 R. I. 242. The principle of the common law, as to the engagement of the professional man, for a reasonable degree of skill and no more, has been settled in the case of attorneys in Pitt v. Yalden, 4 Burr. 2060; Laidler v. Elliott, 3 B. & C. 738; Russel v. Palmer, 2 Wils. 325; Hunter v. Caldwell, 16 L. Jour. Q. B. 274; Purves v. Landell, 12 C. & Fin. 91; Varnum v. Martin, 15 Pick. 440; Stimpson v. Sprague, 6 Greenl. (Me.) 470; Crooker v. Hutchinson, 1 Vt. 73.

³George's Creek, etc., Co. v. County Commissioners, 59 Md. 255; Newsome v. Graham, 10 B. & C. 234; Worley v.

place when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist.¹ Where there has been an accounting and settlement between parties on the basis of merchant's book entries, and afterwards an error is discovered in the account by crediting a single item twice or wrongly adding a column of figures, an action at law will lie to recover the balance paid by reason of such mistake.² An indorser of a note was allowed to recover money paid by him under the mistaken belief that the note had been duly presented for payment;³ but courts do not relieve against every mistake a party may make in his business transactions. A mistake in a matter of fact to be a ground of relief must be of a material nature, inducing or influencing the agreement, or in some matter to which the contract is to be applied.⁴ Money paid by mistake of fact can not be reclaimed when the defendant received it in good faith, in satisfaction of an equitable claim, nor when it was due in honor and conscience.⁵ If it appear that the party paying has received and enjoyed a benefit or consideration, he will not be aided by a court of

Moore (1884), 97 Ind. 15 (mistake in the computation of interest); *Waite v. Leggett*, 8 Cow. 195; *Stanley Rule, etc., Co. v. Bailey*, 45 Conn. 464; *Citizens' Bank v. Graffin*, 31 Md. 507; *Walker v. Mock*, 39 Ala. 568; *Durkin v. Cranston*, 7 John. 442; *Burr v. Veeeder*, 3 Wend. 412; *Milnes v. Duncan*, 6 B. & C. 671; *Chatfield v. Paxton*, 2 East, 471 n.; *Marriot v. Hampton*, 3 Smith's Leading Cases (9th Am. ed.), 1686.

¹ *Calkins v. Griswold*, 11 Hun, 208. But where a person is truly acquainted with the existence or non-existence of facts, but is ignorant of the legal consequences he is under an error of law. *Mowatt & Wright*, 1 Wend. 355.

² *Davis v. Krum*, 12 Mo. App. 279; *Budd v. Eyermann*, 10 Mo. App. 437; *Hanson v. Jones*, 20 Mo. App. 595.

³ *Talbot v. National Bank of the Commonwealth*, 129 Mass. 67.

⁴ *Buffalo v. O'Malley* (1884), 61 Wis. 255, action to recover the sum of \$40,

alleged to have been overpaid for the transportation of tan-bark. At the place of shipment it measured sixty-three cords, and three cords were allowed for shrinkage on repiling. On being repiled at Duluth in the manner customary there, it measured but forty cords. In *Southwick v. First Nat. Bank*, 84 N. Y. 420, Earl, J., said: "It is not every mistake that will lay the ground-work for relief. It must be a mistake as to some fact, not remotely, but directly, bearing upon the act against which relief is sought. If it were the rule to relieve against mistakes as to remote, or what are sometimes called extrinsic, facts, great uncertainty and confusion would attend business transactions." See article by Prof. W. A. Keener on *Recovery of Money Paid under Mistake of Fact*, 1 Harvard Law Rev. 211.

⁵ *Moore v. Eddowes*, 2 Ad. & E. 133; *Farmer v. Arundel*, 2 Wm. Bl. 824.

equity in recovering back that which he has paid, but which he could not have been compelled to pay had he resisted in the outset.¹

§ 661. Effect of negligence upon the right of recovery.—If the money be paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the facts.² Some authorities, on the contrary, seem to countenance the doctrine that a recovery can not be had where the party paying has access to information which he, by his own laches, neglects to acquire.³ But it is generally held that the fact of the plaintiff's mistake having been caused by his own negligence will not, in the absence of other facts, bar a recovery.⁴ And negligence

¹ *City of Louisville v. Zanone*, 1 Metc. (Ky.) 151.

² *Kelly v. Solari*, 9 M. & W. 54; *Koontz v. Central Nat. Bank*, 51 Mo. 275; *Alston v. Richardson*, 51 Texas, 1; *Fraker v. Little*, 24 Kan. 598.

³ *West v. Houston*, 4 Harr. 170; *Peterborough v. Lancaster*, 14 N. H. 382; *Wheeler v. Hatheway*, 58 Mich. 77; *Buffalo v. O'Mally*, 61 Wis. 255; *Brummitt v. McGuire* (1890), 107 N. C. 351.

⁴ *Keener on Quasi-Contracts*, 70. In *Milnes v. Duncan*, 6 B. & C. 671, *Bayley, J.*, said: "If a party pay money under a mistake of the real facts, and no laches is imputable to him, in respect of his omitting to avail himself of the means of knowledge within his power, he may recover back such money." But the rule on this subject has ceased to be thus limited. 2 *Chitty on Contracts*, 11 Am. ed. 930. Money paid under a mistake by the payor, as to a material fact, may be recovered by him, though at the time of making such payment he possessed, but neglected to use, the means of ascertaining the actual fact. *Brown v. College Corner, etc., Co.*, 56 Ind. 110. "If, in consequence

of such mutual mistake, one party has received the property of the other, he must refund, and this, without reference to vigilance or negligence. * * In case of bargains and sales the rule is applicable, *vigilantibus non dormientibus leges subveniunt*," per *Hunt, Ch. J.*, in *Kingston Bank v. Eltinge*, 40 N. Y. 391. "It is well settled by recent decisions that money paid to the holder of a check or draft drawn without funds may be recovered back, if paid by the drawee under a mistake of fact, and though the rule was originally subject to the limitation that it must be shown that the party seeking to recover back had been guilty of no negligence, it is now held that the plaintiff in such cases is not precluded from recovery by laches in not availing himself of the means of knowledge in his power," per *Colt, J.*, in *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281. Where the teller of a bank saw fit to pay a check without taking the precaution to inform himself of the state of the account of the drawer whose balance on deposit was not sufficient to meet it, it was held that there was

will not bar a recovery where the defendant can be put *in statu quo*.¹ When the situation of the party receiving the money has been changed in consequence of the payment, and it would be inequitable to allow a recovery, the payment can not be recalled. In such a case, the person making the payment must bear the loss occasioned by his own negligence.²

§ 662. Recovery of money paid under mistake of law.—Generally money paid under a mistake of law can not be recovered, although it is against conscience for the defendant to retain it.³

nothing in the transaction which bore the character of a mistake of facts, in a legal sense, but only that of laches, and the plaintiff was not entitled to recover the money back. *Boylston Nat. Bank v. Richardson*, 101 Mass. 287.

¹ *Appleton Bank v. McGilvray*, 4 Gray, 518; *Lawrence v. American Nat. Bank*, 54 N. Y. 432; *Devine v. Edwards*, 101 Ill. 138; *Koontz v. Central Nat. Bank*, 51 Mo. 275; *Wilson v. Barker*, 50 Maine, 447.

² *Walker v. Conant* (1887), 65 Mich. 194; *Mayer v. Mayor*, 63 N. Y. 455.

³ *Bilbie v. Lumley*, 2 East, 469; *Flower v. Lance*, 59 N. Y. 603 (no legal right on the part of the creditor to demand payment in gold); *Real Estate Savings Institution v. Linder*, 74 Pa. St. 371; *Norris v. Blethen*, 19 Maine, 348; *Regan v. Baldwin*, 126 Mass. 485; 30 Am. Rep. 689; *Eaton v. Eaton*, 35 N. J. Law, 290; *Natcher v. Natcher*, 47 Pa. St. 496; *Markley v. Stevens*, 89 Pa. St. 279; *Clafin v. McDonough*, 33 Mo. 412; *Campbell v. Clark* (1891), 44 Mo. App. 249; *Beene v. Collenberger*, 38 Ala. 647; *Galveston Co. v. Gorham*, 49 Texas, 279; *Rogers v. Ingham*, L. R. 3 Ch. Div. 351; *Lowry v. Bourdieu*, Dougl. 467; *Brisbane v. Dacres*, 5 Taunt. 143 (a leading case on the subject). When both parties possess equal knowledge of the facts, or possess equal means of obtaining such knowledge, and one of

them voluntarily pays a claim made against him by the other, the money so paid can not be recovered back. *Parker v. Lancaster* (1892), 84 Maine, 512. In *Clarke v. Dutcher*, 9 Cow. 674, *Sutherland, J.*, said: "Although there are few *dicta* of eminent judges to the contrary, I consider the current or weight of authorities as clearly establishing the position, that when money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it can not be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not. He shall not be permitted to allege his ignorance of law; and it shall be considered a voluntary payment." In *Ray v. Bank of Kentucky*, 3 B. Mon. 510, *Ewing, C. J.*, said: "It has long been a controverted question, whether a party could avail himself of his mistake or ignorance of the law, merely as a ground to exonerate himself from his civil obligation, or to rescind an executed contract, or recover back money paid. Able authorities, in England and in the American states, may be found upon both sides of the question," and it was held that where money had been paid under a clear and palpable mistake of either law or fact, essentially bearing upon and affecting the contract, without cause or considera-

The general principle is that where a party with full knowledge, actual or imputed, of the facts, there being no duress, fraud or extortion, voluntarily pays money upon a demand, although not enforceable against him, he can not recover it back.¹ Accordingly a party who overpaid to a building association in dues, premium and interest, can not recover it back in action, where it was a voluntary payment, in ignorance of the law, and received in good faith.² And where an administrator paid money to a distributee of his intestate, with full knowledge of the facts, but under a mistake of law, it was held that he could not recover it unless it was necessary for the payment of the debts of the intestate.³

§ 663. Ignorantia juris neminem excusat—Exception in the case of ignorance of a foreign law.—When the party alleges merely a mistake of law, the maxim applies, *ignorantia juris neminem excusat*.⁴ It is a rule of quiet as well as of good faith, and precludes the courts being occupied in undoing the arrangements of parties, which they have voluntarily made, and into which they have not been drawn by fraud or accident, or by any excusable ignorance of their legal rights and liabilities.⁵ An exception has been made to this rule where a mistake was made as to the law of the jurisdiction foreign to the plaintiff and to the jurisdiction in which the action was brought;⁶ also where, although the action was brought in the

tion, and which in law, honor or conscience was not due and payable, it may be recovered back.

¹ *Schwarzenbach v. Odorless Excavating Apparatus Co.* (1885), 65 Md. 34; *Potomac Coal Co. v. Cumberland, etc., R. Co.*, 38 Md. 226 (to recover back freights paid in excess of proper rates).

² *Dilzer v. Building Assn.* (1892 Pa.), 39 Leg. Int. 383.

³ *Shriver v. Garrison* (1887), 30 W. Va. 456.

⁴ *Ege v. Koontz*, 3 Pa. St. 109. This maxim is a fundamental one, and has always been received, with some few exceptions, as an elementary princi-

ple of the common law for many years, per Gilchrist, J., in *Peterborough v. Lancaster*, 14 N. H. 382. Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he can not afterwards assign his ignorance of the law as the reason why the state should furnish him with legal remedies to recover it back. *Cooley on Taxation* (2d ed.), 809.

⁵ *Cooley on Taxation*, 2d ed. 810.

⁶ *Haven v. Foster*, 9 Pick. 112, where the plaintiff had paid money to the defendant under a mistake as to the law of New York.

jurisdiction about whose law the mistake was made, the mistake was made out of the jurisdiction and by one residing elsewhere.¹ Thus where the plaintiff, living in Missouri, made a payment under an erroneous and mistaken belief that the transaction in question was a valid and binding sale under the laws of Nebraska, he was allowed to recover back.²

§ 664. Recovery of money paid under duress or compulsion.—

It is well settled that money extorted or involuntarily paid under duress or unlawful compulsion may be recovered back.³ To enable the party making the compulsory payment to recover it, the compulsion must have been illegal, unjust or oppressive.⁴ To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, there must be some actual or threatened exercise of power possessed or believed to be possessed by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the court of appeals of Maryland, the doctrine established by the authorities is, that "a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid."⁵ A

¹ *Bank of Chillicothe v. Dodge*, 8 Barb. 233. "The plaintiffs then stand in precisely the same situation as though the money had been paid by them under a mistake as to material facts. Ignorance of the law of a foreign government is ignorance of fact, and in this respect the statute laws of the other states of this Union are foreign laws. And this proceeds upon the principle that foreign laws are matters to be proved, like other facts, before even courts can notice them," per Johnson, J.

² *Lyle v. Shinnebarger*, 17 Mo. App. 66. "When one misunderstands or mistakes a foreign law, it is considered *ignorantia facti excusat*."

³ In *Brisbane v. Dacres*, 5 Taunt. 143, Gibbs, J., mentions that extor-

tion was one of those cases in which money paid might be recovered back. *Ashmole v. Wainwright*, 2 Q. B. 837. Action against a carrier who had refused to deliver goods without payment of an exorbitant remuneration. *Mowatt v. Wright*, 1 Wend. 355; *Chase v. Dwinall*, 7 Greenl. 134; 20 Am. Dec. 352; *Atkinson v. Denby*, 6 H. & N. 778; (money obtained by extortion); *Voiers v. Stout*, 4 Bush, 572 (extorting note and coercing payment by military duress); 1 *Parsons on Contracts*, 395.

⁴ *Dickerman v. Lord*, 21 Iowa, 338, per Dillon, J.: "To constitute duress of imprisonment, the imprisonment must be unlawful." 1 Salk. 68.

⁵ *Mayor, etc., v. Lefferman*, 4 Gill (Md.), 425; 45 Am. Dec. 145, and

payment by a person to free his goods from an attachment put on for the purpose of extorting money, by one who knows that he has no cause of action, is not voluntary, but compulsory, and may be recovered back.¹ A person under sentence until a fine is paid is under duress, and the payment of an illegal fine, under such circumstances, is not deemed voluntary, and may be recovered back.² Threats constitute duress where they cause reasonable apprehension of loss of life, or of some great bodily harm, or of imprisonment.³ But mere fear that one will be sued does not constitute compulsion, so as to enable the party paying money to recover it back.⁴ If a shipper of goods by a common carrier pays illegal rates, such payment is not voluntary in the legal sense, and the shipper may maintain his action for money had and received, to recover back the illegal charge.⁵

notes; *Brumagin v. Tillinghast*, 18 Cal. 265; *Mays v. Cincinnati*, 1 Ohio St. 268; *Radich v. Hutchins* (1877), 95 U. S. 210. "Where the money was paid upon a wrongful demand, to save the party paying from some great or irreparable mischief or damage from which he could not be saved but by the payment of the sum wrongfully demanded, it can be recovered back." *Corkle v. Maxwell*, 3 Blatchf. 413, per *Ingersoll, J.*

¹ *Chandler v. Sanger*, 114 Mass. 364; *Adams v. Reeves*, 68 N. C. 134. What is and what is not duress of goods fully discussed. *Hackley v. Headley*, 45 Mich. 569.

² *Devlin v. United States*, 12 Ct. of Cl. 266, where a citizen was tried and convicted in 1865 by a military commission and sentenced to ten years' imprisonment and a fine of \$10,000. While imprisoned United States bonds were received from him by the jailer and sold, and the sum of \$10,000 was retained from the proceeds as payment of the fine. The fine was illegally imposed, and the suit was brought in the nature of an action of *indebitatus assumpsit* for money had and received.

Pitt v. Coomes, 2 A. & E. 459. Pitt had been arrested, while privileged as in attendance on the court, and had, in order to obtain his liberty, paid into court, under a judge's order, the amount for which he was sued. The court ordered it to be restored to him. "The arrest," said Lord Denman, C. J., "was, we think, illegal. The consequence is that the money was improperly extorted."

³ *Baker v. Morton*, 12 Wall. 150; *Harmon v. Harmon*, 61 Maine, 227; 14 Am. Rep. 556; *Feller v. Green*, 26 Mich. 70; *Bane v. Detrick*, 52 Ill. 19; *Cooley on Torts*, 506.

⁴ *Taylor v. Board of Health*, 31 Pa. St. 73; *Matthews v. Smith*, 67 N. C. 374; *City of Muscatine v. Keokuk Packet Co.*, 45 Iowa, 185; *Higgins v. Brown*, 78 Maine, 473; *Hilborn v. Bucknam*, 78 Maine, 482; *Dunham v. Griswold*, 100 N. Y. 224.

⁵ *Mobile, etc., Ry. Co. v. Steiner* (1878), 61 Ala. 559; *Parker v. Great Western R. Co.*, 7 Man. & G. 253; *Chicago and Alton R. Co. v. Chicago, etc., Coal Co.*, 79 Ill. 121, where the court, in reply to the objection that the money was voluntarily paid, said: "It

§ 665. Voluntary payment of taxes.—A voluntary payment of an assessment made under a mistake of law, but with full knowledge of the facts and not induced by any fraud or improper conduct on the part of the payee, can not be recovered back.¹ In order to justify a recovery by the tax-payer, it is not only necessary that the assessment be void, and that the corporation actually receive the money, but it is also necessary that the payment be made involuntarily and under compulsion.² All payments of taxes are supposed to be voluntary until the contrary is made to appear.³ Money illegally or erroneously,

can hardly be said that these enhanced charges were voluntarily paid by appellees. It was a case of life or death with them, as they had no other means of conveying their coals to the markets offered by the Illinois Central, and were bound to accede to any terms appellants might impose. They were under a sort of moral duress, by submitting to which appellants have received money from them which in equity and good conscience they ought not to retain." *Garton v. Bristol, etc., Ry. Co.* (1861), 1 Best & S. 112; 101 Eng. Com. Law, 112, in the Queen's Bench. In *Kenneth v. South Carolina R. Co.*, 15 Rich. 284; 98 Am. Dec. 382, it was held that assumpsit for money had and received would not lie against a railroad company to recover charges for transportation in excess of those which by law the carrier is permitted to exact when such charges are paid voluntarily without objection or protest, or notice of discontent, and after the service had been fully performed and the property was out of the possession of and beyond the control of the carrier.

¹ *Vanderbeck v. City of Rochester* (1890), 122 N. Y. 285; *Sowles v. Soule*, 59 Vt. 131; *Lester v. Mayor, etc.*, 29 Md. 415; *City of Houston v. Feeser* (1890), 76 Texas, 365; *Phillips v. Jefferson Co.*, 5 Kan. 412; *Borough of Allentown v. Saeger*, 20 Pa. St. 421; *Town Council of Cahaba v. Burnett*,

34 Ala. 400; *Elston v. Chicago*, 40 Ill. 514; *Smith v. Redfield*, 27 Maine, 145; *Town of Ligonier v. Ackerman*, 46 Ind. 552; *Powell v. Board of Supervisors St. Croix Co.*, 46 Wis. 210; *Dillon on Municipal Corporations*, § 944, *et seq.*

² 1 *Beach on Public Corporations*, § 234. An action will not lie for the recovery of money voluntarily paid, although under protest, upon a sewer assessment which is merely irregular, and because of which irregularity the collection might have been enjoined. *Newcomb v. Davenport* (1892), 86 Iowa, 291. In *Winter v. City Council*, 65 Ala. 403, it was held that, to support an action for money had and received against a municipal corporation, to recover from it the amount of taxes illegally assessed and collected, two facts must concur, namely, first, a want of authority for the imposition and collection of the tax, rendering the proceeding not merely irregular, but void; and second, a payment under compulsion or under duress of person or property.

³ *Cooley on Taxation* (2d ed.), 810. Where a municipality, in good faith, but under a misapprehension of the law, demands a greater sum than it is legally entitled to, for a license to carry on a particular business, a person, who, with knowledge of the facts, pays the sum demanded, can not recover back the excess. *City of*

but voluntarily, paid for license taxes can not be recovered back.¹ And the mere fact that the collector might have enforced payment will not make a payment involuntary when he was taking no steps to collect and making no threats.²

§ 666. Recovery of illegal taxes paid under compulsion.—

Where an illegal and void tax is paid to prevent a seizure and sale of the tax-payer's property to one having apparent colorable or formal authority to make such seizure and sale, if the danger is imminent and the payment is made under protest, the money so paid may be recovered back.³ If a demand for

Camden v. Green (1892), 54 N. J. Law, 591.

¹*Grimley v. Santa Clara Co.*, 68 Cal. 575; *Mays v. Cincinnati*, 1 Ohio St. 268; *Cook v. City of Boston*, 9 Allen, 393. In *Sharp v. Carthage* (1891), 48 Mo. App. 26, where the city voted against the sale of intoxicating liquors after a license had been obtained, it was held that the dram-shop keeper was entitled to recover from the city an appropriate part of the money paid for the license.

²*Wilson v. Pelton* (1883), 40 Ohio St. 306. In *Taylor v. Board of Health*, 31 Pa. St. 73, where the legislature had imposed a poll-tax on all foreign immigrants coming by sea into the state, and after the law had been thirty years in operation, it was declared to be contrary to the Federal constitution and the plaintiff sought to recover back the toll paid under it, it was held that a payment of taxes is not compulsory because made under a threat, express or implied, that the legal remedies for it will be resorted to. "There is no pretence that the defendant's officers did any more than demanded the tax under a supposed authority of the law, and this is no more a compulsion than where an individual demands a supposed right. The threat that is supposed to underlie such demands is a legally harmless one." Per Lowrie, J.

³*Cooley on Taxation* (2d ed.), 814;

Blackwell on Tax Titles (5th ed.), § 328; *Hilliard on Taxation*, 421; *Burroughs on Taxation*, 267; *Town Council of Cahaba v. Burnett*, 34 Ala. 400; *De Fremery v. Austin*, 53 Cal. 380; *Hubbard v. Brainard*, 35 Conn. 563; *Kimball v. Corn Exchange Nat. Bank*, 1 Brad. (Ill. App.) 209; *Lau-man v. County of Des Moines*, 29 Iowa, 310; *First Nat. Bank v. Watkins*, 21 Mich. 483; *City of Grand Rapids v. Blakely*, 40 Mich. 367; *Tuttle v. Everett*, 51 Miss. 27; 24 Am. Rep. 622; *City of Vicksburg v. Butler*, 56 Miss. 72; *Union Ry. Co. v. Skinner*, 9 Mo. App. 189. In *Union Bank v. Mayor, etc., of New York*, 51 Barb. 159, the trial court held that payment of an illegal tax, under a notice from the receiver of taxes that unless paid a penalty would be imposed by way of interest, and a warrant would be issued, was a voluntary payment. The Commissioner of Appeals, in *Union Nat. Bank v. Mayor, etc.*, 51 N. Y. 638, held that such payment was not voluntary, and reversed the decision, following *Bank of Commonwealth v. The Mayor*, 43 N. Y. 184. In *Boston Glass Co. v. Boston*, 4 Metc. 181, it was held that "payment of taxes to a collector who has a tax bill and warrant in the form prescribed by law, is to be regarded as compulsory payment, and if such taxes were assessed without authority, they may be recovered back in an action for money

the tax has been made under a warrant in the officer's hands, though no threat to levy has been made, the payment will be deemed involuntary.¹ Any payment is to be regarded as involuntary which is made under a claim involving the use of force as an alternative.² The rule was stated by Chief Justice Shaw, of Massachusetts, as follows: "When, therefore, a party not liable to taxation is called upon peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and, by showing that he is not liable, recover it back as money had and received."³ Upon this theory the payment of a water license, under threat of turning off the water in case of continued refusal, was held payment under compulsion.⁴

§ 667. Effect of a protest.—A payment of an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release the person or property from detention, or to prevent an immediate seizure of the person or property, must be deemed voluntary. And the fact that the party, at the time of making the payment, files a written protest does not make the payment involuntary.⁵ A mere protest

had and received, although the party made no protest before payment." In *Allen v. Burlington*, 45 Vt. 202, the court says: "If the plaintiff was constrained to pay the tax to save his property from distress, and to avoid a penalty and costs, it was not a voluntary payment."

¹ *Parcher v. Marathon Co.*, 52 Wis. 388; 38 Am. Rep. 745. A party who, when threatened with a distress, pays an illegal tax under protest and notice of suit, may maintain an action to recover it back. *Grim v. Weissenberg School District*, 57 Pa. St. 434.

² *Atwell v. Zeluff*, 26 Mich. 118.

³ *Preston v. Boston*, 12 Pick. 7. When the tax paid is illegally assessed, and is paid under protest, under compulsion, or with notice that

the party intends to institute suit to test the validity of the tax, it may be recovered back of the collector in an action for money had and received, unless the statute prescribes some other remedy, or has annexed other conditions to the right to sue. *State Tonnage Tax Cases*, 12 Wall. 204.

⁴ *Westlake & Button v. St. Louis* (1882), 77 Mo. 47; *Panton v. Duluth Gas & W. Co.*, 50 Minn. 175.

⁵ *Railroad Co. v. Commissioners* (1878), 98 U. S. 541 (suit to recover back taxes paid by the Union Pacific Railroad Company upon certain lands in Nebraska); *Lamborn v. County Commissioners*, 97 U. S. 181; *Commissioners of Wabaunsee County v. Walker*, 8 Kan. 431; *Bowman v. Boyd* (1892), 21 Nev. 281.

against a charge does not entitle the party who voluntarily and without duress or compulsion pays it to recover it back.¹ A protest is available only in cases of payment under duress or coercion, or when undue advantage is taken of the party's situation. It is merely notice to the party receiving the payment, that, if the demand is illegal in whole, or in any specified particular, he may be subjected to an action for the recovery back of the amount to which objection is made, and if an action be brought, the protest is only available as evidence of the fact of compulsion.² Statutes in some of the states have, however, changed the rule to some extent, and provide for a

¹ *Ladd v. Southern Cotton Press*, etc., Co., 53 Texas, 172. Protest can never make that involuntary which in its absence would be voluntary. *Wessel v. D. S. B. Johnston*, etc., Co. (1893), 3 N. Dak. 160; 54 N. W. Rep. 922. It has been repeatedly held that a mere protest, when payment was not made to save arrest, or the seizure or sale of goods or in submission to process that might immediately have been enforced, would not relieve the payment of its presumed voluntary character. *Peebles v. Pittsburgh*, 101 Pa. St. 304; *City of Muscatine v. Keokuk*, etc., Packet Co., 45 Iowa, 185; *Durham v. Board of Commissioners*, 95 Ind. 182; *Cooley on Taxation*, 2d ed., 810.

² *McMillan v. Richards*, 9 Cal. 365; 70 Am. Dec. 655; *Brumagin v. Tillinghast*, 18 Cal. 265; 79 Am. Dec. 176. In *Fleetwood v. City of New York*, 2 Sandf. 475, *Sandford, J.*, said: "Where there is no legal compulsion, a party yielding to the assertion of an adverse claim can not detract from the force of his concession by saying 'I object' or 'I protest,' at the same time that he actually pays the claim. The payment nullifies the protest as effectually as it obviates the previous denial and contestation of the claim." *Chase v. Dwinal*, 7 Greenl. 134; 20 Am. Dec.

352; *Clinton v. Strong*, 9 Johns. 370; *Kansas*, etc., R. Co. v. *Wyandotte Co.*, 16 Kan. 587; *City of Detroit v. Martin*, 34 Mich. 170; 22 Am. Rep. 512; *Shane v. St. Paul*, 26 Minn. 543; *Awalt v. Eutaw*, etc., Assn., 34 Md. 435; *Patterson v. Cox*, 25 Ind. 261; *Benson v. Monroe*, 7 Cush. 125. "There are, no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a protest alone was sufficient to show that the payment was not voluntary, but on examination it will be found that the protest was used to give effect to the other attending circumstances," per *Waite, C. J.*, in *Railroad Co. v. Commissioners* (1878), 98 U. S. 541, citing *Elliott v. Swartwout*, 10 Pet. 137; *Bend v. Hoyt*, 13 Pet. 263 (customs cases, payments made to release goods held for duties); *Philadelphia v. Collector*, 5 Wall. 720; *Collector v. Hubbard*, 12 Wall. 1 (internal revenue tax cases, where the provisions of the internal revenue acts warranted the conclusion that congress intended to give the taxpayer such remedy); *Erskine v. Van Arsdale*, 15 Wall. 75. A protest made after payment is unavailing. *Mariott v. Brune*, 9 How. 619.

a recovery in all cases of the payment of an illegal tax, provided that at the time of such payment a formal protest was made as the statute prescribed.¹

¹Cooley on Taxation, 2d ed., 813. In knowledge of the illegality, though he Kentucky a party may recover back made no protest. City of Louisville taxes illegally assessed paid without v. Zanone, 1 Metc. (Ky.) 151.

CHAPTER XVIII.

JOINT CONTRACTS.

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| § 668. Joint and joint and several contracts. | § 679. Where the deceased joint debtor is surety. |
| 669. Illustrations. | 680. When a surety's estate is held liable. |
| 670. Joint contracts in Louisiana—Mortgage as indivisible. | 681. Partnership contracts. |
| 671. The interest of the parties. | 682. Contribution among joint debtors. |
| 672. The intention of the parties. | 683. Contribution among sureties. |
| 673. Liability of joint obligors. | 684. Actions on joint contracts. |
| 674. Contracts of subscription. | 685. Actions on joint and several contracts. |
| 675. Effect of release of one joint debtor. | 686. Judgments on joint contracts. |
| 676. The same subject continued. | 687. The same subject continued. |
| 677. Effect of death of joint contractor at law. | 688. Statutory modification of the common law rules. |
| 678. The rule in equity. | 689. The same subject continued. |

§ 668. **Joint and joint and several contracts.** — Contracts may be joint, or several, or they may be joint and several. Where an obligation is undertaken by two or more persons, or a right is given to two or more, the general legal presumption is that it is a joint obligation, or a joint right as the case may require. Where the subject-matter of the contract is entire, as where the contract is to pay an entire sum to several persons, it is solely a joint contract.¹ The introduction into a contract of terms expressly joint will entail a joint liability, although the parties would have been otherwise only severally liable; on the other hand, where words of severalty are introduced in the contract or agreement, the parties thereby incurring liability must have the benefit resulting from them.² If the contract made by several persons purports simply to bind themselves or to covenant without more, the obligation, or

¹ 1 Wait's Actions and Defenses, 76. ² Mansell v. Burredge, 7 T. R. 348; Lee v. Nixon, 1 A. & E. 201.

covenant is taken to be joint only, and not several; if the contract purports that they bind themselves, or covenant severally, the liability is separate; if they purport to bind themselves jointly and severally, or to bind themselves and each of them, or to covenant for themselves and each of them, using both joint and several words, the liability is both joint and several.¹ Where several persons stipulate for the performance of a particular act the law implies that they are bound jointly and not severally, and there must be express words in order to create a several responsibility.² It is the tendency of the law to regard an obligation undertaken by several parties as joint, when there are no express words indicating a several obligation.³ A promise, the subject-matter of which is entire, and which is joint in its terms and object, can not be made several by any doubtful implication or limitation. When several persons signed a writing which purported, by its terms, to be a joint agreement to indemnify the plaintiff for becoming bail, but annexed to each of their signatures a character and figuring indicating different sums in dollars and cents, it was held that the contract was not thereby rendered several.⁴

§ 669. Illustrations.—If several persons bind themselves by these words: “We promise to pay” a certain sum of money, it creates a joint obligation. It is to be performed not by one of the obligors, but by all of them.⁵ And a note signed by more than one person, and beginning “we promise,” is joint only.⁶ But if an instrument worded in the singular is executed by several, the obligation is a joint and several one, and those who execute it may be sued either separately or together.⁷ A promis-

¹ 1 Lawson's Rights, Remedies and Practice, § 2387; Leake on Contracts, 456; Simpson v. Vaughan, 2 Atk. 31.

² Alpaugh v. Wood, 53 N. J. Law, 638; Forster v. Taylor, 3 Camp 49; City of London Gas Co. v. Nicholls, 2 C. & P. 365; 1 Chitty on Pleading (16 Am. ed.), 48; Broom on Parties, § 154.

³ 1 Parsons on Contracts, 11; Note to Carter v. Carter, 2 Day, 442; 2 Am. Dec. 113; Elliott v. Bell (1893), 37 W. Va. 834.

⁴ McCullis v. Thurston, 27 Vt. 596.

⁵ Mayor of New Orleans v. Ripley, 5 La. 121; 25 Am. Dec. 175. “If two, three, or more bind themselves in an obligation thus, *obligamus nos*, and say no more, the obligation is and shall be taken to be joint only, and not several.” Sheppard's Touchstone of Common Assurances, 375.

⁶ Barnett v. Juday, 38 Ind. 86.

⁷ Marsh v. Ward, Peake (N. P.) Cas. 177; Clerk v. Blackstock, Holt (N. P.),

sory note in form "I promise to pay," etc., and subscribed by two persons, is a joint and several note.¹ And so also is one signed by two makers, and running, "we or either of us promise to pay."² If three are bound in a bond by these words: "We bind ourselves, and each of us jointly," it is a joint obligation, for the word "jointly" makes the obligation "joint," which the word "each" can not make several.³ Where the obligatory part of a bond is in these words: "We are holden and bound unto M. C. in the sum of five hundred dollars, for the payment of which we bind ourselves and each of us," it is a joint and several bond, on which an action may be brought against one of the obligors separately.⁴ A bond in this form: Know all men that we, A. as principal and B., C. and D. as sureties, are bound unto the people in the several sums affixed to our names, viz.: B. in the sum of ten thousand dollars, C. in the sum of five thousand dollars, D. in the sum of three thousand dollars, etc., "for the which payment, well and truly to be made, we severally bind ourselves, our heirs," etc., was held to be an instrument embracing several distinct obligations, each of which is a joint obligation of the principal and one surety, and not joint and several.⁵

§ 670. Joint contracts in Louisiana—Mortgage as indivisible.—A note containing simply the promise of the makers to pay is merely their joint obligation, binding each only for his proportion of the debt, under the provisions of the Louisiana civil code, and not solidary, binding each for the whole debt, as

474; *Van Alstyne v. VanSlyck*, 10 Barb. 383. The civil code of California follows this rule and provides that "a promise made in the singular number, but executed by several persons, is presumed to be joint and several." § 1660.

¹ *Hemmenway v. Stone*, 7 Mass. 58; *Monson v. Drakeley*, 40 Conn. 552; *Maiden v. Webster*, 30 Ind. 317; *Partidge v. Colby*, 19 Barb. 248; *Solomon v. Hopkins* (1891), 61 Conn. 47.

² *Pogue v. Clark*, 25 Ill. 333; *Harvey v. Irvine*, 11 Iowa, 82.

³ 1 Addison on Contracts, 38.

⁴ *Carter v. Carter*, 2 Day, 442; 2 Am.

Dec. 113. A bond running thus: "For which sums respectively, unto the said state of California, in the manner and in the proportions herein-after set forth, bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents" is a joint and several bond. "We certainly know of no words more apt to express that idea than those used. They have been long used for that purpose." *People v. Love*, 25 Cal. 520.

⁵ *People v. Hartley*, 21 Cal. 585.

solidarity must be expressly stipulated.¹ Under a mortgage not stipulating against indivisibility, as authorized by the Louisiana civil code, declaring that a mortgage is in its nature indivisible, the whole debt is payable out of the whole property, even though the debt be joint and therefore divisible, at least where the consideration was the price of movable property which became by the purchase indivisibly incorporated with the land mortgaged, and where the mortgage remains in the hands of the original holder.²

¹ Louisiana Civil Code, arts. 2080, 2086, 2093.

² *Groves v. Sentell* (1894), 153 U. S. 465; 14 Sup. Ct. Rep. 898, White, J.: "This provision of the Louisiana code was derived from the Code Napoleon, where its identical language is found. Code Napoleon, art. 2114. The mortgage in this case contains nothing on its face which takes it out of the general rule. The parties severally declare that they are indebted, etc., and that they do hereby mortgage to and in favor of the said Rosetta Rhea, represented herein by her attorney in fact, the property described in the deed. There is no stipulation in the act showing in the remotest degree an intention to mortgage separately an undivided half of the property for an undivided half of the debt. Thus, on the face of the act, it is a mortgage of the whole property for the whole debt. It was in the power of the contracting parties to have stipulated against indivisibility, and that they failed to do so is self-evident. The provision of the code is that indivisibility is 'in the nature of a mortgage;' therefore not of its essence. The commentators on the Code Napoleon agree that indivisibility can be avoided even where the parties join in a common act of mortgage by stipulating that the mortgage is to be divisible. Laurent, in his 'Principes de Droit Civil Francais,' thus states the rule: 'All the author-

ities teach the doctrine that the law, in saying that a mortgage is indivisible by its nature, intends simply thereby to declare that it is not so indivisible in its essence. From this it is concluded that parties may, by their conventions, stipulate to the contrary. The right of the parties to make such agreements, in relation to the divisibility of the mortgage, as they deem proper, can not be denied, because indivisibility rests upon intention.' Vol. 30, p. 159. See also, Rodiere 'On Indivisibility,' par. 466. Paul Pont, in his treatise 'On Privileges and Mortgages,' thus states it: 'The words "in the nature of" have a significance which is applied to them sometimes in other provisions of the law. Thus, the law says that indivisibility is in the nature of a mortgage in the same way that it is provided that warranty is in the nature, not in the essence, of contract of sale; and, because indivisibility is purely a matter of intention, it can be controlled by the will of the parties.' Vol. 1, p. 321, pars. 331, 332. These expositions of the civil law writers are persuasive as to the proper construction of the Louisiana code. *Viterbo v. Friedlander*, 120 U. S. 707, 728; 7 Sup. Ct. Rep. 962. Indeed, by the strongest possible analogy, they have been adopted by the Louisiana courts. Thus, a vendor's privilege, under the law of Louisiana, is 'in the nature' of the contract of sale. The rule there

§ 671. The interest of the parties.—Where the language is ambiguous, the contract shall be taken to be joint or several,

as to this privilege is that, where a sale is made, and the privilege is not excluded by express agreement or by implications clearly deducible from the language of the parties, it is implied to exist, as it is of the 'nature of the contract.' *Boner v. Mahle*, 3 La. Ann. 600. The parties, then, having had the power, in contracting the mortgage, to exclude indivisibility, and not having done so, indivisibility applies, not alone as a result of their silence, but also because, being the general rule and of the nature of the contract, it exists unless excluded by the express terms or by plain 'implication deducible from the contract.' It is urged, however, that, as the obligation secured by the mortgage was joint, therefore the mortgage itself must necessarily have been joint. The proposition confounds the nature of the principal obligation with that of the accessory contract of mortgage. That the divisibility of a debt does not necessarily import the divisibility of the mortgage securing it is unanimously held by the civil-law writers. 'Under the theory of the law, the indivisibility of the mortgage has no reference to the nature of the principal obligation. Thus, there may be a division of the obligation either between joint creditors or joint debtors, or between the heirs of joint creditors and joint debtors.' Paul Pont, vol. 1, p. 33. Laurent, in speaking on the same subject, says: 'Thus, if the debt is discharged in part, or is divisible, it has no influence whatever upon the mortgage. This will subsist in its entirety, although the debt may be extinguished in part, and although a third possessor of the immovable mortgaged may be liable only personally for a portion of the debt. We thus see that the indivisibility of the

mortgage does not render the obligation itself indivisible. Where the obligations are joint, they may be divided, actively or passively, between the heirs of the creditor and the heirs of the debtor.' Laurent, vol. 30, p. 151, par. 177. See also, *Rodiere*, p. 167, *et seq.* The whole subject was at an early date considered by the French court of cassation. Certain persons gave a power of attorney to an agent, authorizing him to contract a debt and consent a mortgage. The agent borrowed the money and gave the mortgage. When the mortgage came to be enforced, the debtors defended on the ground that the agent had consented a solidary debt when he had only the power to consent a joint one; that, therefore, not only was the debt joint, but the mortgage securing it divisible. The court found that the power only authorized the contracting of a joint debt; but it held that as the power authorized the agent to consent a mortgage, and the mortgage was in its nature indivisible, the debt was joint; but the indivisible mortgage securing it remained and was in force. *Cassation*, May 6, 1818, referred to and quoted in Paul Pont, vol. 1, p. 328. It has been contended that a different rule has been established in Louisiana. We are referred, in support of this proposition, to *Walton v. Lizardi*, 15 La. 588, and *Erwin v. Greene*, 5 Rob. (La.) 70. These cases, instead of supporting the contention, we think refute it. In the *Walton Case* several persons had bought separate undivided portions of a square of ground. To evidence their obligations to pay the purchase price they issued their separate notes for their respective shares, and secured them by one act of mortgage upon the property. Some of the purchasers paid their notes, and others

according to the interest of the parties and the nature of the cause of action.¹ It has been held that when the legal interest in a covenant and in the cause of action thereon is joint, the covenant is joint, although it may, in its terms, be several or joint and several.² The nature, and especially the entireness

did not. Foreclosure proceedings were commenced upon the unpaid notes against the whole property, and the issue presented was whether the mortgage was divisible or indivisible. The court held, after a critical examination of the contract, that upon its face it stipulated that the mortgage should be divisible, and not indivisible. It said that each of the parties had given his separate notes for his separate obligation, and that the agreement between them and the vendor was that the notes should be secured by a special mortgage on 'each of the lots for which the same should be given in payment.' The language of the mortgage in that case was as follows: 'We, in order to secure the following described notes, jointly effect, mortgage and hypothecate;' again: 'And the said purchasers, each in proportion of their respective shares and interest in said property, do hereby confess judgment in favor of said parties;' again: 'Now, the said parties do hereby agree that a sale of said ground shall be made in favor of * * * and in the following proportions.' The facts clearly justified the court in saying: 'From the particular care which the parties appear to have taken to distinguish their proportionate interest in the property, as well as in the payments for which they respectively gave their separate obligations,' their intention was clear to create a divisible, and not an indivisible mortgage. The facts in *Erwin v. Greene*, 5 Rob. (La.) 70, were very similar to those just referred to. There the court said: 'Each of the obligors promised to pay

his portion of the price for which he gave his separate notes, and each took care to distinguish and designate the proportion of their respective interests in the property.' These cases, by converse reasoning, confirm the rule of indivisibility as applied to the contract with which we are dealing. Indeed, we think this contract is controlled, not by the foregoing cases, but by *Potts v. Blanchard*, 19 La. Ann. 167, and *Stewart v. Buard*, 23 La. Ann. 411."

¹ *Goldsmith v. Sachs* (1882), 17 Fed. Rep. 726. If the interest is joint, all the covenantees must join in bringing the action, and words of severalty shall not prevail. *Servante v. James*, 10 B. & C. 410; *Petrie v. Bury*, 3 B. & C. 353; *Broom on Parties*, § 7.

² *Capen v. Barrows*, 1 Gray, 376, where the covenants were not in terms either joint or several, and there rules were laid down, citing *Broom on Parties*, 8: "Where the covenant is, in its terms, several, but the interest of the covenantees is joint, they must join in suing upon the covenant; (2) Where the covenant is, in its terms, expressly and positively joint, the covenantees must join in an action upon the covenant, although as between themselves their interest is several; (3) Where the language of the covenant is capable of being so construed, it shall be taken to be joint or several according to the interest of the covenantees." *Bradburne v. Botfield*, 14 M. & W. 559; *Scott v. Godwin*, 1 B. & P. 67; *James v. Emery*, 8 Taunt. 245; *Wakefield v. Brown*, 9 Ad. & El. (N. S.) 209; *Mag-nay v. Edwards*, 13 C. B. 479; *Pugh v.*

of the consideration, is of great importance in determining whether the promise be joint or several, because, if the consideration move from many persons jointly, then the promise is joint; if from many persons, but from each severally, then the promise is several.¹

§ 672. The intention of the parties.—Whether the contract is joint or several, or joint and several, is one of intention.² The contract must be considered as a whole, and if, upon such consideration, the intention of the parties becomes apparent, it must prevail over the literal interpretation of detached words, phrases and clauses.³ A contract which is plainly meant to be several is not to be treated as joint merely because several persons have signed it on one side or the other.⁴ When persons engage for the performance of distinct and several duties, mere words of plurality, such as “we bind ourselves,”

Stringfield, 3 C. B. N. S. 2. It has been held that a contract is to be construed solely according to the interest of the parties. “The better doctrine would seem to be, that a contract is to be construed, first, according to its express words, if they be clear and unambiguous, and not according to the interest of the parties where it conflicts with such terms; second, according to the interest, where the words are ambiguous and susceptible of different constructions.” Story on Contracts, § 33 b.

¹ Beck v. Pounds, 20 Ga. 36; 1 Parsons on Contracts, 19, citing Bell v. Chaplain, Hardres, 321.

² Lawson on Contracts, § 116. Whether a bond be joint, or joint and several, or several only, must be determined primarily by its terms. If these are distinct and express, and leave no room for doubt, they must control the construction to be placed on the instrument. If, however, the obligation be ambiguous and liable to different constructions the question must be settled by considerations of the interests of the obligors, and, of

course, of their intentions. Murfree on Official Bonds, § 236.

³ Landwerlen v. Wheeler, 106 Ind. 523; Jacobs v. Spalding, 71 Wis. 177. In the construction of contracts, the court will look at all the circumstances of the case, and ascertain by reasonable inference what the parties must have understood and mutually expected at the time of making of the contract. Dwelley v. Dwelley, 143 Mass. 509. In contracts which are not reduced to writing, the courts will look into the special circumstances of the case and the situation of the parties, as well as into the consideration itself, in order to determine whether the interest be joint or several, and how the action should be brought; and if the parties have, by their acts, manifested an intention to treat the contract as several and not joint, it will be so held to be. Story on Contracts, § 33j.

⁴ Larkin v. Butterfield, 29 Mich. 254. Covenants are to be construed according to their spirit and intent. Ludlow v. McCrea, 1 Wend. 228.

will not make the contract joint.¹ Where a contract describes the parties on one side as principal and sureties, and stipulates that the principal shall perform the obligations and receive the pay, while the sureties shall only be liable for liquidated damages on his default, it is, in effect, a severable contract, and the sureties need not be joined as plaintiffs in a suit upon it.²

§ 673. Liability of joint obligors.—The liability of obligors on an obligation that is joint only, is in the absence of statutory modification strictly aggregate.³ Each obligor is bound, *in solido*, for the whole undertaking.⁴ It is incident to every joint contract that all are bound to its performance. Each and every one of the contractors stipulates that the contracts shall be performed by all. If two persons hire a carriage without a driver, and it be broken by the negligence of one who attempts to drive it, both would be liable, although the other was passive and free from blame. And where several persons jointly hire a carriage, horses and driver, and it is a part of the contract that the carriage should be driven by the driver alone, then to permit a stranger to drive it or to drive it themselves, would be a violation of the contract, and for any damage arising out of the breach of the joint contract all are liable.⁵ Each party to a joint contract is severally liable in one sense, that is, if sued severally and he does not plead in abatement, he is liable to pay the entire debt, but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, although on one piece of parchment or paper, in effect comprises the joint bond of all and the several bonds of each of the obligors.⁶

¹ Addison on Contracts (Am. ed. by Morgan), 86; Collins v. Prosser, 1 B. & C. 682.

² Widner v. Western Union Tel. Co. (1882), 47 Mich. 612. By the terms of the contract the sureties were neither promisors nor promisees except in the separate clause relating to liquidated damages.

³ Murfree on Official Bonds, § 238.

⁴ Allin v. Shadburne's Executor, 1 Dana, 68; 25 Am. Dec. 121; Clark v. Rawson, 2 Denio, 135; Ripley v. Crooker, 47 Maine, 370; Slocum v. Fairchild, 7 Hill, 292; Field v. Runk, 22 N. J. Law, 525.

⁵ O'Brien v. Bound, 2 Speer Law (S. C.) 495; 42 Am. Dec. 384.

⁶ Per Parke, B., in King v. Hoare, 13 M. & W. 493.

§ 674. **Contracts of subscription.**—Where a number of persons, for a good consideration, sign a subscription paper, agreeing to pay a certain sum, and by its terms each subscriber is to be liable only for the amount set opposite his name, the contract is several.¹ In an instrument reading: “The following rates of tuition we, the subscribers, agree to pay the proposed teacher at the expiration of the term,” the rates of tuition being given and the names of the subscribers, with the number of scholars entered by each, it was held that the liability of the subscribers was several, and not joint.² A paper reading, “We, the undersigned, promise to pay the following subscriptions for a new church,” etc., followed by names, opposite which are different amounts, was held to be the several and not the joint obligation of the subscribers.³ In a case involving the construction of a contract to build a butter and cheese factory, where sixty-one persons subscribed the contract for various amounts, it was held that, notwithstanding the use of the words “we agree to pay,” the contract was several, and not joint.⁴ Where several subscribers to the

¹ *Darnall v. Lyon* (1892 Texas App.); 19 S. W. Rep. 506; *Gibbons v. Bente* (1892), 51 Minn. 499; 22 Lawyers' Rep. Ann. 80 and note; *Robertson v. March*, 4 Ill. 198, “we promise to pay the sum annexed to each of our names.” *Moss v. Wilson*, 40 Cal. 159; *Watkins v. Eames*, 9 Cush. 537. “We agree to pay the sum set to our respective names.” *Carter v. Carter*, 14 Pick. 424; *Galt's Executor v. Swain*, 9 Gratt. 633; 60 Am. Dec. 311. The wording of such contracts is usually such as to make them several, but even when the language has been doubtful the construction has been that each subscription was separate.

² *Beck v. Pounds*, 20 Ga. 36. “That each employer designed to obligate himself to pay for the tuition of every other patron's pupils, no one, for a moment, can believe,” per Lumpkin, J.

³ *Landwerlen v. Wheeler*, 106 Ind. 523. In this case there was no state-

ment limiting the liability of each subscriber to the amounts opposite each name, but opposite each name were the amounts subscribed by the different parties. The paper and the manner of the subscriptions clearly indicated the intention of all the parties that each subscriber should be liable and only liable for the amount by him subscribed. “Where a person signed the paper, and put down opposite his name the amount subscribed, he just as plainly declared that that was the amount for which he was to be liable, as if in the body of the paper it had been stated that each subscriber was to be liable for the amount opposite his name.”

⁴ *Davis, etc., Co. v. Barber* (1892), 51 Fed. Rep. 148, disapproving *Davis v. Shaper*, 50 Fed. Rep. 764. In *Gibbons v. Grinsel* (1891), 79 Wis. 365, a similar contract was held to be several. It was said: “The manifest purpose

stock of a railroad company sign the same subscription agreement, the obligation is construed to be several, and not joint.¹ Each subscription is an independent undertaking, and in no way affected by the terms of other subscriptions.²

§ 675. Effect of release of one joint debtor.—The strict common law rule is, that if two persons be bound jointly or jointly and severally in an obligation, and the obligee voluntarily and unconditionally releases one of them, both are discharged, and either may plead the release in bar,³ because the debt is entire, and when once satisfied or released can no longer be enforced against any party to it.⁴ But the release, in order to operate to discharge the other promisors from their liability on the contract, must be a technical release under seal.⁵ The legal

was that each such subscriber should thus pay the amount of his particular subscription, and not that he should become liable jointly with all the other subscribers for the aggregate amount of all subscriptions. In other words, the amount which each subscriber thus agreed to pay was limited to the amount which he thus subscribed, otherwise a few responsible subscribers might be made liable for numerous irresponsible subscribers." *Davis v. Belford*, 70 Mich. 120 (similar contract held to be several); *Frost v. Williams* (1892), 2 S. Dak. 457 (contract with a number of farmers to build a cheese factory).

¹ *Price v. Grand Rapids, etc., R. Co.*, 18 Ind. 137. "These stock subscriptions, though in form joint contracts, are intended to be, and are to be treated as several, and each stockholder is liable simply for the amount opposite his own name."

² *Connecticut, etc., R. Co. v. Bailey*, 24 Vt. 465; *Eric, etc., R. Co. v. Patrick*, 2 Abbott App. Dec. 72; 1 Wood on Railway Law, 57. Subscriptions to corporate stock are separate contracts. *Whittlesey v. Frantz*, 74 N. Y. 456.

³ *Sheppard's Touchstone*, 337; § 383, *supra*. The release of one joint or joint and several promisor is, generally speaking, a release of all. *Maslin's Exrs. v. Hiett* (1892), 37 W. Va. 15; *Tuckerman v. Newhall*, 17 Mass. 581; *Rowley v. Stoddard*, 7 Johns. 207; *Peasley v. Boatwright*, 2 Leigh, 195; *Berry v. Gillis*, 17 N. H. 9; 43 Am. Dec. 584, and note; *Bishop on Contracts*, §§ 869, 870.

⁴ *Wiggin v. Tudor*, 23 Pick. 434; *Goodnow v. Smith*, 18 Pick. 414. A receipt, under seal, given by the obligee of a joint obligation to one of the joint obligors, in full satisfaction for his liability on said joint obligation, releases all of the obligors, and oral evidence is inadmissible to show that the obligee did not intend to release them all. *Hale v. Spaulding*, 145 Mass. 482.

⁵ *Shaw v. Pratt*, 22 Pick. 305. It is well settled, that a technical release to one of several joint obligors, whether they are bound jointly, or jointly and severally, discharges the others and may be pleaded in bar. *Ludlow v. McCrea*, 1 Wend. 228, per *Sutherland, J.* *Seligman v. Pinet* (1889), 78 Mich. 50, discharge of a

operation of a release of one of two or more joint debtors may be restrained by an express provision in the instrument that it shall not operate as to the other.¹ Equity gives to a release operation according to the intention of the parties and the justice of the case. This equitable rule now prevails, and a release is to be construed according to the intention of the parties, and the object and purpose of the instrument, and that intent will limit and control its operation.² When several persons are jointly indebted, and one of them pays his specific share of the debt, and it is received and receipted for by the creditor as such, such payment will not exonerate the party paying from his liability for the residue of the debt. Notwithstanding such receipt, the parties to the contract will remain jointly bound, to the extent of what is unpaid, in the same manner as if no such specific payment had been made.³

debt just as good without a seal as with it. It has been held in England, that an act of the creditor, though by parol, which discharges one of two or more joint debtors, will discharge both or all, though the contract be in writing. *Nicholson v. Revill*, 4 Ad. & Ell. 675. The rule is different in this country; here a release by parol to one joint debtor will not operate as a discharge to other debtors jointly liable, and can only be pleaded by the debtor to whom it is given. *Harrison v. Close*, 2 Johns. 448; *Rowley v. Stoddard*, 7 Johns. 207; *De Zeng v. Bailey*, 9 Wend. 336; *Morgan v. Smith*, 70 N. Y. 537. But see *Seligman v. Pinet* (1889), 78 Mich. 50.

¹ *Hood v. Hayward*, 124 N. Y. 1; *Kirby v. Taylor*, 6 John. Ch. 242; *Hosack v. Rogers*, 25 Wend. 313; *Burke v. Noble*, 48 Pa. St. 168; *Yates v. Donaldson*, 5 Md. 389; 61 Am. Dec. 283, and note; *Edwards v. Varick*, 5 Denio, 664; *North v. Wakefield*, 13 Ad. & E. (N. S.) 536; *Solly v. Forbes*, 2 Brod. & B. 38; *Ex parte Good*, 5 Ch. Div. 46; *Harbeck v. Pupin*, 23 Abb. New

Cas. 190, 194, n., decisions of New York courts and forms collected; 2 Chitty on Contracts (11 Am. ed.), 1154, *et seq.*

² *Whittemore v. Judd, etc., Co.*, 124 N. Y. 565; 21 Am. St. Rep. 708; *Benton v. Mullen* (1881), 61 N. H. 125.

³ *Ripley v. Crooker*, 47 Maine, 370; *Eldred v. Peterson*, 80 Iowa, 264, part payment. A parol agreement by the payee of a note to release one of three makers as to two-thirds of the debt, and permit the other portion to be paid in a certain manner, is a release of the other two makers upon their payment of their proportionate shares. *Seligman v. Pinet*, 78 Mich. 50. Several debtors being jointly liable for a debt, an agreement by the creditor to release one from further payment and from liability for contribution does not discharge the others. *Benton v. Mullen*, 61 N. H. 125. Payment by one debtor of a judgment recovered against all of several joint debtors extinguishes the whole recovery. *Caldwell v. Martin*, 29 S. C. 22; *Harbeck v. Vanderbilt*, 20 N. Y. 395.

§ 676. The same subject continued.—If a joint agreement is invalid or incapable of enforcement against all of its makers, it is invalid and incapable of enforcement against any one or more of them.¹ Accordingly an action can not be maintained against one of three joint obligors on allegations that the other two have paid their shares of the amount due. And a fraudulent conveyance by a joint obligor will not be set aside as long as there is a legal remedy against the other joint obligors.²

¹ *Bennett v. Morse* (Colo. App. 1894), 39 Pac. Rep. 582. In *Davis Mfg. Co. v. Booth*, 10 Ind. App. 364; 37 N. E. Rep. 818, plaintiff's assignor contracted to build a factory for \$5,200. The contract provided that the "under-signed" subscribers would pay the amount when the factory was completed, and that they would incorporate with a capital stock of not less than \$5,200, to be issued to the subscribers according to their paid-up interests, each stockholder to be liable only for the amount subscribed by him. No person subscribed for more than two shares of \$100 each. It was held that such contract was several, and not joint. In *Shipman v. Straitsville Co.* (1895), 158 U. S. 356; 15 Sup. Ct. Rep. 886, Brown, J., said: "The court below was of opinion that the contract in question was a several one as between Shipman and the three other parties, and hence that an action would lie in favor of either of these parties without joining the others. Three separate actions were in fact brought against him. There is nothing in the contract indicating that the three parties were connected in any way, except that each was to furnish an equal quantity of coal. They are spoken of in the contract as 'the other three parties,' as if it were intended that each of them should stand for himself. If either of them had failed to furnish his quota of coal, Shipman might have brought an action against him;

but it is clear that, if he had sued them jointly for such default, the two others might answer that they had done all that they agreed to do, and could not be held liable for the default of the third. These parties did not agree to furnish any definite amount of coal, but merely that they would ship the defendant the product of their mines in equal quantities. Separate orders were given by Shipman, and separate bills were rendered by the companies for coal shipped upon such orders; and there is nothing to indicate that either of the parties to the contract treated it as involving a joint liability. *Hall v. Leigh*, 8 Cranch, 50."

² *Eller v. Lacy*, 137 Ind. 436; 36 N. E. Rep. 1088, Hackney, J.: "The failure of Eller to contribute to such payments neither changed the character of the contract nor created a construction of it, nor did that fact release the other obligors from the payment of the whole sum due from time to time by the terms of the contract. It is unnecessary that we should intimate an opinion as to whether a construction by the parties of a plain and unambiguous contract may prevail as against the only possible construction or legal interpretation its terms will permit. If the obligation is joint, there is not only no action stated for the claim to a personal judgment for the \$200 against Eller upon the obligation, but there could be no cause for setting aside a conveyance

But where two or more parties, by their concurrent wrongdoing, cause injury to a third person, they are jointly and severally liable, and the injured party may, at his option, institute an action and recover against one or all of those contributing to the injury.¹

§ 677. **Effect of death of joint contractor at law.**—On the death of a joint contractor, at common law, the liability of the deceased on the contract absolutely ceases. His representatives are not liable to any action at law; the surviving contractors alone remain liable, and they only can be sued.² Upon the death of one of the makers of a joint note his representatives are, at law, discharged, and the survivor alone can be sued.³ But in case of a several contract, or of a contract joint and several, the executor or administrator of one of the parties, deceased, could be sued in a separate action, but not jointly with the survivors, because he was to be charged *de bonis testatoris* and they *de bonis propriis*.⁴

of his property without exhausting those who were, as to such sum, liable jointly with him. As long as the legal remedy existed against part of the joint debtors, equity would not extend its relief as to another of such debtors. This is elemental, but our attention has fallen upon two cases involving the exact question before us. *Wales v. Lawrence*, 36 N. J. Eq. 207; *Randolph v. Daly*, 16 N. J. Eq. 313."

¹*City of Kansas City v. Slangstrom*, 53 Kan. 431; 36 Pac. Rep. 706, Johnston, J.: "It is optional with the injured party to proceed against one or all of those contributing to the injury, as any one who aids and assists in committing the wrong is liable for the whole. *Westbrook v. Mize*, 35 Kan. 299; 10 Pac. Rep. 881; *Fish v. Street*, 27 Kan. 270; *Sharpe v. Williams*, 41 Kan. 56; 20 Pac. Rep. 497; *Hillman v. Newington*, 57 Cal. 56; *Bryant v. Bigelow Carpet Co.*, 131 Mass. 491."

²*Godson v. Good*, 6 Taunt. 587; *Foster v. Hooper*, 2 Mass. 572; *New Haven, etc., Co. v. Hayden*, 119 Mass.

361; *Bradley v. Burwell*, 3 Denio, 61; *Johnson v. Harvey*, 84 N. Y. 363; *Burgoyne v. Ohio, etc., Co.*, 5 Ohio St. 586; *Seaman v. Slater*, 18 Fed. Rep. 485; *Hawkins v. Ball's Admrs.*, 18 B. Mon. 816; 668 Am. Dec. 761, note. This rule was a necessary conclusion from the technical conception of a joint liability or right at the common law, as one, single, indivisible right or liability. 3 Pomeroy's Equity Jurisprudence, § 1301. In *Lane v. Doty*, 4 Barb. 530, Judge Paige remarks: "In case of a joint contract, if one of the parties dies, his executor or administrator is at law discharged from liability, and the survivor alone can be sued."

³*Towers v. Moor*, 2 Vern. 98; *Simpson v. Vaughan*, 2 Atk. 31; *Richter v. Poppenhausen*, 42 N. Y. 373; *Boykin v. Watson's Admrs.*, 1 Const. Tr. (S. C.) 157; *Stevens v. Catlin* (1891), 44 Ill. App. 114.

⁴*Seaman v. Slater*, 18 Fed. Rep. 485; *Mattison v. Childs*, 5 Colo. 78; *New Haven, etc., Co. v. Hayden*, 119 Mass. 361.

§ 678. **The rule in equity.**—But while, at law, the death of a joint contractor terminates his liability, and the surviving joint contractors alone remain liable, the doctrine of equity is different. In equity, therefore, upon the death of one joint contractor, the liability does not rest solely upon the survivors, but may be enforced against the estate of the decedent.¹ This equitable doctrine has been incorporated into the statutes of several of the states. In some states the statute provides that if one of several joint contractors dies, his estate may be charged, as if the contract had been joint and several, that is, by an action against the personal representative alone.² And in a number of states there are statutes, expressly authorizing an

¹ *Simpson v. Vaughan*, 2 Atk. 31; *Ex parte Kendall*, 17 Ves. 514; *Hunt v. Rousmanier*, 8 Wheat. 174; *Voorhis v. Childs*, 17 N. Y. 354; *Pope v. Cole*, 55 N. Y. 124. The theory upon which the estate of a joint debtor is held bound in equity, is that the obligation is joint and several in equity, although joint in form and only joint in law. In cases where there is an obligation to pay the debt irrespective of the joint obligation, equity will conclusively presume that the parties intended that the contract should have been and was intended to be made joint and several, but was joint in form, by mistake. *Hunt v. Rousmaniere*, 1 Pet. 1; *United States v. Price*, 9 How. 83. In *Pickersgill v. Lahens*, 15 Wall. 140, the court say: "The court will not vary the legal effect of the instrument by making it several as well as joint, unless it can see either by independent testimony or from the nature of the transaction itself that the parties concerned intended to create a separate as well as a joint liability. If through fraud, ignorance or mistake, the joint obligation does not express the meaning of the parties, it will be reformed so as to conform to it. This has been

done where there is a previous equity which gives the obligee the right to a several indemnity from each of the obligors as in the case of money loaned to both of them. There a court of equity will enforce the obligation against the representatives of a deceased obligor, although the bond be joint and not several, on the ground that the lending to both creates a moral obligation in both to pay, and the reasonable presumption is the parties intended their contract to be joint and several, but through fraud, ignorance, mistake or want of skill failed to accomplish the object." The equitable rule is not settled in England, professedly based upon the notion that all joint liabilities at law are in equity joint and several, that the creditor has his option at all times either to sue the survivors alone at law, or to sue the representatives of the deceased debtor in equity, whether the survivors are solvent or not.³ *Pomeroy's Equity Jurisprudence* § 1301.

² *Curtis v. Mansfield*, 11 Cush. 152; *Sampson v. Shaw*, 101 Mass. 145; *Thompson v. Johnson*. 4th N. J. Law, 220.

action to be brought against the survivors and the personal representatives of the deceased joint contractor.¹

§ 679. Where the deceased joint debtor is surety.—While the courts have been disposed to treat a joint obligation as joint and several in equity under peculiar circumstances, this rule is not applied as against a surety.² It is a rule of the common law that if a joint obligor dying be a surety, not liable for the debt irrespective of the joint obligation, his estate is absolutely discharged, both at law and in equity, the survivor only being liable.³ And it makes no difference that the surety died after a joint judgment against him and the principal.⁴

¹ Pomeroy on Remedies, §§ 118, 303. Ranney, C. J., in *Burgoyne v. Ohio, etc., Co.*, 5 Ohio St. 586, referring to the Ohio statute, said: "This statute effected an entire abrogation of the common law principle to which allusion has been made, and left the estate of the joint debtor liable to every legal remedy as fully as though the contract had been joint and several." In Indiana it has been held that the code of procedure, by abolishing the distinctions between legal and equitable actions, and introducing the equitable doctrines concerning parties, and providing for the severance of the judgment, has, without any special provision on the subject, introduced this equitable rule into the law. *Daily v. Robinson*, 86 Ind. 382; *Corbaley v. State*, 81 Ind. 62; *Eaton v. Burns*, 31 Ind. 390; *Braxton v. State*, 25 Ind. 82.

² *Pickersgill v. Lahens*, 15 Wall. 140 and cases cited; *Risley v. Brown*, 67 N. Y. 160.

³ *Towers v. Moor*, 2 Vern. 98; *Simpson v. Vaughan*, 2 Atk. 31; *Bradley v. Burwell*, 3 Denio, 61; *Baskin v. Andrews* (1889), 53 Hun, 95 (Mr. Baskin having died before the enactment of section 758, New York Code of Civil Procedure, the rule applicable to this case is the one existing at com-

mon law); *Getty v. Binsse*, 49 N. Y. 385; 10 Am. Rep. 379; *Wood v. Fisk*, 63 N. Y. 245; 20 Am. Rep. 528; *Davis v. Van Buren*, 72 N. Y. 587; *Randall v. Sackett*, 77 N. Y. 480; *Sumner v. Powell*, 2 Mer. 30; *Jones v. Beach*, 2 De G. M. & G. 886; 3 Pomeroy's Equity Jurisprudence, § 1302.

⁴ *United States v. Price*, 9 How. 83, where there was a joint and several bond, but judgment had been recovered against all the obligors, and afterwards the surety died. As the creditor had elected to treat the obligors as joint debtors, he could not proceed in equity against the surety's estate. The court says: "The obligation of a surety arises only from positive contract. The liability is construed strictly both at law and in equity, and the liability of the surety can not be extended by implication beyond the terms of his contract. If he contracts jointly with his principal, it is a legal consequence, known to all parties, that his personal estate will be discharged in case he should die before his principal." In *Chard v. Hamilton* (1890), 56 Hun, 259, affirmed 125 N. Y. 777, it was held that, where the obligatory part of the bond was as follows: "For which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly

§ 680. When a surety's estate is held liable.—When the surety or guarantor in a joint obligation is directly benefited from the contract, his estate will not be discharged from liability.¹ Accordingly, if the surety participates in the consideration for which the joint obligation was made, his estate is liable. And, if the consideration for which the joint obligation was given was the discharge of a prior obligation on which the surety was liable, such discharge would be sufficient to render the estate of the surety liable.² Where in some states all causes of action founded on contract survive, the estate of a deceased surety on a joint, but not several, promissory note will not be discharged from liability.³

§ 681. Partnership contracts.—Contracts made by partners are joint. Each copartner is bound for the entire amount due

by these presents," etc., the words binding the executors and administrators of the obligors were of no moment in the construction of the instrument. The doctrine was held, in *Royal Ins. Co. v. Davies*, 40 Iowa, 469; 20 Am. Rep. 581, where the bond stipulated that the surety bound himself, his "heirs, executors and administrators," that death did not limit liability of surety. In Indiana, the death of a surety on a joint promissory note does not discharge his estate from liability upon the note, the common law rule having never been a part of the law of that state. *Hudelson v. Armstrong*, 70 Ind. 99. In *Susong v. Vaiden* (1878), 10 S. C. 247; 30 Am. Rep. 50, it was held that, where a joint note is executed by a principal, and by a surety not otherwise liable, and the latter dies, leaving the principal surviving, his estate is not discharged from the obligation. "Since the adoption of the code of procedure, which, in conformity to the requirement of the constitution, has provided that justice shall be administered in a uniform mode of pleading, without distinction between

law and equity, we can see no reason why the representatives of a deceased co-obligor, who was a mere surety, may not be joined with the surviving obligor in an action upon a joint bond or note, as in this case." Per McIver, C. J.

¹ *Richardson v. Draper*, 87 N. Y. 337, affirming 23 Hun, 188. The death of a joint obligor only discharges his obligation in a case where it appears that he was a mere surety, who received no benefit whatever from the joint obligation; where a benefit was secured, and there was a moral obligation to pay, the rule was held not to apply. "It is difficult to perceive why the estate of a surety, who was a joint obligor, upon whose credit and responsibility mainly the obligee loaned his money, should be discharged by the death of the surety. It would seem that in good conscience and sound morals, and upon principles of natural justice, it should respond, and bear the loss, if any, rather than the obligee, who trusted the surety," per Earl, J.

² *Boyd v. Bell*, 69 Texas, 735.

³ *Brandt on Suretyship*, § 140.

on copartnership contracts, and this obligation is so far several that if he is sued alone, and does not plead the non-jointness of his copartners, a recovery may be had against him for the whole amount due upon the contract, and a joint judgment against the copartners may be enforced against the property of each.¹ A joint and several note by all the members of a firm is not strictly a partnership note nor has it the same effect.² A note made by one partner, and beginning, "I promise to pay," but signed with the name of the firm, was held binding on the partnership, as meaning, "I, one of the partners, promise on behalf of the firm," etc.³ If a note be signed by a person in the name of a firm, whether that name represents in form more than one person, as "A. & Co." or only one person, as "A.," it is in both cases the joint note of the firm, and all the partners will be bound, whether the language be "I" or "we promise."⁴ In partnership, while the estate of each partner, both deceased and survivors, is charged with the partnership liabilities, yet there is supposed to be a partnership estate from which they should be liquidated. The death of a partner dissolves the partnership, and the estate goes at once into liquidation in the hands of the survivors; their first duty is to provide for the liabilities of the firm, and like other administrators, they hold the partnership assets in trust for that purpose.⁵

¹ *Mason v. Eldred*, 6 Wall. 231. "The law merchant, which is now a part of the common law, recognizes partnerships as *quasi*-corporations. They are something between individuals and corporations, and are not governed altogether by the laws applicable to either, but by their own law." *Parsons on Partnership*, § 114.

² *Freeman v. Campbell*, 55 Cal. 197; *Ex parte Weston*, 12 Metc. 1; *Parsons on Partnership*, § 141.

³ *Doty v. Bates*, 11 Johns. 544.

⁴ *Daniel on Negotiable Instruments*, § 94.

⁵ *Bliss on Code Pleading*, § 106. Sev-

eral cases have come before the New York court of appeals in regard to the joint liability of partners, and it is there held that the personal representative of a deceased partner can not be sued by the creditor. *Voorhis v. Childs*, 17 N. Y. 354, leading case, elaborate opinion by Selden, J., affirmed by *Richter v. Poffenhausen*, 42 N. Y. 373; *Pope v. Cole*, 55 N. Y. 124. The English courts proceed upon the theory that partnership obligations should be treated as joint and several while those of New York regard them as joint only with the legal incidents. *Bliss on Code Pleading*, § 107, note.

§ 682. **Contribution among joint debtors.**—Where two or more persons are jointly liable to pay a claim, and one of them pays the whole of it, either voluntarily or by compulsion of legal process, he may recover from the others the proportion of the claim that each ought to pay.¹ The doctrine of contribution rests upon the broad principle of justice, that when one has discharged a debt or obligation, which others were equally bound with him to discharge, and thus removed a common burden, the others who have received a benefit ought, in conscience, to refund to him a ratable proportion.² The doctrine of contribution applies equally between original contractors, that is, those jointly bound on their own account—not copartners—as it does between cosureties, that is, those jointly bound to answer for the debt or default of another.³ There must be a fixed and positive obligation to pay.⁴ If a party has voluntarily paid money on a void note or obligation, he can not maintain an action for contribution.⁵ Nor when he pays a claim barred by the statute of limitations.⁶ Where one of two defendants in a joint judgment pays it, but not with the intention of discharging it, he may enforce the judgment against the codefendant for his legal proportion of the debt.⁷ Generally one wrong-doer, who has been compelled to pay the damages done by several who co-operated with him in the wrongful act, can not proceed for contribution against those who co-operated

¹ *Bailey v. Bussing*, 28 Conn. 455; *Harbach v. Elder*, 18 Pa. St. 33; *Booth v. Farmers, etc., Bank*, 74 N. Y. 228.

² *Aspinwall v. Sacchi*, 57 N. Y. 331.

³ *Chipman v. Morrill*, 20 Cal. 130; *Sadler v. Nixon*, 5 Barn. & Ad. 936; *Snyder v. Kirtley*, 35 Mo. 423; *Finlay v. Stewart*, 56 Pa. St. 183.

⁴ *Pitt v. Purssord*, 8 Mees. & W. 538; *Frith v. Sprague*, 14 Mass. 455.

⁵ *Russell v. Tailor*, 1 Ohio St. 327.

⁶ *Williamson v. Rees*, 15 Ohio, 572; *Williamson v. Collins*, 17 Ohio, 354.

⁷ *Wood v. Merritt*, 2 Bosw. 368; *Parker v. Ellis*, 2 Sand. 223; *Murray v. Bogert*, 14 Johns. 318, where a

party has paid a judgment against him for an entire demand, to which a person not party to a suit was jointly liable, he can not maintain action against such person for contribution. Story on Contracts, § 33 q. Contribution among joint principles. *Henderson v. McDuffe*, 5 N. H. 38; 20 Am. Dec. 557; *Peaslee v. Breed*, 10 N. H. 489; 34 Am. Dec. 178; *Mills v. Hyde*, 19 Vt. 59; 46 Am. Dec. 177 and notes. Suit by one joint promisor against another for excess paid by him beyond his share. *Fletcher v. Grover*, 11 N. H. 368; 35 Am. Dec. 497; *Mills & Hyde*, 19 Vt. 59; 46 Am. Dec. 177.

with him.¹ But where there was no intentional wrong, or violation of law, the rule does not apply.²

§ 683. Contribution among sureties.—An action at law will lie by one surety who has paid more than his share to recover contribution from his cosurety.³ The death of one of several cosureties on a joint undertaking does not relieve his estate from the liability of contribution among the cosureties. If one cosurety, either before or after the death, pays the debt, he is entitled to a contribution from the estate of the deceased cosurety.⁴ The law implies a contract between the sureties, originating at the time they executed the obligation by which they became such, to contribute ratably towards discharging any liability which they incur in behalf of their principal, and in the case of death of either of them, the obligation devolves upon his legal representatives, the same as any other contract made by him, the breach of which occurs after his death.⁵

¹ *Moore v. Appleton*, 26 Ala. 633; *Peck v. Ellis*, 2 Johns. Ch. 131; *Acheson v. Miller*, 18 Ohio, 1; *Miller v. Fenton*, 11 Paige, 18.

² *Acheson v. Miller*, 18 Ohio, 1; *Bailey v. Bussing*, 28 Conn. 455.

³ *Rindge v. Baker*, 57 N.Y. 209; 15 Am. Rep. 475; *Morrison v. Poyntz*, 7 Dana, 307; 32 Am. Dec. 92; *Crisfield v. Murdock* (1891), 127 N. Y. 315; *Burge on Suretyship*, 384. "The right to contribution has been considered as depending rather upon a principle of equity than upon contract; but it may well be considered as resting alike on both for its foundation; for although generally there is no express agreement entered into between joint sureties, yet from the uniform and almost universal understanding which seems to pervade the whole community, that from the circumstance alone of their agreeing to be, and becoming accordingly cosureties of the principal, they mutually become bound to each other to divide and equalize any loss that may arise therefrom to each other, or any of

them, it may with great propriety be said that there is at least an implied contract." *Agnew v. Bell*, 4 Watts (Pa.), 31. Per *Kennedy, J.* Right of surety to enforce contribution from another. Cases collected in note to *Gross v. Davis*, 87 Tenn. 226; 10 Am. St. Rep. 635, note.

⁴ *Dussol v. Bruguere*, 50 Cal. 456.

⁵ *Bachelder v. Fiske*, 17 Mass. 464; *Wood v. Leland*, 1 Metc. 387; *Barry v. Ransom*, 12 N. Y. 462; *Bradley v. Burwell*, 3 Denio, 61; *Johnson v. Harvey* (1881), 84 N. Y. 363. *Contra*, *Waters v. Riley*, 2 Har. & G. 305. The last named case was expressly disapproved in *Bradley v. Burwell*, 84 N. Y. 363, and *Johnson v. Harvey*, 3 Denio, 61. In *Bradley v. Burwell*, *Jewett, J.*, said: "I think that the law implies a contract between cosureties to contribute ratably towards discharging any liability which they may incur in behalf of their principal, such contract originating at the time they executed the principal obligation; that these results, by implication of law, a promise on the part of the principal to

The weight of authority is, that successive accommodation indorsers of negotiable instruments are not, in the absence of an agreement to that effect, cosureties, nor liable to contribution as between each other.¹

§ 684. Actions on joint contracts.—An instrument can only be sued upon in the manner in which the parties have made themselves liable. If the words show that they meant to render themselves liable separately and not jointly, then they must be sued severally.² Where there is a plurality of debtors and the undertaking is joint, unless they waive the advantage, by not interposing a plea in abatement, they must be sued jointly, provided neither has been discharged by operation of a bankrupt or insolvent law, or is not liable on the ground of infancy.³ Where an obligation is made to sev-

indemnify his sureties; and also, in like manner, a mutual promise between the sureties to contribute proportionately towards indemnifying each other against such liability, and that such implication does not take its origin from the subsequent payment of the money. * * * The right of action as between the sureties grows out of the original implied agreement, that if one shall be compelled to pay the whole or a disproportionate part of the debt the other will pay such sum as will make the common burden equal. In case of the death of either, this obligation devolves upon his legal representatives. In this respect it is like any other contract made by one in his life-time to pay money at a future time, absolutely or contingently, who dies before the occurrence of any breach of the contract." A valuable article upon the contribution of sureties between themselves, where there are no special equities between them, may be found in 10 Central Law Journal, 264.

¹ *Sherrod v. Rhodes*, 5 Ala. 683; *McCarty v. Roots*, 21 How. (U. S.) 432; *McCune v. Belt*, 45 Mo. 174; *Hillegas*

v. Stephenson, 75 Mo. 118; *McGurk v. Huggett*, 56 Mich. 187; *Phillips v. Plato*, 42 Hun, 189; *Armstrong v. Harshman*, 61 Ind. 52. *Contra*, *Daniel v. McRae*, 2 Hawk. N. C. 590; *Stovall v. Border*, etc., Bank, 78 Va. 188; *Janson v. Paxton*, 22 Up. Can. (C. P.) 505; *Brandt on Suretyship*, § 260.

² *Lee v. Nixon*, 1 A. & E. 201, per Lord Denman, C. J.; 3 *Robinson's Practice*, 99.

³ *Robertson v. Smith*, 18 Johns. 459; *Anderson v. Martindale*, 1 East, 497; *Eccleston v. Clipsham*, 1 Saund. 153, note 1; *Hopkinson v. Lee*, 6 Ad. & El. (N. S.) 964; *Foley v. Addenbrooke*, 4 Ad. & El. (N. S.) 197. Where the contract is not several, nor joint and several, but joint merely, the action on it, if there be two obligors, and both of them living at the time of action brought, must necessarily be a joint action against both. *Newman v. Graham*, 3 Munf. 187. Where a suit is brought against three joint contractors, and the writ is served on two only, the two, by pleading the general issue, waive their right to object to the want of service on the third. *Bartlett v. Robbins*, 5 Metc. 184.

eral persons jointly all the obligees must join in an action to enforce it.¹ Thus all the parties jointly insured in a policy of insurance should join in an action to recover for a loss.² All the payees in a note must join in an action thereon, unless it has been assigned to a less number of them.³ And all the joint obligees of a bond are necessary parties plaintiff in an action for its breach. They are joint proprietors, and one must have as much right as the other to say and determine when suit shall be brought and when it shall be compromised or settled without suit. Neither can sue alone for his proportion.⁴ And there can be no recovery, except for damages in which all such obligees are interested.⁵ In assumpsit, the non-joinder of a copromisor as defendant can only be taken advantage of by plea in abatement; but the non-joinder of a copromisee as plaintiff is ground for a non-suit.⁶ If one joint contractor is sued alone, and does not plead in abatement the non-joinder of the other, and judgment is rendered against the one sued, it merges the cause of action against him, and, unless otherwise provided by statute, inasmuch as the two are no longer jointly liable, prevents a subsequent recovery against the other joint contractor.⁷

When the contract was made with several persons, whether it was under seal, or in writing but not under seal, or by parol, if their legal interest were joint, they must all, if living, join in an action in form *ex contractu* for the breach of it, although the covenant with them was in terms joint and several. 1 Chitty on Pleading 10 Am. ed.), 9.

¹ Ohnsorg v. Turner (1888), 33 Mo. App. 486; Clark v. Cable, 21 Mo. 223; Dewey v. Carey, 60 Mo. 224; Henry v. Mt. Pleasant Tp., 70 Mo. 500. Nothing is better settled than the rule that on an undertaking to two, both must join in an action on it; otherwise there is no cause of action. It is a part of the contract that both shall sue. Rainey v. Smizer, 28 Mo. 310.

² Blanchard v. Dyer, 21 Maine, 111; 38 Am. Dec. 253; Monaghan v. Agri-

cultural Fire Ins. Co., 53 Mich. 238; Tate v. Citizens' Mutual Fire Ins. Co., 13 Gray, 79.

³ Yell v. Snow, 24 Ark. 554. It is however otherwise where the note is joint and several. Curtis v. Bowrie, 2 McLean, 374.

⁴ Ryan v. Riddle (1883), 78 Mo. 521; Sweigart v. Berk, 8 S. & R. 308; 1 Parsons on Contracts, 13.

⁵ Burns v. Follansbee (1886), 20 Ill. App. 41. A joint owner of a cause of action can not introduce a new joint owner into the contract by individual assignment. Learned v. Ayres, 41 Mich. 677.

⁶ Holyoke v. Loud, 69 Maine, 59; 2 Greenleaf on Evidence, § 110.

⁷ Cowley v. Patch, 120 Mass. 137; Purvis v. Butler, 87 Mich. 248, effect of non-joinder.

§ 685. **Actions on joint and several contracts.**—Contracts which are joint and several may be regarded as furnishing two distinct remedies, one by a joint action against all the obligors and the other by a several action against each.¹ The only difference between a contract merely joint and one joint and several, as respects the right of the holder of the one or the other in pursuing his remedy, is, that on the first he is obliged to sue all the living promisors, whereas on the latter he has the right to elect between one and all of them. Having made his election, the contract becomes, so far as the rules of law applicable to his remedy are concerned, purely several or purely joint; and he is no longer at liberty to consider it other than what he has made it by his own determination.² If the plaintiff obtains a joint judgment, he can not afterwards sue the promisors or obligors separately, for the reason that the contract or bond is merged in the judgment, nor can he maintain a joint action after he has recovered judgment against one of the parties in a separate action, as the prior judgment is a waiver of his right to pursue a joint remedy.³ The action, if brought by virtue of the common law, is to be against all the obligors jointly, or one of them singly, and not against any intermediate number, unless some obligor or obligors shall have died, in which case the death of him, or them, must be stated in the declaration.⁴

¹ *People v. Harrison*, 82 Ill. 84; *Minor v. Mechanics' Bank*, 1 Pet. 46; *Cummings v. People*, 50 Ill. 132. In a joint and several contract the contract contains distinct engagements, that of each contractor individually, and that of all jointly, and different remedies may be pursued upon each. *Mason v. Eldred*, 6 Wall. 231.

² *Gibbons v. Surber*, 4 Blackf. (Ind.) 155. On a joint and several bond, suit may be brought against one of the sureties without joining another with him. *Poullain v. Brown*, 80 Ga. 27; and a suit may be brought against a surety without joining the principal. *People v. Butler*, 74 Mich. 643. The law appears to be well settled, that if

two or more are bound jointly and severally, the obligee may elect to sue them jointly or severally. *United States v. Archer*, 1 Wall. Jr. 173. The creditor is bound by his election in treating a joint and several contract either as joint or several. *United States v. Ames*, 99 U. S. 35; *Winslow v. Herrick*, 9 Mich. 380; *United States v. Payne*, 17 How. Prac. 407; *Downey v. Farmers' & M. Bank*, 13 S. & R. 288.

³ *Sessions v. Johnson*, 95 U. S. 347.

⁴ *Leftwich v. Berkeley*, 1 H. & M. 61; *Saunders v. Wood*, 1 Munf. 406; *Newell v. Wood*, 1 Munf. 555; *Amis v. Smith*, 16 Pet. 303. When an obligation is joint and several, it can not be treated as several as to

§ 686. **Judgments on joint contracts.**—At common law, in a joint action, whether upon a joint or a joint and several contract, or upon several distinct contracts, the general rule was that there could be no judgment except for or against all of the defendants.¹ Where the plaintiff treats the contract as joint by suing the makers jointly, the rule of recovery in actions upon joint contracts must govern.² The statutes of most of the states have changed the common law rule.³ This general rule was, however, subject to this exception: if one or more of the defendants pleaded infancy or coverture, or discharge in bankruptcy, these pleas, being inconsistent with the averment in the declaration of an original joint contract, the plaintiff could enter a *nolle prosequi* as to such defendants, and recover judgment against the other defendants.⁴ A judgment against one of several makers of a note, without process against the others,

some and joint as to the rest. *Streatfield v. Halliday*, 3 T. R. 779; *Cabell v. Vaughan*, 1 Wm. Saund. 291; *President of Bank v. Treat*, 6 Greenl. 207. All must be proceeded against jointly, or each severally, subject to certain exceptions, as where one is an infant, or has been discharged in bankruptcy. *Fay v. Jenks*, 78 Mich. 312. In California, under the code, in an action upon a joint and several contract, the plaintiff may, at his election, sue one or more, or all, of the parties severally liable. Code Civ. Proc., § 383. *Hurlbutt v. Spaulding, etc., Co.* (1892), 93 Cal. 55; *People v. Love*, 25 Cal. 520. In many states the law provides that when two or more persons are bound by contract, whether jointly only or jointly and severally or severally only, the action may at the plaintiff's option be brought against any or all of them. *Stimson's American Statute Law*, § 5015.

¹ *Freeman on Judgments*, § 43; *Minor v. Mechanics' Bank*, 1 Pet. 46; *Brown v. Tuttle* (1888), 27 Ill. App. 389; *Enterprise, etc., Co. v. Bradley* (1885), 17 Ill. App. 509; *Midkiff v.*

Lusher, 27 W. Va. 439 (the judgment being a joint judgment; if set aside as to one of the defendants, it would have to be set aside as to both); *Proctor v. Lewis*, 50 Mich. 329; *Fisk v. Henarie*, 14 Ore. 29 (rule changed by the code); *Gibbons v. Surber*, 4 Blackf. 155; *Aten v. Brown*, 14 Ill. App. 451; *Murdy v. McCutcheon*, 95 Pa. St. 435; *Woodward v. Newhall*, 1 Pick. 500; *Netso v. Foss*, 21 Fla. 143; *Wootters v. Kauffman*, 67 Texas. 488.

² *Gould v. Sternburg*, 69 Ill. 531.

³ *Carmien v. Whitaker*, 36 Ind. 509; *Erwin v. Scotten*, 40 Ind. 389; *Moore v. Estes*, 79 Ky. 282; *Huot v. Wise*, 27 Minn. 68; *Stedeker v. Bernard*, 102 N. Y. 327; *Lee v. Basey*, 85 Ind. 543; *Sawin v. Kenny*, 93 U. S. 289; *Black on Judgments*, § 82.

⁴ *Westheimer v. Craig* (1892), 76 Md. 399; 25 Atl. Rep. 419. The exception is where the defense is personal, as infancy, or bankruptcy, or the like. *Fuller v. Robb*, 26 Ill. 246; *Enterprise Distilling Co. v. Bradley*, 17 Ill. App. 509. Exception where one of the joint promisors resides without the jurisdiction. *West v. Furbish*, 67 Maine, 17.

releases those who are not sued.¹ In some of the states, in derogation of the common law rule, a distinction is taken between joint contracts and such as are joint and several, the courts holding that, in an action upon the latter species of obligation, the plaintiff may enter a *nolle prosequi* against one of the defendants and proceed to judgment against the others.²

§ 687. The same subject continued.—The doctrine at common law is that a judgment against one or more of several joint debtors absolutely discharges the others from all liability on the joint contract.³ Where all the defendants are brought into court, judgment rendered by agreement against one is tantamount to a dismissal as to the others.⁴ When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered being extinguished, their entire liability is gone. They can not be sued separately, for they have incurred no separate obligation; they can not be sued jointly with the others, because judgment has already been recovered against the latter, who would otherwise be subjected to two suits for the same cause.⁵ The supreme court of Pennsylvania has held that a judg-

¹ *Mitchell v. Brewster*, 28 Ill. 163; *Bell v. State*, 7 Blackf. (Ind.) 33, a judgment against one defendant on an action on contract against two is erroneous unless there is a suggestion of "not found" as to the other.

² *Peyton v. Scott*, 2 How. (Miss.) 870; 1 Black on Judgments, § 206.

³ *Wooters v. Smith*, 56 Texas, 198; *Martin v. Baugh* (1890), 1 Ind. App. 20; *Cowley v. Patch*, 120 Mass. 137; *Candee v. Smith*, 93 N. Y. 349; *Smith v. Black*, 9 S. & R. 142; 11 Am. Dec. 686. See generally article by G. C. H. Corliss on "Joint Debtors," 36 Albany Law J. 245, 265.

⁴ *Henry v. Gibson*, 55 Mo. 570. Verdict for a defendant who pleads payment in a suit against him and another on their joint note discharges both. *Lenoir v. Moore*, 61 Miss. 400.

⁵ *Mason v. Eldred* (1867), 6 Wall. 231, overruling *Sheehy v. Mandeville*, 6 Cranch, 254; *Lauer v. Bandow* (1879), 48 Wis. 638; *Bowen v. Hastings*, 47 Wis. 232; *Ward v. Johnson*, 13 Mass. 148; *King v. Hoare*, 13 Mees. & W. 494. The decision in the case of *Sheehy v. Mandeville*, 6 Cranch, 254, to the contrary has been distinctly overruled in this country and in England. In *Wann v. McNulty*, 2 Gilman, 355, the supreme court of Illinois commented upon the case and declined to follow it as authority. *Ferrall v. Bradford*, 2 Fla. 508; 50 Am. Dec. 293. It is the right of persons jointly liable to pay a debt to insist on being sued together. If then there are three persons so liable, and the creditor sues two of them, and those two make no objection, the creditor

ment recovered against one of two partners is a bar to a subsequent suit against both, although the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment.¹ The rule that judgment recovered against one of two joint contractors is a bar to an action against the other, applies equally when one of the joint contractors is a married woman, contracting in respect of her separate property.² A judgment in favor of one or more joint debtors, who were served with process, is no bar to a suit against some not served, particularly when those not served are non-residents.³ And there are several cases which hold that where the joint debtors live in different jurisdictions, judgment against one of them in one jurisdiction is no bar to a subsequent action against the other or both in another jurisdiction.⁴

§ 688. Statutory modifications of the common law rules.—

Joint contracts, or contracts which would be joint by the common law, are in many states declared to be construed as joint and several.⁵ The rules of the common law, as it prevails in

may recover judgment against those two. But should he afterwards bring a farther action against the third, that third may justly contend that the three should be sued together. By recovering judgment against two in the same cause of action the creditor has disabled himself from suing the third in the way in which the third has a right to be sued. *Kendall v. Hamilton*, L. R. 4 App. Cas. 504, per Earl Cairns, L. C. The rule here laid down does not apply where the parties are severally as well as jointly bound, and the recovery of a judgment against one is no bar to an action against the other, until the judgment has been satisfied. *Vestry of Bermondsley v. Ramsey*, L. R. 6 C. P. 247.

¹ *Smith v. Black*, 9 S. & R. 142. "No principle," said the court, "is better settled than that a judgment once rendered absorbs and merges the whole cause of action, and that neither the

matter nor the parties can be severed, unless indeed where the cause of action is joint and several, which, certainly, actions against partners are not."

² *Hoare v. Niblett*, L. R. (1891), 1 Q. B. 781.

³ *Larison v. Hager* (1890), 44 Fed. Rep. 49; *Merriman v. Barker* (1889), 121 Ind. 74. A judgment against one of the joint-makers of a note does not merge the cause of action and bar a separate action against the other maker where he is a non-resident, and not made a party to the former suit.

⁴ *Dennett v. Chick*, 2 Greenl. 191; 11 Am. Dec. 59; *Alcock v. Little*, 9 N. H. 259; 32 Am. Dec. 357; *West v. Furbish*, 67 Maine, 17.

⁵ *Stimson's American Statute Law*, § 4113. The common law rules as to joint or several liability upon contracts are directly, or in effect, abolished in the states of Kentucky,

this country and in England, except as the same have been modified by statute, are very strict in requiring service of process upon all the defendants in an action on a demand against joint obligors or partners. If any of the joint defendants were beyond seas, or could not be found, so that it was impossible to reach them by the process of the court, the proper mode thereon was to institute proceedings of outlawry against them; and after a judgment of outlawry had been rendered, the plaintiff could then obtain a separate judgment against the defendants before the court.¹ Statutes have been passed in most of the states, and in all in which the code system of pleading prevails, which provide that when action is commenced against two or more defendants, jointly or severally liable on a contract, and the summons is served on one or more of the defendants, but not on all, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants.² And a recovery may be had against one defendant alone, in a proper case, notwithstanding another of the debtors has been released by the plaintiff upon a compromise.³

§ 689. The same subject continued.—In most of the states acts called “joint debtor acts” provide that judgment may be given “for or against one or more of several plaintiffs, and for or against one or more of several defendants,” and usually contain a provision that “in an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.”⁴ Under these statutes, if a plaintiff commences an action against two or more

Arkansas, Missouri, North Carolina and Colorado. Bliss on Code Pleading, § 93. Belleville Savings Bank v. Winslow (1887), 30 Fed. Rep. 488, under the Missouri statute providing that “all contracts which, by common law, are joint only, shall be construed to be joint and several.” Wiley v. Holmes, 28 Mo. 286; 75 Am. Dec. 126.

¹ Edwards v. Carter, 1 Stra. 473; Hall v. Lanning, 91 U. S. 160.

² Wood v. Watkinson, 17 Conn. 500; 44 Am. Dec. 562, 570, note.

³ Moss v. Jerome, 10 Bosw. 220.

⁴ Code of New York, § 274; Ohio Code of Civil Procedure, § 371; California Code of Civil Procedure, §§ 578, 579; Iowa Code, § 1815; Wisconsin Code, § 184; Arkansas Code, §§ 400, 401; Wagner on Missouri Statutes, p. 1019, § 32; 1 Black on Judgments, § 208.

defendants upon a joint obligation, he is no longer compelled to establish a joint cause of action against all, but a judgment may be taken against the party or parties shown to be liable, when the others are not liable.¹

¹ *Richardson v. Jones*, 58 Ind. 240. Various effects and consequences are attributed to such judgments in the states in which they are rendered. *Hall v. Lanning*, 91 U. S. 160; *Blodget v. Morris*, 14 N. Y. 482; *Ah Lep v. Gong Choy*, 13 Ore. 205; *Lampkin v. Chisom*, 10 Ohio St. 450; *Hubbell v. Woolf*, 15 Ind. 204; *Longstreet v. Rea*, 52 Ala. 195; *Eyre v. Cook*, 9 Iowa, 185; *Stafford v. Nutt*, 51 Ind. 535. A judgment may be entered against any one or more of several defendants wherever a several suit might have been brought, or a several judgment on the facts of the case would be proper. *Van Ness v. Corkins*, 12 Wis. 186; *Bonesteel v. Todd*, 9 Mich. 371. Action brought against two parties, one of whom was alone served with process. He produced the record of a judgment recovered against himself and his codefendant under the joint debtor act of New York, process in that state having been served upon his codefendant alone. The court said: "We can not, therefore, regard the liability as extinguished. And, inasmuch as the new action must be

based upon the original claim, while, as in the case of foreign judgment at common law, it may be of no great importance whether the action may be brought in form upon the judgment or on the previous debt, it is certainly more in harmony with our practice to resort to the form of action appropriate to the real demand in controversy." *Oakley v. Aspinwall*, 4 N. Y. 514, where the court of appeal of New York considered the effect of a judgment recovered under the joint debtor act of that state upon the original demand, *Bronson, J.*, said: "It is said that the original demand was merged in and extinguished by the judgment, and, consequently, that the plaintiff must sue upon the judgment, if he sues at all. That would undoubtedly be so if both the defendants had been before the court in the original action. But the joint debtor act creates an anomaly in the law. And for the purpose of giving effect to the statute, and at the same time preserving the rights of all parties, the plaintiff must be allowed to sue on the original demand."

CHAPTER XIX.

PART PERFORMANCE.

- § 690. The rule at law.
- 691. Part performance an equitable doctrine.
- 692. Basis upon which the doctrine rests.
- 693. *Quantum meruit* for part performed.
- 694. When no recovery for part performance.
- 695. What acts do not constitute part performance.
- § 696. Acts of part performance—Possession.
- 697. Continuance of possession—Landlord and tenant.
- 698. Improvements.
- 699. Where the consideration is labor and services.
- 700. Marriage.
- 701. Parol gifts of land.

§ 690. The rule at law.—The rule is well settled that a part performance of a verbal contract within the statute of frauds has no effect at law to take the case out of its provisions.¹ In

¹Chicago Attachment Co. v. Davis, etc., Co. (1892), 142 Ill. 171; Lane v. Shackford, 5 N. H. 130; Thompson v. Gould, 20 Pick. 134; Adams v. Townsend, 1 Metc. 483; Brown v. Pollard (1893), 89 Va. 696; Thomas v. Dickinson, 14 Barb. 90; Abbott v. Draper, 4 Denio, 51; Seymour v. Davis, 2 Sandf. 239; Hunt v. Coe, 15 Iowa, 197; Eaton v. Whitaker, 18 Conn. 222; 44 Am. Dec. 586; Hibbard v. Whitney, 13 Vt. 21; Barnes v. Boston & Maine R. Co., 130 Mass. 388; Brockway v. Thomas, 36 Ark. 518. Part performance of a parol contract for the sale of real estate does not entitle either party to sustain an action at law for damages suffered from non-performance. Norton v. Preston, 15 Maine, 14; 32 Am. Dec. 128. It was said by Mr. Justice Buller, "that, as it is settled in equity that a part performance takes it out of the statute, the same rule shall hold in law."

Brodie v. St. Paul, 1 Ves. Jr. 326. In O'Herlihy v. Hedges, 1 Sch. & Lef. 123, Mr. Justice Buller's opinion is stated to be wrong, and Kent, C. J., said, in Jackson v. Pierce, 2 Johns. 222, "there is such a *dictum* of Justice Buller, while sitting in chancery, but it has never been received as law." The reasons for the distinction between an action at law upon such a contract for damages and the specific enforcement thereof by a court of equity are stated by the supreme court of Massachusetts, in Kidder v. Hunt, 1 Pick. 328; 11 Am. Dec. 183: "The contract declared upon is admitted to be within the statute of frauds, since it relates to an interest in land, and is not in writing. It is provided by statute that no action shall be maintained upon such a contract. But it is said that, as part performance of the contract is averred, and, as courts of chancery will decree

general, when a contract within the statute of frauds has been in part executed by one party, there is a remedy to a certain extent in a court of law, in case the other party fraudulently refuses to execute the contract on his part. Thus if money has been paid, it may be recovered; if labor has been performed, compensation for it may be obtained.¹

§ 691. Part performance an equitable doctrine.—The rule has long been established that, in equity, a contract relating to lands may be taken out of the operation of the statute of frauds by part performance.² The doctrine in England is applied only in cases concerning lands. In *Britain v. Rossiter*³ it was sought to apply it to a contract of service. When the provisions of the judicature act of 1873 came into force, which enable the high court and court of appeal to recognize all equitable duties appearing in the course of any matter before them, and to grant all remedies in respect of any legal or equitable claim, and which provide that where “there is any conflict between the rules of equity and the rules of common law, with reference to the same matter, the rules of equity shall prevail,” it was thought possible that the equitable doctrine of part performance might become applicable to contracts

a specific performance of a parol contract if there has been a part performance, as here, as we have no court of chancery with power to decree a specific performance in such cases, the plaintiff may at least recover damages for the breach of such contract. * * Perhaps, in the case of a parol contract respecting land, where the party has been put to expense as to his part of the contract under circumstances which would amount to fraud by the other party, case might lie for damages for the fraud, as was intimated in *Boyd v. Stone*, 11 Mass. 342, but this action is brought upon the contract itself, and to sustain it would be indirectly to give efficacy to a contract which the legislature says shall have none.” This case has been several times cited with approval in subse-

quent cases in Massachusetts. *Dix v. Marcy*, 116 Mass. 416; *Williams v. Bemis*, 108 Mass. 91; *Thompson v. Gould*, 20 Pick. 134. Part performance of a verbal contract, void by the statute of frauds, has no effect at law to take the case out of its provisions, but is only a grant for equitable relief. *Warner v. Texas, etc., Ry. Co.*, 54 Fed. Rep. 922 (1893); 4 C. C. A. 673.

¹ *Sherburne v. Fuller*, 5 Mass. 133; *Boyd v. Stone*, 11 Mass. 342; *Burlingame v. Burlingame*, 7 Cow. 92.

² *Maddison v. Alderson*, L. R. 8 App. Cas. 467; *Brett's Leading Cases in Modern Equity*, 98; *Lester v. Foxcroft*, 1 Lead. Cas. Eq. 1027 (768); 2 *Beach on Modern Equity Jurisprudence*, § 613, and cases cited.

³ *Britain v. Rossiter*, 48 L. J. Q. B. 362; L. R. 11 Q. B. Div. 123.

other than those to which courts of equity had been in the habit of applying it. The court of appeal, however, refused to extend the application of the doctrine to any cases in which equity had not applied it, holding that the contrary ruling would be to construe the judicature acts as conferring new rights, whereas they only change the procedure.¹ In this country, the tendency is to give it a wider scope.² The doctrine has no application to contracts that, by their terms, can not be performed within one year from the making thereof.³

§ 692. Basis upon which the doctrine rests.—The basis upon which the doctrine rests is, that when a verbal contract has been made, which should have been in writing, under the statute of frauds, and one party has knowingly aided or permitted the other to go on and do acts in part performance of the agreement, in full reliance upon such agreement as a valid and binding contract, and which would not have been done without

¹Smith on Contracts, 99. In the case cited it was said by Thesinger, L. J.: "I confess that on principle I do not see why a similar doctrine should not be applied to a case of a contract of service; and as the doctrine of equity is based upon the theory that the court will not allow a fraud on the part of one party to a contract on the faith of which another party has altered his position, I do not see why a similar doctrine should not comprehend a contract of service. At the same time, I feel that doctrines of this nature are not to be unwarrantably extended, and that we ought not to go further than the decisions of courts of equity as to the principles of relief, and as to the instances to which the doctrine of part performance is to be applied." *McManus v. Cooke* (1887), L. R. 35 Ch. Div. 681, in which it was said: "The doctrine of part performance of a parol agreement, which enables proof of it to be given notwithstanding the statute of frauds, though principally applied in the case of contracts for the sale or purchase of land,

or for the acquisition of an interest in land, has not been confined to those cases. Probably it would be more accurate to say it applies to all cases in which a court of equity would entertain a suit for specific performance if the alleged contract had been in writing." The doctrine of part performance making valid a contract void by the statute applies only to contracts relating to land. *McElroy v. Ludlum*, 32 N. J. Eq. 828; 3 *Pomeroy's Equity Jurisprudence*, § 1409; *Pomeroy on Specific Performance*, § 101.

²*Birdsall v. Birdsall*, 52 Wis. 208, where equity disregarded the statute on the ground of part performance where a person had been induced by a promise of employment to give up his business and incur expense in traveling, etc., on the faith of the promise to employ.

³*Wahl v. Barnum* (1889), 116 N. Y. 87; *Wolke v. Fleming* (1885), 103 Ind. 105; *Osborne v. Kimball* (1889), 41 Kan. 187.

the agreement, and are of such a nature as to change the relations of the parties, and to prevent a restoration to their former condition, or an adequate compensation for the loss by a judgment at law for damages, then it would be a virtual fraud in the first party to interpose the statute of frauds as a bar to the completion of the contract, and thus secure for himself all the benefits of the acts already done in part performance, while the other party would not only lose all advantage from the bargain but would be left without adequate remedy for its failure, or compensation for what he had done in pursuance of it. To prevent the success of such a palpable fraud, equity interposes under these circumstances and compels the entire completion of the contract by decreeing its specific execution.¹ The underlying principle is that where one of the contracting parties has been induced or allowed to alter his situation on the faith of an oral agreement within the statute, to such an extent that it would be a fraud on the part of the other party to set up its invalidity, equity will make the case an exception to the statute.² That is, equity will not permit the statute, the purpose of which was to prevent fraud, to be used as a means of committing it.³

¹ *Barrett v. Geisinger* (1893), 148 Ill. 98, per Bailey, J.; *Von Trotha v. Bamberger* (1890), 15 Colo. 1; *Pomeroy on Specific Performance*, § 104. Equity will not interpose unless a fraud will result. *Sullivan v. O'Neal* (1886), 66 Texas, 433.

² *Brown v. Hoag* (1886), 35 Minn. 373. Nothing can be considered as a part performance such as to take the case out of the statute, unless it puts the party performing into a situation which is a fraud upon him, unless the agreement is fully performed. *Burnett v. Blackmar*, 43 Ga. 569; *Bryan v. Southwestern R. Co.*, 37 Ga. 26. In *Neale v. Neales*, 9 Wall. 1, Mr. Justice Davis said: "The statute of frauds requires a contract concerning real estate to be in writing, but courts of equity, whether wisely or not it is too late now to inquire, have stepped

in and relaxed the rigidity of this rule, and hold that a part performance removes the bar of the statute, on the ground that it is a fraud for the vendor to insist on the absence of a written instrument when he had permitted the contract to be partly executed." *Riggles v. Erney* (1894), 154 U. S. 244; *Murphy v. Whitney* (1893), 69 Hun, 573.

³ *Slingerland v. Slingerland* (1888), 39 Minn. 197. Mr. Pomeroy says: "A plaintiff can not, in the face of the statute, prove a verbal contract by parol evidence, and then show that it has been partly performed. This course of proceeding would be a virtual repeal of the statute. He must first prove acts done by himself or on his behalf, which point unmistakably to a contract between himself and the defendant, which can not, in the or-

§ 693. Quantum meruit for part performed.—It is a rule that has been applied in a certain class of cases that if there has been a special contract, and the plaintiff has performed part of it according to its terms, and has been prevented by the act of the defendant from completing it, he may recover upon the *quantum meruit* the reasonable price of the services already performed.¹ Accordingly in an action on a *quantum meruit* to recover the price of logs sold, if in the original contract a method of scaling and measurement was agreed upon as conclusive, the vendor is bound by such method as to the logs he delivers, although the purchaser has put it out of the vendor's power to make a full delivery.² Where the plaintiffs agreed,

dinary course of human conduct be accounted for in any other manner than as having been done in pursuance of a contract, and which would not have been done without an existing contract; and although these acts of part performance can not, of themselves, indicate all the terms of the agreement sought to be enforced, they must be consistent with it, and in conformity with its provisions when these shall have been shown by the subsequent parol evidence." Specific Performance, 154.

¹ Hemminger v. Western Assurance Co., 95 Mich. 355; McGregor v. Ross, 96 Mich. 103.

² Eakright v. Torrent (Mich. 1895), 63 N. W. Rep. 293, Montgomery, J.: "Does it result, in a case where a party to such a contract as the present is entitled to sue and recover upon the *quantum meruit*, that such a stipulation as that contained in the present contract, relating to the scale, may be wholly set aside? If the breach of this contract by defendant had been a refusal to pay when the work was completed, there can be no doubt that the stipulation would be binding. 13 Am. and Eng. Encyc. of Law, 1034; Johnson v. Howard, 20 Minn. 370 (cil. 322); Malone v. Gates, 87 Mich. 332; 49 N. W. Rep. 638. There is a

dictum in Chapman v. Dease, 34 Mich. 375, which tends to sustain the view adopted by the circuit judge. But no such holding was necessary to the determination of the question in that case, as the case turned upon the point that the contract between the parties did not give the scaler the right to determine the percentages of different qualities contained in the logs, and that was the question to which the testimony was directed. Unless the defendant is to be punished beyond the actual damages sustained by the plaintiff for a breach of the contract, we can see no good reason why the scale fixed by agreement of the parties should not be controlling whenever the quantity becomes the subject of judicial inquiry in a suit between the parties. If it be said that it does sometimes result under the rule permitting a recovery under the *quantum meruit* that the defendant is punished by being compelled to pay more than the contract price, the answer is that this is permitted upon the theory that it is one means of measuring the damages of the plaintiff, and, in case of a non-severable contract, perhaps the only means. But the stipulation relative to scaling is a rule of evidence established by the parties, and no logical reason has

for a gross sum, to furnish defendant the entire wood for the inside finish of a house, the wood for two rooms to be first-class mahogany, and when the wood for these two rooms was delivered, the defendant objected to it as not being first-class mahogany; but the plaintiffs, insisting that it was, agreed that if the defendant would use it, and it proved not to be first-class mahogany, he need not pay anything for it, and the wood, upon being used in the rooms, proved to be inferior to the quality contracted for, it was held, in an action to recover the contract price for the entire job, that defendant was entitled to have deducted the reasonable value of the wood for the two rooms of the quality contracted therefor, and not merely the value of the inferior wood actually furnished.¹

§ 694. Where no recovery for part performance.—Where it appeared that the defendant made an offer to excavate and dredge a trench for a bulkhead, the material to be deposited in-shore, which was accepted, but upon commencing the work he was prevented by the shore-inspector from making such deposits, and after continuing work for awhile he abandoned it,

been suggested why this rule of evidence should not control on the trial of any issue which may arise between the parties where the subject-matter to be determined is that which they themselves have fixed a means of determining. The rule is analogous to that which makes the written evidence of a contract the controlling and only admissible evidence. In fact, in practice, the scale is entered in writing, and the opportunity to obtain correct information oftentimes passes by when the scale is entered and the logs barked or put afloat. The contract has been to this extent acted upon and executed by both parties, and the scale established and reduced to writing becomes the superior, and, we think, conclusive evidence upon the subject, in the absence of fraud or such gross error as is referred to in *Malone v. Gates*, 87 Mich. 332; 49 N. W. Rep. 638. The danger of any

other rule is well illustrated in this case. Loose testimony, based upon an inspection of the stumps left upon the ground is admitted, and guesswork as to the number of logs per thousand which a proper scale would show was permitted to overcome the actual scale of the scalers mutually agreed upon; and the jury was, under the instructions, authorized to accept this testimony, even though the scaler committed no fraud, and though no error as to the number of logs was pointed out, and though no actual scale subsequently made showed even any error in judgment. We think it would be unjust to permit this kind of testimony to overcome that which the parties themselves have seen fit to fix as the only competent testimony to determine the identical question which the jury is called to pass upon.'

¹ *Wheaton v. Lund* (Minn. 1895), 63 N. W. Rep. 251.

claiming that there was a failure to perform on plaintiff's part in not securing for him the right to dump inshore, and at the time of the abandonment cribs had been built, and others were permitted to so deposit material, it was held that there was no justification for the abandonment, and that defendant was not entitled to payment for the work actually done.¹ So also, a clause in a building contract giving the owner the right to terminate it if the contractors neglect or refuse to furnish skillful workmen and proper materials, and that, in such case, if the expense of completion shall exceed the unpaid balance of the contract price, the contractors shall pay the difference, does not authorize the owner to pay any amount he may choose for the work and hold the contractors for the excess, but limits him to such sum as is reasonably necessary to complete in accordance with the contract.² So also one who contracts to drill a well which will furnish plenty of water can not recover therefor when sufficient water is not obtained.³

§ 695. What acts do not constitute part performance.—

Where there is an oral contract to convey lands the mere payment of a part or even the whole of the purchase price will not of itself take the case out of the operation of the statute for the money may be recovered back by an action at law.⁴ But the

¹ *Cronin v. Tebo*, 144 N. Y. 660; 39 N. E. Rep. 344, affirming 71 Hun, 59.

² *Charlton v. Scoville* (1895), 144 N. Y. 691; 39 N. E. Rep. 394, affirming 68 Hun, 348.

³ *Jackson v. Cresswell* (Iowa 1894), 61 N. W. Rep. 383, per Kinne, J.. "If he had a hard contract, it was his own fault. The contract was of his own seeking, and he himself dictated its terms. He was an experienced man in the business of drilling wells. He must have known that the procuring of plenty of water was a matter of much uncertainty. He, therefore, took the chances of being able to fully comply with his contract in that respect. We can not relieve parties from obligations voluntarily entered into, even though the enforcement of them may

sometimes seem to work a hardship to one of the contracting parties."

⁴ *Mims v. Chandler*, 21 S. C. 480; *Baker v. Wiswell*, 17 Neb. 52; *Townsend v. Fenton* (1884), 32 Minn. 482; *Humbert v. Brisbane*, 25 S. C. 506; *Boozar v. Teague*, 27 S. C. 348; *Wood v. Jones*, 35 Texas, 64; *Ann Berta Lodge v. Laverton*, 42 Texas, 18; *Jamison v. Dimock*, 95 Pa. St. 52; *Temple v. Johnson*, 71 Ill. 13; *Frazer v. Gates*, 118 Ill. 99; *Neal v. Gregory*, 19 Fla. 356; *Junkins v. Lovelace*, 72 Ala. 303; *Humphries v. Green*, L. R. 10 Q. B. Div. 148; *Lydick v. Holland* (1884), 83 Mo. 703; *Crabill v. Marsh*, 38 Ohio St. 331; *Suman v. Springgate*, 67 Ind. 115; *Forrester v. Flores*, 64 Cal. 24; *Nibert v. Baghurst* (1890), 47 N. J. Eq. 201; *Dunckel v. Dunckel* (1890),

rule is otherwise where a party has paid money on the contract, and a recovery of the money would not restore him to his former situation.¹ Acts, preparatory or ancillary to an agreement, although attended with expense, are not considered acts of part performance. Thus, the delivery of abstracts of title, giving orders for conveyances, going to view an estate, putting deed in solicitor's hands to prepare a conveyance, surveying and similar acts, do not have the effect of taking the case out of the interdiction of the statute.²

§ 696. Acts of part performance—Possession.—The acts of part performance to satisfy this principle must be done in pursuance of the contract, and must alter the relations of the parties. The most important acts which constitute a sufficient part performance are actual possession, permanent and valuable improvements, and these two combined.³ Possession

56 Hun, 25. Otherwise in Iowa by statute. *Stem v. Nysonger*, 69 Iowa, 512; *Nan v. Jackman*, 58 Iowa, 359. The code provides that the statute shall not apply "where the purchase-money, or any part thereof, has been received by the vendor." § 3665. So too, Alabama, § 1732. It was formerly held that the payment of a portion of the purchase-money was sufficient to take a verbal contract for the sale of land out from the operation of the statute. Afterwards the courts refused to recognize any such distinction. *Clinan v. Cooke*, 1 Sch. & Lef. 22, per Lord Redesdale; *Townsend v. Houston*, 1 Harr. 532; 27 Am. Dec. 732, note discussing the question; *Waterman on Specific Performance of Contracts*, § 268; *Browne on Statute of Frauds*, § 461. In parol agreements for the sale of lands, payment of the contract price by the purchaser is not of itself sufficient part performance to take the case out of the statute, for the reason that money can be recovered back with interest by way of damages for its detention. *Brown v. Brown* (1881), 33 N. J. Eq. 650;

Hughes v. Morris, 2 De G. M. & G. 349; *Glass v. Hurlbert*, 102 Mass. 24; *Cole v. Potts*, 10 N. J. Eq. 67; *Green v. Richards*, 23 N. J. Eq. 32.

¹ *Malins v. Brown*, 4 N. Y. 403; *Moore v. Gordon* (1884), 44 Ark. 334; *Cooper v. Monroe* (1894), 77 Hun, 1.

² 1 *White & Tudor's Leading Cases* (1886), notes to *Lester v. Foxcroft*, 11 T. Cas. in Eq. 1027; *Brett's Leading Cases*, No. 101; *Cooth v. Jackson*, 6 Ves. 12; *Thynne v. Earl of Glengall*, 2 H. L. Cas. 131; *Montacute v. Maxwell*, 1 P. Wms. 618; *Colgrove v. Solomon*, 34 Mich. 494; *Graham v. Theis*, 47 Ga. 479 (tendering a deed); *Sands v. Thompson*, 43 Ind. 18 (the same); *Clerk v. Wright*, 1 Atk. 12 (giving orders to have conveyances drawn and going to view the estate); *Phillips v. Edwards*, 33 Beav. 440 (preparing a lease); *Smith v. Smith*, 1 Rich. Eq. 130 (delivering an abstract of title and giving instructions to prepare deeds); *Redding v. Wilkes*, 3 Bro. C. C. 400 (putting a deed into the hands of a solicitor to prepare a conveyance of the estate).

³ *Burns v. Daggett*, 141 Mass. 368;

alone under some circumstances without payment or other acts of ownership has been held sufficient part performance of an oral contract for the sale of land to take the case out of the statute.¹ In order that possession shall operate as part performance it must be a visible, notorious, and exclusive possession taken under the parol contract.² Possession must be taken with the actual or constructive assent of the vendor. The mere remaining silent, while seeing the purchaser take possession of the land agreed to be sold, and make improvements on it for the purpose for which it was purchased, without remonstrance, might be deemed an assent.³ The vendor, after he has seen the purchaser in possession and making expenditures upon the

3 Pomeroy's Equity Jurisprudence, § 1409. Chancellor Kent says: "Generally, it may be observed, delivery of possession is part performance." 4 Kent's Commentaries, 451, and among the cases to which he refers in support of the proposition is the Earl of Aylesford's Case, 2 Stra. 783. In that case there was a parol agreement for a lease of twenty-one years; the lessee had entered and enjoyed the premises six years. The bill was brought by the lessor, to compel the lessee to execute a counterpart to the lease, for the residue of the term. The defendant pleaded the statute of frauds, but the plea was overruled on the ground of part performance.

¹ Danforth v. Laney, 28 Ala. 274; Arrington v. Porter, 47 Ala. 714; Pindall v. Trevor, 30 Ark. 249; McCarger v. Rood, 47 Cal. 138; Jefferson v. Jefferson, 96 Ill. 551; Puterbaugh v. Puterbaugh (1891), 131 Ind. 288; Rucker v. Steelman, 73 Ind. 396; Anderson v. Simpson, 21 Iowa, 399; Lamb v. Hinman, 46 Mich. 112; Jamison v. Dimock, 95 Pa. St. 52; Seaman v. Ascherman, 51 Wis. 678; Coles v. Pilkington, L. R. 19 Eq. Cas. 174; Christy v. Barnhart, 14 Pa. St. 260; 53 Am. Dec. 538, and notes; Calanchini v. Branstetter (1890), 84 Cal. 249. Admission into possession, hav-

ing unequivocal reference to the contract, has always been considered an act of part performance. Green v. Jones, 76 Maine, 563; Morphet v. Jones, 1 Swans. 172. "Taking possession under a parol agreement and in compliance with the provisions of such agreement, accompanied by other acts which can not be recalled so as to place the party taking possession in the same situation in which he was in before, has always been held to take such agreement out of the operation of the statute of frauds." Lowry v. Tew, 3 Barb. Ch. 407; Miller v. Ball, 64 N. Y. 286; Young v. Overbaugh (1894), 76 Hun, 151.

² Brown v. Lord, 7 Ore. 302; Moore v. Small, 19 Pa. St. 461 (notorious); Charpiot v. Sigerson, 25 Mo. 63 (notorious); Frye v. Shepler, 7 Pa. St. 91 (exclusive); Haslet v. Haslet, 6 Watts. 464 (exclusive); Barnes v. Boston, etc., R., 130 Mass. 388 (in pursuance of the contract); Ham v. Goodrich, 33 N. H. 32; Cole v. Potts, 14 N. J. Eq. 67; Welsh v. Bayurd, 21 N. J. Eq. 186; Peckham v. Barker, 8 R. I. 17; Wood v. Thornly, 58 Ill. 464; Judy v. Gilbert, 77 Ind. 96.

³ Waterman on Specific Performance, § 261; Nibert v. Baghurst (1890), 47 N. J. Eq. 201.

land for a long time, will not be permitted to allege that he is not in by virtue of the contract.¹

§ 697. Continuance of possession—Landlord and tenant.—

Mere continuance of possession does not constitute part performance. There must be a radical change in the attitude of the contracting parties towards each other, a change consisting of acts done, a notorious change which itself indicates that some contract has been made between the parties.² Possession taken under a prior contract and merely continued under the oral one is not sufficient.³ Where one is in possession of land as a tenant at the time he verbally contracts to purchase the premises, his subsequent possession will be presumed to be under the lease, unless it be clearly shown to result from the subsequent agreement.⁴ If a tenant in possession verbally contracts with the owner for a new term, his merely continuing in possession after the making of the alleged contract is not an act of part performance within the meaning of the rule, so

¹ *Harris v. Knickerbacker*, 5 Wend. 638; *Freeman v. Freeman*, 43 N. Y. 34; *Howe v. Rogers*, 32 Texas, 218; *Purcell v. Miner*, 4 Wall. 513; *Moore v. Higbee*, 45 Ind. 487; *Gregory v. Mighell*, 18 Ves. 328; *Millard v. Harvey*, 34 Beav. 237; *Lord v. Underdunk*, 1 Sandf. Ch. 46.

² *Emmel v. Hayes* (1890), 102 Mo. 186. In *Andrew v. Babcock* (1893), 63 Conn. 109, Fenn, J., said: "Some of the most recent cases, however, undoubtedly hold that possession alone is not sufficient. But on examination we think most of the cases capable of being reconciled and made consistent on this principle that, while possession alone of land, under a verbal contract, when delivered to a vendee or lessee with the consent of the vendor or lessor, or with such knowledge as would imply consent, and under such circumstances that it can naturally and reasonably be accounted for only by the supposition of some

contract, instead of any other relation between the parties, thus clearly indicating the commencement of a new estate or interest in the land on the part of the possessor, is a sufficient act of part performance to take the case out of the statute, yet the mere physical fact of possession is not sufficient. 'When the possession is not a new fact, but is the continuation of a former similar condition, as when it is by a tenant after the expiration of his term alleging a verbal contract to renew or to convey, the intent' (to carry out and execute the agreement) 'must be proved by some further act which clearly shows that possession must be accounted for by the new relation, and can not be referred to the previous holding.' " *Pomeroy on Specific Performance*, § 116.

³ *Lamme v. Dodson*, 4 Mont. 560; *Felton v. Smith*, 84 Ind. 485.

⁴ *Bigler v. Baker* (1894), 140 Neb. 325; 58 W. Rep. 1026.

as to justify a decree for a lease according to the contract;¹ because in such a case his possession may be referable to the old lease, and does not unequivocally refer to and result from the agreement.² But if the tenant goes on and makes extensive improvements that are inconsistent with the old relation, the rule is otherwise.³ Where a tenant already in possession made a verbal contract with his landlord for a thirty-year lease, and made improvements on the faith of it, or had them made by a sublessee, it was held that he was entitled to specific performance, by virtue of the improvements, although he was in possession when the contract was made.⁴

§ 698. Improvements. — Expenditures made on improvements upon the land constitute a part performance which will take a parol agreement relating to the sale or leasing thereof out of the statute, especially where such improvements are incapable of compensation by damages.⁵ Improvements relied

¹ *Browne on Statute of Frauds*, § 476, and cases cited. In *Recknagle v. Schmaltz*, 72 Iowa, 63, it was held that possession alone was not sufficient, because the plaintiff was occupying the land as a tenant or employe of the intestate at the time of the alleged contract. In *Swales v. Jackson*, 126 Ind. 282, it was held that, "where the vendees were already occupying the land as tenants or as former owners, and continued in possession after the parol contract was made, there is no such taking of possession as will bring the case within the exception of the statute of frauds. To bring a parol contract for the sale of real estate within the exception to the statute, there must be an open and visible change of possession under the contract."

² *Mahana v. Blunt*, 20 Iowa, 142; *Rosenthal v. Freeburger*, 26 Md. 75.

³ *Spalding v. Couzelman*, 30 Mo. 177. They must of course be of such a marked and important character as to be not naturally reconcilable with the continuance of the old relation.

Browne on Statute of Frauds, § 480. In *Brennan v. Balton*, 2 Dru. & War. 349, Chancellor Sugden said that, where the improvements which were made, and the alleged expenditure by the tenant, were no more than what would take place in the ordinary course of husbandry, it would be against all authority to say that such acts amounted to part performance.

⁴ *Williams v. Evans*, 19 L. R. Eq. 547; 13 Moak's Eng. Reports, 490.

⁵ *Hoffman v. Fett*, 39 Cal. 109; *Burlingame v. Rowland* (1888), 77 Cal. 315; *Green v. Finin*, 35 Conn. 178; *Tate v. Jones*, 16 Fla. 216; *McDowell v. Lucas*, 97 Ill. 489; *Laird v. Allen*, 82 Ill. 43; *Fall v. Hazelrigg*, 45 Ind. 576; *Casler v. Thompson*, 4 N. J. Eq. 59; *Moss v. Culver*, 64 Pa. St. 414; *Detrick v. Sharrar*, 95 Pa. St. 521; *Johnson v. Bowden*, 37 Texas, 621; *Hunkins v. Hunkins*, 65 N. H. 95; *Lowry v. Buffington*, 6 W. Va. 249; *Ingles v. Patterson*, 36 Wis. 373; *Neale v. Neales*, 9 Wall. 1; *Swain v. Seamens*, 9 Wall. 254; *Wetmore v. White*, 2 Caine's Cas. 87; 2 Am. Dec.

upon to constitute a part performance must be valuable, permanently beneficial to the estate, and involving a sacrifice to the purchaser who made them.¹ The building of a party-wall under a parol agreement that the adjacent owner will pay for one-half of as much as he shall use when he builds is a part performance taking the case out of the statute.² Slight and temporary erections for the tenant's own convenience give no equity.³ Improvements to constitute part performance need not necessarily consist of erections on land, but may arise from skill and labor bestowed in cultivation.⁴ Where a parol contract was made for the rent of a plantation, and the defendant went into possession of the place in pursuance of the contract and cultivated it for the year, this was held such a part performance of the contract as took it out of the operation of the statute in an action brought for the rent.⁵

323, note; *Ungley v. Ungley*, L. R. 4 Ch. Div. 73. "A principle of common justice forbids that one shall be permitted to lead another to act upon a contract of purchase with him, and incur expenses by reason of it, and then, upon some pretext of a defect in a matter of form, refuse compliance with its provisions, and thus deprive the purchaser of the benefit of his labor and expenditures." *Union Pacific Ry. Co. v. McAlpine* (1888), 129 U. S. 305, per Field, J. In *Pomeroy on Specific Performance of Contracts*, § 126, numerous cases are cited to sustain the general proposition that "the making of valuable permanent improvements on the land by the vendee or lessee, in pursuance of the agreement, and with the knowledge of the other party, is always considered to be the strongest and most unequivocal act of part performance by which a verbal contract to sell or convey or to lease is taken out of the statute."

¹ *Hamilton v. Jones*, 3 Gill & J. 127; *Davenport v. Mason*, 15 Mass. 85; *Wack v. Sorber*, 2 Wharton, 387; 30

Am. Dec. 269; *Gallagher v. Gallagher* (1888), 31 W. Va. 9.

² *Rawson v. Bell*, 46 Ga. 19. In *Rindge v. Baker*, 57 N. Y. 209, where under a parol agreement between two adjoining proprietors to jointly build a party wall, one-half on the premises of each, the parties went on and built a portion of the wall, it was held that one party, who had prepared his materials and planned his building in view of and relying upon the performance of the contract, upon the refusal of the other to proceed, is not limited to an action for specific performance, but may, after notice to the other, complete the wall, and recover of the other one-half the expense. Such an action is not purely an action at law, but is one of equitable cognizance, it being not for a breach of the parol contract, but for money by way of performance.

³ *Young v. Glendenning*, 6 Watts, 509, per Gibson, C. J.

⁴ *Waterman on Specific Performance*, § 282.

⁵ *Rosser v. Harris*, 48 Ga. 512.

§ 699. Where the consideration is labor and services.—

Where there is an agreement to convey land, and the consideration is paid in services of such a character that their value may be estimated and liquidated in money, so as to measurably make the vendee whole, it is not an act of part performance which will take the case out of the statute.¹ But where the labor and services are of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and the vendor did not intend so to estimate them, the labor and services will constitute part performance.² When the consideration of an agreement to convey land by a father to his daughter was nearly forty years of domestic service rendered for him at his request, it was held that, inasmuch as the bar of the statute of limitations could be interposed to cut off more than seven-eighths of the claim if the party was left to a suit at law to recover compensation, fraud would result, unless the agreement was carried into effect; and the case was brought within the reason of the rule “that nothing is to be considered as a part performance which does not put a party in a situation which is a fraud upon him, unless the agreement be fully performed.”³

¹ *Slingerland v. Slingerland* (1888), 39 Minn. 197.

² *Rhodes v. Rhodes*, 3 Sandf. Ch. 279, where two brothers, one having a family and the other being single, owned a farm in common on which they had always lived together. The unmarried brother, being subject to epileptic fits, made a verbal agreement with his other brother to give him all his property, provided he would take care of him as long as he lived. The married brother and family took care of the unmarried brother up to the time of his death. It was held that this constituted such a part performance as to relieve a parol contract from the operation of the statute. “The case is clearly within the rule which governs courts of equity in carrying parol agreements into effect where possession has been taken or

moneys laid out in improvements upon the land sold.” In *Davison v. Davison*, 13 N. J. Eq. 246, a father agreed with his son, on the latter attaining his majority, that if he would remain at home and take care of the family he would, at his death, leave him the farm. The son performed his part of the agreement, and specific performance was decreed, on the ground of part performance. *Sutton v. Hayden*, 62 Mo. 101; *Sharkey v. McDermott* (1887), 91 Mo. 647; *Hiatt v. Williams*, 72 Mo. 214; *Lloyd v. Hollenback* (1893), 98 Mich. 203; *Twiss v. George*, 33 Mich. 253; *Johnson v. Hubbell*, 10 N. J. Eq. 332; *Brown v. Sutton* (1888), 129 U. S. 238.

³ *Warren v. Warren* (1883), 105 Ill. 568. A contract to leave property to an adopted child as an heir is taken out of the statute of frauds by per-

§ 700. **Marriage.**—Contracts made upon the consideration of marriage if verbal are capable of partial performance so as to be taken out of the operation of the statute.¹ Marriage itself is not part performance and does not take a parol agreement to convey lands in consideration of the marriage out of the statute.² But in connection with other acts it may be a sufficient part performance upon which to base the equitable jurisdiction, and secure the enforcement of such agreements.³ Taking possession and making permanent improvements by the husband and wife are held a sufficient part performance of an antenuptial verbal promise by the father of the husband, to convey land to the wife made in consideration of the intended marriage.⁴ Where a father gave his daughter verbally a house as a marriage portion previous to her marriage, it was held that the delivery of the property to the daughter, in pursuance of the gift, and the fulfillment of the condition on

formance on the part of the child. *Wright v. Wright* (1894), 99 Mich. 170. In *Pond v. Sheean* (1890), 132 Ill. 312, it was held that where a person took a child to raise as a member of his family and made a parol promise to give the child all his property on his death and that of his wife the performance on the part of the child did not take it out of the statute. *Austin v. Davis* (1891), 128 Ind. 472, to the same effect.

¹ *Pomeroy on Specific Performance*, § 101.

² *Peek v. Peek*, 77 Cal. 106; 11 Am. St. Rep. 244; *Caton v. Caton*, L. R. 1 Ch. App. Cas. 137. In *Ungley v. Ungley*, L. R. 4 Ch. Div. 73, Malins, V. C., said: "I must say in this case as I have said on similar occasions before, that the decisions are to be regretted which have uniformly held that marriage is not part performance, so as to take parol contracts out of the statute." With reference to this subject, Story says: "The subsequent marriage is not deemed a part performance, taking the case out of the

statute, contrary to the rule which prevails in other cases of contract. In this respect it is always treated as a peculiar case standing on its own ground." 1 Story's Equity Jurisprudence, § 768; *Atherley on Marriage*, 90.

³ *Gough v. Crane*, 3 Md. Ch. 119; *Crane v. Grough*, 4 Md. 316. In *Hammersley v. De Biel*, 12 Cl. & Fin. 45, the lady's father and her intended husband made a verbal agreement prior to the marriage, by which the father agreed to settle certain property on his daughter, and the husband agreed to settle a certain jointure upon her. The intended husband executed his settlement as he had promised, and the marriage took place. It was held by Lord Chancellor Cottenham, that this execution of the settlement in pursuance of his contract by the husband, being an act done by him over and above the marriage, was a sufficient part performance to take the father's verbal agreement out of the statute.

⁴ *Neale v. Neales*, 9 Wall. 1.

which it was to attach by the consummation of the marriage, withdrew the contract from the reach of the statute of frauds. There were two ingredients which relieved the parol agreement from the operation of the statute, performance of the consideration, and a change of possession under the contract.¹

§ 701. Parol gifts of land.—Equity will protect a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee induced by the promise to give it has made valuable improvements on the property.² But possession taken in pursuance of a verbal gift is not alone sufficient part performance,³ there being no valuable consideration, and possession in such a case not being inconsistent with permission simply to occupy the land.⁴ Besides such possession there must be improvements not capable of compensation in damages.⁵ Nor do improvements tend directly to es-

¹ *Dugan v. Gittings*, 3 Gill (Md.), 138; 43 Am. Dec. 306. In *Ungley v. Ungley*, L. R. 4 Ch. Div. 73, Malins, V. C., said: "I should say, therefore, that if A. is about to marry, and proves a promise on behalf of the intended wife's father that he will give him a house on his marriage, that is a void contract, because it is not in writing, but if that promise is followed upon the marriage by possession, that simple fact, if it be for an hour only, ought, in my opinion, as being a part performance of the promise, to take the case out of the statute of frauds, and the party who has got the contract thus perfected by part performance is in just as good a situation as if he had a contract in writing by the father, saying that 'in consideration of the marriage, I will give or settle upon you a house.'" In *Surcome v. Pinniger*, 3 De G.M. & G. 571, where a father, on the marriage of his daughter, promised to give certain leaseholds, and then after the marriage let his son-in-law into possession, gave him the title deeds, and allowed him to expend money on the land, the case was held to be taken out of the statute.

² *Halsey v. Peters* (1884), 79 Va. 60; *Erie, etc., Ry. Co. v. Knowles*, 117 Pa. St. 77; *Hunter v. Mills*, 29 S. C. 72; *Beall v. Clark*, 71 Ga. 818; *Irwin v. Dyke*, 114 Ill. 302; *West v. Bundy*, 78 Mo. 407; *Newkirk v. Marshall*, 35 Kan. 77; *Dawson v. McFaddin*, 22 Neb. 131. In *Lessee of Syler v. Eckhart*, 1 Binney, 378, Tilghman, C. J., said: "We see no material difference between a sale and a gift, because it certainly would be fraudulent conduct in a parent to make a gift which he knew to be void, and thus entice his child into a great expenditure of money and labor of which he meant to reap the benefit himself."

³ *Guynn v. McCauley*, 32 Ark. 97. As between a father and son, or a son-in-law, possession of the land alone is not sufficient to entitle the donee to specific performance. *Anderson v. Scott* (1888), 94 Mo. 637.

⁴ *Stewart v. Stewart*, 3 Watts, 253; *Pinckard v. Pinckard*, 23 Ala. 649.

⁵ *Ballard v. Ward*, 89 Pa. St. 358. The expenditure in money or labor in the improvement of the land induced by the donor's promise to give the land

tablish the principal fact, and where the improvements are merely such as are essential to the use of the land they have but little weight as corroborative evidence.¹ If the expenditure has been trivial, or does not appear to have been induced by or founded upon the gift, or has been compensated for by the past profits of the land, or admits of an adequate compensation from other sources, it will not be sufficient.² The gift must be proved clearly and distinctly, and the proof that the donee actually expended money under and on the faith of it must be of equal clearness.³ Where a son goes into possession of his father's land, and makes improvements, a jury is not to infer from that, in the absence of other evidence, that the father gave him the land. And loose declarations of the father, in casual conversations, calling it his son's property, without any explanation how it came to be his, are not sufficient evidence of a gift.⁴

to the party making the expenditure constitutes, in equity, a consideration for the promise and the promise will be enforced. *Crosbie v. McDoual*, 13 Ves. 148; *Freeman v. Freeman*, 43 N. Y. 34; *Seavey v. Drake*, 62 N. H. 393.

¹ *Cox v. Cox*, 26 Pa. St. 375. Mere repairs not sufficient. *Gallagher v. Gallagher*, 31 W. Va. 9.

² *Wack v. Sorber*, 2 Wharton, 387. The improvements, as they were called, were at most equal in value only to a year's rent, and the donee had the premises five years. Besides, the improvements were not such as added to the permanent value of the land, consisting, as they did, in repairs of fences, and the erection of a shed for a cow-stable. "These attempts to turn an experimental investiture of possession into a sale, or

gift executed, are of such repeated occurrence as to require the courts to hold a strict hand over them." *Per curiam*.

³ *Allison v. Burns* (1884), 107 Pa. St. 50; *Truman v. Truman* (1890), 79 Iowa, 506.

⁴ *Hugus v. Walker*, 12 Pa. St. 173. "It is so natural for parents to help their children by giving them the use of a farm or house, and then to call it theirs, that no gift or sale of the property can be inferred from such circumstance. * * The very nature of the relation, therefore, requires the contracts between parents and children to be proved by a kind of evidence that is very different from that which may be sufficient between strangers." *Poorman v. Kilgore*, 26 Pa. St. 365. *Per Lowrie, J.*

CHAPTER XX.

CONSTRUCTION OF CONTRACTS.

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| § 702. The intention of the parties the cardinal rule. | § 724. Construction by parties—Es-toppel. |
| 703. Intent as ascertained from the language used. | 725. Parol evidence to show the construction of the party. |
| 704. Construing written contracts when oral evidence excluded. | 726. The rule <i>contra proferentem</i> . |
| 705. The same subject continued. | 727. Grants. |
| 706. Superseding the old by a new contract. | 728. Contracts partly written and partly printed. |
| 707. Error of the parties. | 729. The same subject continued. |
| 708. Reasonable construction to be adopted. | 730. Punctuation. |
| 709. The contract to be upheld if possible. | 731. Whether a contract is entire or severable. |
| 710. Necessary implications. | 732. Whether a contract is severable or joint. |
| 711. The whole contract to be considered. | 733. The same subject continued—Illustrations. |
| 712. Construing particular clauses. | 734. Laws, customs and usages. |
| 713. Reading two instruments as one. | 735. Construction of deeds. |
| 714. Words to be given their ordinary meaning. | 736. The same subject continued. |
| 715. When the ordinary sense will not control. | 737. Construction of insurance policies. |
| 716. Technical words. | 738. The same subject continued. |
| 717. Where the contract is capable of two meanings. | 739. Building contracts. |
| 718. Repugnancy. | 740. Parol evidence admissible when. |
| 719. Effect to be allowed to surrounding circumstances. | 741. The same subject continued. |
| 720. The same subject continued. | 742. Latent and patent ambiguities. |
| 721. Construction by the parties. | 743. Function of judge and jury respectively. |
| 722. The same subject continued. | 744. The same subject continued. |
| 723. The object of construction. | 745. The same subject continued—Oral contracts. |
| | 746. Contracts of sale or return of sale or bailment. |

§ 702. The intention of the parties the cardinal rule.—It is a cardinal rule in the construction of all contracts that the intention of the parties is to be inquired into, and, if not for-

bidden by law, is to be effectuated.¹ The great object, and indeed the only foundation, of all rules for the construction of contracts is to come at the intention of the parties.² Mr. Broom, translating a fundamental maxim, says: "A liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties."³ Written contracts should be so construed as to give effect to them, rather than the contrary, and when they are informal, illiterate and unskillfully drawn, the intent is to be ascertained, if possible, without regard to technical rules, by construing the words as they were understood by the parties, resort being had to every part of the instrument, and the intent when thus ascertained is the governing rule.⁴ To ascertain the intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view.⁵ The words employed, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended them to have.⁶

¹ *Bradley v. Washington, etc., Co.*, 13 Pet. 89; *Walters v. Morrow*, 1 Houst. (Del.) 527; *Mauran v. Bullus*, 16 Pet. 528 (construction of a letter of guarantee); *The Binghamton Bridge*, 3 Wall. 51; *Chesapeake & Ohio Canal Co. v. Hill*, 15 Wall. 94; *Mathews v. Phelps*, 61 Mich. 327; 1 Am. St. Rep. 581; *Smith v. Kerr*, 108 N. Y. 31; 2 Am. St. Rep. 362; *Field v. Leiter*, 118 Ill. 17; *Flagg v. Eames*, 40 Vt. 16; *Hawes v. Smith*, 12 Maine, 429; *Donahue v. McNulty*, 24 Cal. 411; 85 Am. Dec. 78; *Melick v. Pidcock*, 44 N. J. Eq. 525; 6 Am. St. Rep. 901; *Edwards v. Bowden*, 99 N. C. 80; 6 Am. St. Rep. 487; *Noyes v. Nichols*, 28 Vt. 159; *Walker v. Tucker*, 70 Ill. 527; *Dwight v. German, etc., Insurance Co.*, 103 N. Y. 341; *Williamson v. McClure*, 37 Pa. St. 402; *McConnell v. New Orleans*, 35 La. Ann. 273.

² *Gray v. Clark*, 11 Vt. 583. The rule most conspicuous and wide-reaching of all is that a written contract

shall be so interpreted, as, if possible, to carry out what the parties meant. *Bishop on Contracts*, § 380.

³ *Broom's Legal Maxims*, *p. 540.

⁴ *Atwood v. Cobb*, 16 Pick. 227; 26 Am. Dec. 657.

⁵ *Lawson's Rights, Remedies and Practice*, § 2316; *McConnel v. Murphy*, L. R. 5 P. C. 203.

⁶ *Tennessee v. Whitworth*, 117 U. S. 129. The construction is to be according to the intention appearing by the words. *Calcutta and Burmah Steam Nav. v. De Mattos*, 32 L. J. Q. B. 322. According to the intent apparent on the face as far as words will admit. *Williams v. Gray*, 67 Eng. C. L. R. 730 (9 C. B.); *Pensacola Gas Co. v. Lotze's Sons*, 23 Fla. 368; *Belch v. Miller*, 32 Mo. App. 387; *Crocker v. Hill*, 61 N. H. 345; *Benjamin's Succession*, 39 La. Ann. 612. The intention of the parties is to be derived from the terms and subject-matter and not from the statements of one party

§ 703. **Intent as ascertained by the language used.**—If the contract was reduced to writing, the language of the instrument, if lucid, is the best evidence of the intent.¹ The construction should be such as to give effect to the intention of the parties as gathered from the words used.² The language of a written contract, while it is in force, is the only legitimate evidence of what the parties intended and understood by it.³ And it will be presumed that the writing expresses the whole contract.⁴ The court can not import words into a contract which would make it materially different in a vital particular from what it is.⁵ A party to a contract may reasonably be held bound by what he fairly expressed in the terms used, whether he intended what he expressed or not.⁶ The law will presume that a person meant what his language, by its terms, and under the circumstances under which it was used, would be fairly understood as to what may have been his understanding. *Meinhardt v. Mode*, 22 Fla. 279.

¹ *Rogers v. Atkinson*, 1 Ga. 12; *Walker v. Tucker*, 70 Ill. 527; *Greene v. Day*, 34 Iowa, 328; *Robb v. Bancroft*, 13 Kan. 123; *McLellan v. Cumberland Bank*, 24 Maine, 566; *Jeffrey v. Grant*, 37 Maine, 236; *Mumford v. McPherson*, 1 Johns. 363; *Westcott v. Thompson*, 18 N. Y. 367; *Dent v. North American Steamship Co.*, 49 N. Y. 390; *Heirs of Watrous v. McKie*, 54 Texas, 65; *Bearss v. Ford*, 108 Ill. 16.

² *Stout v. Whitney*, 12 Ill. 218; *Tracy v. Chicago*, 24 Ill. 500; *Streeter v. Streeter*, 43 Ill. 155; *Wilson v. Marlow*, 66 Ill. 385; *Walker v. Douglas*, 70 Ill. 445; *Schneider v. Turner*, 130 Ill. 28; *Hill v. Parker*, 10 Ill. App. 323; *Chestnut v. Chestnut*, 15 Ill. App. 390. The meaning and intention of the parties to a contract is to be ascertained from the face of the instrument and by the application of common sense to the particular case. *Green v. Town of Dyersburg*, 2 Flip. 472.

³ *West Haven Water Co. v. Redfield* (1889), 58 Conn. 39. "The writing, it is true, may be read by the

light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties, but as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the courts in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of the words they may have used." 1 Greenleaf on Evidence, § 277.

⁴ *Farrar v. Hinch*, 20 Ill. 646; *Merchants Ins. Co. v. Morrison*, 62 Ill. 242; *Harding v. Commercial Loan Co.*, 84 Ill. 251; *Wight v. Sampter*, 127 Ill. 167.

⁵ *Gavinzel v. Crump* (1874), 22 Wall. 308 (construction of a bond); *Robinson v. Stow*, 39 Ill. 568; *Fitzgerald v. Staples*, 88 Ill. 234.

⁶ *William Cramp & Sons, Ship, etc., Building Co. v. Sloan*, 21 Fed. Rep. 561. A contractor must stand by the words of his contract, even if he does not read it. *Upton v. Tribilcock*, 91 U. S. 45.

stood to mean, and this presumption can not be rebutted by proof that he intended something more or different, which he made no attempt to express, and which a person dealing with him neither understood nor had reason to understand.¹ Accordingly, a prior verbal contract will be merged in a subsequent written one.²

§ 704. Construing written contracts—When oral evidence excluded.—A plain written contract must, therefore, be construed according to its terms, whatever the result may be.³ And such terms should be taken in their natural, popular and obvious meaning, where there is nothing in the contract itself or the attending circumstances which shows that the parties intended to use them in some particular or technical sense. Thus, where a contract between a city and a water company provided that the latter should put in such further number of fire hydrants upon street mains as might be ordered by the city council, "provided that the cost and expense of all such further number of hydrants and of the putting in of the same shall be paid by said city," it was held that the city was liable only for the actual sum expended by the company in putting in such hydrants, and not for what such work was reasonably worth.⁴ Oral evidence is not admissible to explain or limit the construction of the word "incompatibility," when stated among the grounds for discharge provided in a written contract of employment.⁵ Thus, where one takes charge of a farm under a contract

¹ *Clark v. Lillie*, 39 Vt. 405; *Locke v. Sioux City & P. R.*, 46 Iowa, 109; *Meriam v. Piner City Lumber Co.*, 23 Minn. 314.

² *Carr v. Hays*, 110 Ind. 408; 9 West. Rep. 183; *Stuebben v. Granger*, 63 Mich. 306; *Stoddard v. Nelson*, 17 Ore. 417; *Welz v. Rhodius*, 87 Ind. 1, and cases cited.

³ *Preston v. Smith*, 156 Ill. 359; 40 N. E. Rep. 949; and see *Einstein v. Rochester Gas Co.*, 146 N.Y. 46; 40 N. E. Rep. 631, 633; *Sirk v. Ela*, 163 Mass. 394; 40 N. E. Rep. 183. "A contract is to be understood according to the meaning of the language employed

therein, and not according to the views of its meaning entertained by the parties drawing it; and a court will not change plain language of the contract in order to conform it to a mistaken notion of its meaning, entertained by the person executing it, in the absence of proof of fraud, accident, or mistake." *Wadsworth v. Smith*, 43 Iowa, 439.

⁴ *Bull v. City of Quincy*, 155 Ill. 566; 40 N. E. Rep. 1035.

⁵ *Gray v. Shepard* (Oct. 1895), 147 N. Y. 177, per Andrew, C. J.: "The plaintiff, by the evidence offered, sought to limit the meaning of a word

which provides that he "is to receive five per cent. of the money used or collected," the contract will be construed as allowing him five per cent. of all disbursements made in accordance with the terms of the contract, as well as five per cent. of all moneys collected.¹ -

§ 705. The same subject continued.—Where a clause in a contract, having been left unfinished, is meaningless, the court will not supply supposed omissions to give it legal effect.² And whether a contract for the sale of goods was intended as such, or was a mere banter, and so understood by the parties, is for the jury.³ But in a contract between two sisters, providing that, should either of them die before the other without a "living heir," the survivor should become sole owner of a note held by them jointly, the words "living heir" should be construed to mean *issue*.⁴ An instruction wherein the court

in common use, the only indefiniteness of meaning consisting in its wide application, and which for that very reason, as may be inferred, was introduced into the contract. The elements and qualities which may create incompatibility between persons elude exact definition, so varied are the circumstances and so dependent is such a state of feeling upon education, habits of thought and peculiarities of character. It must be assumed that the parties understood the wide signification of the word and used it understandingly. The service to be rendered involved mutual confidence between the parties and intimate personal association. Want of harmony between them for any cause would be likely to interfere with the newspaper enterprise and made the insertion of this ground for discharge natural and reasonable. The word is not a word of art, or of technical or local meaning, or having two distinct meanings, circumstances which have been held to justify parol evidence of the meaning of a word used in a written contract. Greenleaf on Evidence, § 295.

The largeness of the meaning of the term used in the contract is no reason for limiting the interpretation, nor does it furnish any reason for permitting parol evidence in explanation."

¹ Whitmore v. Nelson (Texas App. 1895), 29 S. W. Rep. 521.

² Sinclair v. Hicks, 116 N. C. 606; 21 S. E. Rep. 395.

³ Theiss v. Weiss, 166 Pa. St. 9; 31 Atl. Rep. 63, Green, J.: "The case, in its circumstances, is very much like the case of Brown v. Finney, 53 Pa. St. 373, which received the condemnation and reversal of this court after a verdict of two thousand dollars had been recovered in the court below."

⁴ Taylor v. Smith, 116 N. C. 531; 21 S. E. Rep. 202, Avery, J.: "In the connection in which they appear, the words 'living heir' were manifestly intended to mean issue, and we will so interpret them in construing the agreement. Howell v. Knight, 100 N. C. 254; 6 S. E. Rep. 721; Patrick v. Morehead, 85 N. C. 62. To say that one sister died 'without a living heir,' and at the same time leaving a surviving sister, would be palpably ab-

undertook to construe a contract with reference to all the circumstances which the evidence tended to establish, and left it to the jury to determine whether the circumstances assumed had been established, is not objectionable, as leaving the whole construction of a written contract to the jury.¹

§ 706. Superseding the old by a new contract.—An agreement to furnish gas to plaintiff at his residence “for ordinary purposes,” for twenty years, entitles him to gas for a gas cook stove subsequently acquired, although, at the time of making the contract, such stoves were not in use.² A new contract

surd, unless we construe ‘heir’ to mean ‘issue.’” As to the construction of an ambiguous contract most strongly against the party proffering it, see *Bascom v. Smith*, 164 Mass. 61; 41 N. E. Rep. 130.

¹ *Bascom v. Smith*, 164 Mass. 61; 41 N. E. Rep. 130.

² *Graves v. Key City Gas Co.* (Iowa, 1895), 61 N. W. Rep. 937, Given, C. J.. “The first question discussed is whether the words ‘all gas for ordinary purposes,’ as found in said resolution, were intended as a limitation upon the appliances and quantity to be used, or only upon the appliances. This intention we are to ascertain from the language employed, construed in the light of the subject of the contract and the surrounding circumstances. The language we have quoted. The subject-matter is the supplying of gas to plaintiff for use in his street lamps and residence, and the surrounding circumstances are in substance these: Plaintiff’s residence is large, having thirty-two rooms, and so constructed, with basement, dining-room, etc., as to require an unusually large supply of gas to light it. His family was such that a number of different rooms were occupied and lighted in the evenings. In addition to the gas used for lighting, he had two street lamps in front of his resi-

dence, a small heater in the dining-room, and a gas log in the library. This gas log was used a large part of the time in cold and chilly or damp weather at its full capacity, and consumed nearly sixty cubic feet per hour. It is manifest that, at and for years prior to the making of this contract, plaintiff was a large consumer of the gas manufactured at his works. Several of the men employed in connection with the works continued in their positions after the sale to the defendant; several who became active in the organization of the defendant company, and, as officers in its management, were familiar with the size of plaintiff’s residence, the appliances used in consuming gas, the purposes for which used, and that a large amount was being used. There being no meter attached, the amount consumed could only be known in a general way. We have much discussion as to what defendant’s officers knew as to the amount of gas consumed by plaintiff at and prior to the contract, and how far defendant should be bound thereby. We are in no doubt but those who made this agreement on the part of the defendant knew of the appliances being used by the plaintiff, the purposes for which he used gas, and that he was a large consumer. It was under these circum-

with reference to the subject-matter of a former one does not supersede the former, and destroy its obligations, except in so far as the new one is inconsistent therewith, when it is evident from an inspection of the contracts, and from an examination of the circumstances, that the parties did not intend the new contract to supersede the old, but intended it as supplementary thereto.¹ Thus, where a contract consisted partly of correspondence, and one of the letters was lost, and many of the details of the contract were left to implication or inference, it was for the jury to say whether the contract was an independent one, or was supplementary to another contract, previously made between the same persons.²

§ 707. Error of the parties.—There is no equitable construction of an agreement distinct from its legal construction.³ The error of the parties can not control the effect of the instrument where its meaning is clear.⁴ And an instrument must stand as written if deliberately adopted by the parties, although they mistook its legal intent, the mistake being one of law merely.⁵ Courts will not assume to make a contract for the parties which they did not choose to make for themselves.⁶ Where a written

stances and with this knowledge that the defendant agreed to furnish plaintiff with 'all gas for ordinary purposes,' including the gas log and street lamps. Aside from the lamps and log, the purposes contemplated were ordinary domestic purposes. Therefore it must have been contemplated that plaintiff might use any appliance used in consuming gas for ordinary domestic purposes. The contract had twenty years to run. Therefore it was not intended to limit plaintiff to the appliances then in use, but to permit the use of any that might thereafter be adapted to the use of gas for ordinary domestic purposes."

¹ Uhlig v. Barnum, 43 Neb. 584; 61 N. W. Rep. 749.

² Holm v. Colman, 89 Wis. 233; 61 N. W. Rep. 767.

³ Scott v. Liverpool, 5 Jur. N. S. 105; 27 L. J. Ch. 230; 3 DeG. & J. 334, per Lord Chelmsford, L. C.

⁴ Railroad Co. v. Trimble, 10 Wall. (U. S.) 367; Citizens', etc., Insurance Co. v. Doll, 35 Md. 89.

⁵ Holmes v. Hall, 8 Mich. 66; 77 Am. Dec. 444. The construction of a contract does not depend upon what each party thought, but upon what both agreed. Brunhild v. Freeman, 77 N. C. 128. The construction of a contract is matter of law, and if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be to recover at law. Midland, etc., Co. v. Johnson, 6 H. L. C. 798.

⁶ County of Morgan v. Allen, 103 U. S. 515.

contract has an apparent meaning at variance with its real meaning, it may bind the author of the ambiguity contrary to its real meaning, if this meaning was so obscurely expressed that the other party was likely to be misled and was misled, and if the circumstances entitled him to timely notice of his mistake and notice was not given.¹ What one party to a contract understands or believes is not to govern its construction unless such understanding or belief was induced by the conduct or declaration of the other party.² The language used by either party is to receive such a construction as he at the time supposed the other party would give to it, or such a construction as the other party was fairly justified in giving to it.³ A distinction is to be observed between the construction of a contract and the correction of a mistake. If there is a mistake in a written contract so that it does not express the intention of the parties, equity will reform it so as to make it carry out that intention.⁴ Accordingly, where it is apparent upon the face of a written instrument that a mere clerical error has been made, and it is also apparent from the face of the instrument what the correction should be to make it as intended, the court will correct such error by construction.⁵

§ 708. Reasonable construction to be adopted.—A reasonable construction should be given every contract, for it should not be presumed that the parties intended anything either senseless or absurd.⁶ A rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties.⁷ Inconsistent clauses must be construed according to the subject-matter and the motive, and the intention of the parties, as gathered from the whole instrument, must prevail over the strictness of the letter.⁸ The fact that the con-

¹ *Hill v. John P. King Mfg. Co.*, 79 Ga. 105.

² *Bank v. Kennedy*, 17 Wall. 19.

³ *Barlow v. Scott*, 24 N. Y. 40; *Gunnison v. Bancroft*, 11 Vt. 490.

⁴ 1 *Beach on Modern Equity Jurisprudence*, 40, 63 and cases cited.

⁵ *Richmond v. Woodard*, 32 Vt. 833 (error consisted in writing the wrong

name in the condition of a bond); *Wood v. Cochrane*, 39 Vt. 544.

⁶ *Buckingham v. Jackson*, 4 Biss. 295; *Blitz v. Union Steamboat Co.*, 51 Mich. 558; *Robinson v. Bullock*, 58 Ala. 618.

⁷ *Reed v. Insurance Co.* (1877), 95 U. S. 23.

⁸ *Bent v. Alexander*, 15 Mo. App.

struction contended for would make the contract unreasonable, and place one of the parties at the mercy of the other, may be taken into consideration.¹ A clause or a word may be rejected which is irreconcilable with the nature of the contract or the general design of the parties;² or to which no meaning can be assigned in view of the connection in which it is used, and of the whole instrument.³

§ 709. The contract to be upheld if possible.—The general rule is that a contract should, if possible, be so construed as to render it binding on both parties and not so as to render it oppressive or inequitable as to either party.⁴ Thus an agreement by a railroad company, with one owning land adjacent to its track, that, if he would build a coal tipple and a trestle therefrom to its track, it would construct a switch thereon, and thereafter deliver coal to him there, does not contain an implication that the switch shall be perpetual.⁵ An applica-

181; *Russell v. Merrifield* (1891), 131 Ind. 148 (wrong word used through inadvertence); *Findley v. Armstrong* (1883), 23 W. Va. 113 (where the language was unmeaning and contradictory).

¹ *Little v. Banks* (1894), 77 Hun, 511, citing, *Russell v. Allerton*, 108 N. Y. 288; *Jugla v. Trouttet*, 120 N. Y. 21; *Wright v. Reusens*, 133 N. Y. 298.

² *Stockton v. Turner*, 7 J. J. Marsh. 192; *Buck v. Burk*, 18 N. Y. 337.

³ *Tucker v. Meeks*, 2 Sweeny, 736; *Decorah v. Kesselmeier*, 45 Iowa, 166.

⁴ *Nute v. American Glucose Co.*, 55 Kan. 225; 40 Pac. Rep. 279.

⁵ *Jones v. Newport News, etc., Co.* (1895), 65 Fed. Rep. 736, per Taft, J.: "It is not alleged that either the defendant or its predecessor agreed to keep the switch in the main line for any definite time, or that either expressly agreed to keep it there forever. The plaintiff contends that, nothing having been said as to the time, the implication is that the switch was to be maintained at all times, *i. e.*

forever. Such a construction is quite at variance with the views of the supreme court, as expressed in *Texas & P. Ry. Co. v. City of Marshall*, 136 U. S. 393; 10 Sup. Ct. Rep. 846. In that case the city of Marshall filed a bill in equity to enforce an agreement with the railroad company under which it had given the railroad company \$300,000 in county bonds and sixty-six acres of land in the city limits, and the company, in consideration of the donation, agreed 'to permanently establish its eastern terminus and Texas office at the city of Marshall, and to establish and construct at said city the main machine shops and car works of said railroad company.' It was held that the contract on the part of the railroad company was satisfied and performed when the company had established and kept a depot and offices at Marshall, and set in operation said car works and machine shops there, and kept them going for eight years, and until the interests of the railway company and

tion to a broker for a loan of money for a certain time and rate of interest, the principal and interest payable at such place as the lender may appoint, to be secured by note and trust deed in the broker's "usual form," does not bind the applicant to agree to pay in gold coin, although that provision appears in the forms used by the broker, where it is not shown that the existence of such provision was known to the applicant.¹ The

the public demanded a removal of all or part of these subjects of the contract to some other place; that the word 'permanent,' in the contract, was to be construed with reference to the subject-matter of the contract, and, under the circumstances of the case, it was complied with by the establishment of the shops, with no intention at the time of removing or abandoning them; that if the contract were to be interpreted as one to maintain forever the eastern terminus and the shops and Texas office at Marshall, without regard to the convenience of the public, it would become a contract that could not be enforced in equity. In this case, Mr. Justice Miller, speaking for the court, and referring to the contract, said: 'But it did not amount to a covenant that the company would never cease to make its eastern terminus at Marshall; that it would forever keep up the depot at that place; that it would for all time continue to have its machine shops and car shops there; and that, whatever might be the changes of time and circumstances of railroad rivalry and assistance, these things alone should remain forever unchangeable. Such a contract, while we do not say that it would be void on the ground of public policy, is undoubtedly so far objectionable as obstructing improvements and changes which might be for the public interest, and is so far a hindrance in the way of what might be necessary for the advantage of the railroad itself,

and of the community which enjoyed its benefits, that we must look the whole contract over critically before we decide that it bears such an imperative and such a remarkable meaning.' In the light of this construction of an express agreement to locate and maintain a depot permanently at a town on the line of a railroad, it would seem clear that we should not imply in a contract for a private switch connection a term that shall be perpetual, and thus forever limit the discretion of the directors to deal with a subject which may seriously affect the convenience or safety of the public in its use of the road."

¹ *Peabody v. Dewey* 153 Ill. 657; 39 N. E. Rep. 977, per Wilkin, C. J.: "Appellants proved on the trial that on July 23, 1890, and for about nine months prior thereto, the only blank forms of notes and trust deeds used by them for securing loans were like those filled out and presented to the defendants, containing the 'gold-coin clause'; and they insist that the words of the application, 'As security for such loan, we will give a joint and several principal note, and interest notes, and a mortgage or trust deed (in your usual form), conveying,' etc., were an agreement to give notes and mortgage or trust deed providing for payment 'in gold coin of the United States of the present standard weight and fineness.' Appellees were allowed to prove, over objection, that formerly, and for several years, appellants had used forms without the

rule is universal that general words in a contract are strengthened by exceptions, and weakened by enumeration.¹

§ 710. Necessary implications.—What is implied in a contract is as much a part of it as what is expressed.² The writing

'gold-coin clause'; that on two or three occasions, in the years 1885 and 1886, Dewey made loans from them, signing applications precisely like the one in question, and executing notes and mortgages therefor in the form then used, making the last payment thereon to appellants by bank check; also that he examined two mortgages executed upon their forms about two years prior to the application. On these facts appellees insist that, when Dewey signed the application, he understood, and was justifiable in understanding, that the words meant no more than that the notes were to be payable in the usual way, and so secured by a mortgage or trust deed. Mere fact that the applicants agreed to give a mortgage or trust deed in a particular form did not of itself bind them to make payments upon unusual terms and conditions, although printed in those forms. The application is for a loan of \$250,000 for five years, * * * at 6 per cent. interest per annum, payable half-yearly, and principal and interest payable at such place as the lender may appoint.' This clearly means, payable in any money which could be legally offered for that purpose. To say that, by agreeing to give notes and mortgage or trust deed in the other parties' usual form to secure them, they bound themselves to pay in gold coin of the United States, etc., because that unusual condition was printed in those forms, but unknown to them, is most unreasonable, and can find no support in the law of contracts. Any one signing this application would reasonably understand the words in parentheses to refer to the form of the mortgage

or trust deed, and not to the particular kind of money in which the notes were to be payable. In the argument, counsel for appellants treat those words as synonymous with 'upon the terms and conditions set forth in your usual form'; and they liken it to cases in which a written contract refers to and makes the terms and conditions of another instrument a part of it. Manifestly there is no analogy between that class of cases and this. It is undoubtedly the duty of a party to acquaint himself with the terms of a contract to which he is a party before he enters into it, and, if other instruments or agreements are made a part of the contract, he is bound to know the terms and conditions of such instrument or agreement; but, as seen, no such agreement is here shown."

¹ *Webster v. Morris*, 66 Wis. 366; *Sharpless v. Mayor*, 21 Pa. St. 147. And see, *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37, 90. According to Lord Bacon "all words, whether they be in deeds or statutes, if they be general and not express and precise, shall be restrained into the fitness of the matter and the person." *Broom's Legal Maxims*, 646. See also, *Thorpe v. Thorpe*, 1 Ld. Raym. 235; *Moore v. Magrath*, Cowp. 9; *Roe v. Vernon*, 5 East, 51; *Morrell v. Fisher*, 4 Exch. 591; *Wood v. Rowcliffe*, 6 Exch. 407.

² *Gelpcke v. Dubuque*, 1 Wall. 175, 222; *Dean v. Clark* (1894), 80 Hun, 80; *Jones v. Turner* (1894), 80 Hun, 157; *Currier v. Boston and Maine R.*, 34 N. H. 498; *Rogers v. Kneeland*, 13 Wend. 114; *Lawler v. Murphy* (1890), 58 Conn. 294.

must be understood as containing all that may be fairly implied from the language used.¹ There are very few contracts which contain all of the intentions of the parties. There are implied conditions along with which the express terms must be read in order to obtain the real meaning of the parties.² If there is a contract for the sale of goods, and no time is provided for delivery, the law adds that delivery must be made within a reasonable time; whatever consequent and incident is in common sense appurtenant to its terms the parties must have understood and intended should be attached.³ Although necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed, yet omissions or defects in written instruments can not be supplied by virtue of that rule, unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect.⁴ The expression of one or more things of a class or kind in a contract is by implication the exclusion of all not expressed.⁵

§ 711. The whole contract to be considered.—A written contract should be read as a whole; all its provisions are to be considered, and the general design must not be frustrated by allowing too much force to single words or clauses.⁶ A single

¹ *Jones v. Kent*, 80 N. Y. 585; *Tallman v. Franklin*, 14 N. Y. 584; *Rogers v. Smith*, 47 N. Y. 324; *Nicoll v. Sands* (1892), 131 N. Y. 19.

² *Rogers v. Sheerer* (1885), 77 Maine, 323.

³ *Robinson v. Bullock*, 58 Ala. 618.

⁴ *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276.

⁵ *Finley v. Steele*, 23 Ill. 56. And this, even if the law would have implied all, if none had been enumerated. *Stettauer v. Hamlin*, 97 Ill. 312; *Hammerquist v. Swensson* (1891), 44 Ill. App. 627. "Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed

some, they have expressed all the conditions by which they intend to be bound under that instrument." *Aspdin v. Austin*, 5 Q. B. 671, per Lord Denman, C. J.

⁶ *Brown v. Slater*, 16 Conn. 192; *Tracy v. Chicago*, 24 Ill. 500; *Chase v. Bradley*, 26 Maine, 531; *Merrill v. Gore*, 29 Maine, 346; *Smith v. Davenport*, 34 Maine, 520; *Hewitt v. Wheeler*, 22 Conn. 557; *Chapman v. Seecomb*, 36 Maine, 102; *Heywood v. Perin*, 10 Pick. 228; *Goosey v. Goosey*, 48 Miss. 210; *Salmon Falls Manfg. Co. v. Portsmouth Co.*, 46 N. H. 249; *Hamilton v. Taylor*, 18 N. Y. 358; *Richards v. Warring*, 39 Barb. 42; *Stewart v. Lang*, 37 Pa. St. 201; *Monmouth Park Association v. Wallis Iron Works*, 55 N. J. Law, 132.

sentence should not be construed alone, but should be considered with reference to the context.¹ The construction should make the whole consistent, giving all parts their due weight.² Force and effect should be given to all the words employed by the parties where that is possible.³ And one part of the agreement may be resorted to to explain the meaning of the language or expressions of another part.⁴ Where the words in the operative part of the instrument are of doubtful meaning, the recitals preceding the doubtful part may be used as a test to discover the intention of the parties and fix the meaning of the words.⁵ This simply means that the entire language shall be considered, that included in the recitals as well as that included in the operative part of the instrument, and from the whole to ascertain the intention of the parties.⁶ Where the contract is a bond the condition should be considered in the construction of the obligatory part.⁷ In construing a contract entered into by correspondence, the whole correspondence must be considered.⁸

§ 712. Construing particular clauses.—In the interpretation of any particular clause of a contract, the court is required to examine the entire contract, and may also consider the rela-

¹ *Central Trust Co. v. Wabash, etc., Railroad*, 29 Fed. Rep. 546. The meaning of the parties must be ascertained by the tenor of the writing, and not by looking at a part. *Boardman v. Reed*, 6 Pet. 328; *Baron v. Placide*, 7 La. Ann. 229; *Metcalf v. Taylor*, 36 Maine, 28; *Heywood v. Heywood*, 42 Maine, 229; *Hazleton, etc., Coal Co. v. Buck Mountain Coal Co.*, 57 Pa. St. 301.

² *Railroad Co. v. Railway Co.*, 44 Ohio St. 287. And see, *Bent v. Alexander*, 15 Mo. App. 181; *Chrisman v. State Ins. Co.*, 16 Ore. 283; *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6; 16 16 Am. St. Rep. 298.

³ *Railroad v. Bartlett*, 120 Ill. 603; *Bowman v. Long*, 89 Ill. 19. In *Barton v. Fitzgerald*, 15 East, 530, Lord

Ellenborough said: "It is a true rule of construction that the sense and meaning of the parties, in any particular part of an instrument, may be collected *ex antecedentibus et consequentibus*. Every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done."

⁴ *Pensacola Gas Co. v. Lotze's Sons*, 23 Fla. 368; 2 So. Rep. 609; *Stout v. Whitney*, 12 Ill. 218; *Belch v. Miller*, 32 Mo. App. 387.

⁵ *Walker v. Tucker*, 70 Ill. 527.

⁶ *Burgess v. Badger* (1888), 124 Ill. 288.

⁷ *Chicago, etc., R. Co. v. Aurora*, 99 Ill. 205.

⁸ *United States v. Bostwick*, 94 U. S. 53.

tions of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was made.¹

¹ Chicago, R. I., etc., R. Co. v. Denver & R.G. R. Co., 143 U.S. 596; 12 Sup. Ct. Rep. 479; Knox Co. v. Ninth Nat. Bank, 147 U. S. 91; 13 Sup. Ct. Rep. 267. In Chicago, etc., R. Co. v. Hoyt, 89 Wis. 314; 62 N. W. Rep. 189, a contract by which defendants agreed to sell to plaintiff's assignor a controlling interest in the stock of certain railroad companies contained a clause by which defendants agreed that the capital stock of such companies was "subject only to a first mortgage of \$17,000 per mile, issued or to be issued," on an aggregate mileage of 362¼ miles of main line completed railway, and an equipment mortgage of \$400,000, issued, or to be issued, and that, with the exception of such indebtedness, such companies had no other indebtedness. It was held that defendants agreed that the indebtedness of such companies should not exceed \$17,000 per mile of the main line of completed road. Cassoday, J., said: "Putting ourselves in the shoes of the parties at the time of making the contract, and remembering that the first mortgage was not only to secure bonds which had been issued, but such as should thereafter be issued, up to the time of closing the deal, and hence that the amount of such indebtedness was not only then unknown to the purchaser, but unascertainable by either party, and it is very obvious that a purchaser of ordinary prudence would naturally exact, and the sellers willingly make, some stipulation as to the limit of such indebtedness at the time when the deal should be closed. In our judgment, the third paragraph of the contract does contain such a stipulation. Had the parties intended that the amount of the first mortgage should be mentioned merely by

way of description, then the paragraph should have stopped with such mention, but it did not. On the contrary, it declares, in effect, that the capital stock of the three companies was 'subject only' to a first mortgage at the rate of \$17,000 per mile of the 'main line of completed railway, issued or to be issued.' Then, after providing, in effect, that the three roads should be 'subject further to an equipment mortgage of \$400,000, issued or to be issued,' and operating liabilities to an amount not exceeding the cash assets and operating supplies, it declares, in effect, 'that, with the exception of the above indebtedness, said railroad companies shall have * * * no other indebtedness, and that all the tracks, depots, real estate and equipment, except the equipment represented by the equipment mortgage aforesaid, shall likewise be free from any debt or incumbrances, except as above specified.'" In *Wood v. Lindley*, 12 Ind. App. 258; 40 N. E. Rep. 283, Davis, J., collects several general rules of construction: "The rule of interpretation found in *Bishop on Contracts*, § 384, is as follows: 'Every clause, and even every word, should, when possible, have assigned to it some meaning. It is not allowable to presume or to concede, when avoidable, that the parties in a solemn transaction have employed language idly.' *Pollock on Contracts*, 438. The surrounding circumstances and the situation of the parties when the contract was made, when its terms are of doubtful or ambiguous meaning, may be considered for the purpose of arriving at the true intention. *Indpls. Cabinet Co. v. Herrman*, 7 Ind. App. 462; 34 N. E. Rep. 579; *Reissner v. Oxley*, 80 Ind. 580, 584.

§ 713. Reading two instruments as one.—Where two contracts relating to the same subject-matter are made at the same

One of the rules of construction is that in any writing 'general words shall be restrained unto the fitness of the matter and the persons;' and 'when there is a particular recital in a deed, and general words follow, the general words shall be qualified by the particular recital.' *Burns v. Singer Mfg. Co.*, 87 Ind. 541, 548. The application of this rule is limited to cases where, 'from other covenants in the same deed, it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they impart.' *Pollock on Contracts*, 436, 437. The rule here applicable was correctly stated by Judge Lotz in *Guaranty, etc., Association v. Rutan*, 6 Ind. App. 83, 87; 33 N. E. Rep. 210: 'The primary object in the construction of contracts is to ascertain the intention of the contracting parties at the moment their minds assented to the same proposition. In the absence of the averments of any extrinsic matter, courts are confined to the contract as written. *Evansville, etc., R. Co. v. Meeds*, 11 Ind. 273; *Beard v. Lofton*, 102 Ind. 408; 2 N. E. Rep. 129. But this rule does not preclude the court from considering the situation and relation of the contracting parties, the objects to be accomplished, and the motives they had in the dealing with each other. He who interprets should, as nearly as possible, put himself in the position of the parties at the time the contract was executed. He should consider the subject-matter of the agreement, and the knowledge of it which the parties possessed, the objects to be accomplished, and the motives which they had in dealing with each other. The whole writing should be considered, also, in determining the meaning of any of its parts.' " In *Central Trust Co. v. Condon*

(1895), 67 Fed. Rep. 84, the question was whether the contractor was bound by the contract to furnish rolling-stock as well as construct the railroad. On this point Taft, J., said: "In the recital the desire of the railroad company to contract 'for the making and construction of its railroad' is referred to. In the first clause Eager agrees to build and complete the railroad, and the company agrees that he may build it according to specifications (which never appear to have been made). In the second and third clauses reference is made to the 'railroad herein agreed to be constructed.' By the fifth clause the payment under the contract is to be for the railroad 'constructed and to be hereafter constructed,' and the bonds which constitute the final payment are to be paid 'whenever each mile of road is built and ready for the operation of trains.' These expressions are utterly inconsistent with the idea that Eager was bound to furnish the rolling-stock in addition to completely constructing the road. The second half of the second clause, inserted manifestly for the purpose of merging the contract of the North Georgia Construction Company in this one of Eager, does refer to 'all works, materials and plants heretofore constructed, equipped and provided, now in use in or about the construction or operation of the railroad,' but this clause does not necessarily include rolling-stock, although it may not necessarily exclude it. Rolling-stock is usually not referred to either as 'works' or 'plant' or 'materials.' Works and plant which must be furnished in the building of a road are as necessary in the operation of the road as rolling-stock, so that 'operation' does not necessarily imply that the works, plant, or materials referred to were rolling-stock. In the fourth

time, they form but one contract, and are to be construed together.¹ Thus where the making of a note is accompanied by

clause of the contract the company agrees to execute a mortgage to secure the bonds to be issued as compensation for Eager's building the road, and also to issue additional mortgages necessary to secure any first or other mortgage bonds issued to aid in the construction or equipment of the road. Just what the bonds were which the additional mortgages were expected to secure is not quite clear. Certainly so obscure a sentence can not be held to impose on Eager an obligation to equip the road, when the clause in which his obligations are defined excludes such an idea. But it may be suggested that the feature of the contract by which all the available assets of the company were to be delivered to him to pay for his work, leaving nothing to the company to buy rolling-stock, made it reasonable and probable that he should furnish the rolling-stock, and requires this effect to be given to the contract, if possible. This road was built as an extension of the Marietta and North Georgia Railway, with an immediate consolidation in view, and it would not be unreasonable to suppose that the parties to this contract looked to the latter road for aid in this respect. The agreement in the fourth clause of the contract that the company would give an additional mortgage to secure bonds issued to aid in the equipment of its road suggests that the parties then had some plan for the issuance of other bonds by the the Marietta and North Georgia Railway to pay for equipment of this road, also to be secured by mortgage on this road. However this may be, the court can not disregard the plain limitations imposed by the language used, and expand an agreement to build and construct into an agreement to construct and furnish rolling-stock."

¹Gregory v. Marks, Fed. Cas. No. 5802, 8 Biss. 44; 4 L. & Eq. Rep. 283; 9 Chicago Leg. News, 394 (7th U. S. Cir.) (Ill. 1877), where a claim in a trust deed provided that the indebtedness secured thereby was to become wholly due and payable in case of default in the payment of interest. It was held that the note and the trust deed, being contemporaneous, must be construed together, and that, if default was made in the payment of interest, the whole indebtedness became due. Woodward v. Jewell (1885), 25 Fed. Rep. 689; Whitehurst v. Boyd, 8 Ala. 375; Byrne v. Marshall, 44 Ala. 355; Denby v. Graff, 10 Ill. App. 195; Allen v. Nofsinger, 13 Ind. 494; Makepeace v. Harvard College, 10 Pick. 298; Hill v. Huntress, 43 N. H. 480; Knowles v. Toone, 96 N. Y. 534; Church v. Broun, 21 N. Y. 315; Pepper v. Haight, 20 Barb. 429; Hamilton v. Taylor, 18 N. Y. 358; Norton v. Kearney, 10 Wis. 443; Chrisman v. State Ins. Co., 16 Ore. 283; Dean v. Lawham, 7 Ore. 422; Chambers v. Marks, 93 Ala. 412; Hagerty v. White, 69 Wis. 317; Livingston v. Story, 11 Pet. 351; Wilson v. Randall, 67 N. Y. 338; Marsh v. Dodge, 66 N. Y. 533; Meriden Britannia Co. v. Zingsen, 48 N. Y. 247; Draper v. Snow, 20 N. Y. 331; Gaffney v. Hicks, 131 Mass. 124; Avery v. Bushnell, 123 Mass. 349; Collins v. Delaporte, 115 Mass. 159; Washburn, etc., Co. v. Salisbury, 152 Mass. 346; Galena, etc., Railroad v. Barrett, 95 Ill. 467; Gammon v. Freeman, 31 Maine, 243; Strong v. Barnes, 11 Vt. 221; Reed v. Field, 15 Vt. 672; Cumming v. Antes, 19 Pa. St. 287; Kenyon v. Nichols, 1 R. I. 411; In re Phoenix Bessemer Steel Co., 44 L. J. Ch. 683; Hannig v. Mueller (1892), 82 Wis. 235 (deed and bond); Carr v. Hays (1886), 110 Ind.

an agreement in relation thereto, the note and the agreement are to be taken together and form one entire transaction.¹ A chattel mortgage on buildings in course of erection and upon a leasehold interest, an assignment of the lease, and a contract between the parties in relation to the subject-matter, all executed on the same day, will be construed together in determining the rights of the parties thereunder.² Where a contract has reference to another paper for its terms, the effect is the same as if the words of the paper referred to were inserted in the contract.³ Where two papers are executed in duplicate, one of the parties signing one of the papers and the other party signing the other, both papers together are to be treated as one document.⁴ For the purpose of arriving at the intent of the parties both copies of the contract sued on purporting to have been made in duplicate, but varying in terms, are to be construed together.⁵ Where parties make several contracts concerning the same subject-matter, but upon different dates and inconsistent with each other, the latest must control their respective rights and liabilities as far as it goes.⁶

§ 714. Words to be given their ordinary meaning.—A contract written in clear and common language should be construed according to the ordinary acceptation of the words.⁷ Words free from ambiguity should be given their plain and

408; 25 Cent. L. Jour. 32; *Herbst v. Lowe*, 65 Wis. 316; *Dudgeon v. Haggart*, 17 Mich. 273, where a large number of cases on this point are collected; *Coughran v. Bigelow* (1893), 9 Utah, 260 (contract and a bond referring to the contract construed together); *Hennessy v. Gore*, 35 Ill. App. 594 (promissory notes and deed of trust). The fact that they bear different dates is immaterial if the contract is not carried into effect until both are executed. *Knowles v. Toone*, 96 N. Y. 534; *Neill v. Chesson*, 15 Ill. App. 266.

¹ *Bailey v. Cromwell*, 3 Scam. (Ill.)

71; *Bradley v. Marshall*, 54 Ill. 173; *Denby v. Graff*, 10 Ill. App. 195.

² *Edling v. Bradford* (1890), 30 Neb. 593.

³ *Adams v. Hill*, 16 Maine, 215.

⁴ *Richmond, etc., Co. v. Shomo* (1892), 90 Ga. 496.

⁵ *Shelmire v. Williams and Clark Fertilizer Co.* (1893), 68 Hun, 196.

⁶ *Loper v. United States*, 13 Ct. of Cl. 269.

⁷ *Gove v. Downer* (1886), 59 Vt. 139; 7 Atl. Rep. 463; 9 Eastern Rep. 65; *Knowlton v. Oliver* (1886), 28 Fed. Rep. 516; *Stearns v. Sweet*, 78 Ill.

446; *Supreme Council v. Curd*, 111

ordinary meaning.¹ They should be construed according to their strict and primary acceptation, unless from the context of the instrument, and the intention of the parties to be collected from it, they appear to be used in a different sense, or unless in their strict sense they are incapable of being carried into effect; subject, however, to this, that the meaning of a particular word may be shown by parol evidence to be different, in some particular place, trade or business from its proper and ordinary signification.² Where a word has a general, well-defined, well-known meaning, such meaning can not be controlled by a local custom.³ But, whenever particular words or clauses appear to have been introduced with a purpose of restricting the general language, that effect will be given to them.⁴ And words are not to be taken in their broadest sense if they are equally appropriate in a sense limited to the object and intent of the contract.⁵

§ 715. When the ordinary sense will not control.—Accordingly, the ordinary sense will not control when the context shows that the parties could not have used the word in such a sense.⁶

Ill. 284; *Schneider v. Turner*, 130 Ill. 28; *Railroad Companies v. Schutte*, 103 U. S. 118; *Nash v. Drisco*, 51 Maine, 417; *Ricker v. Fairbanks*, 40 Maine, 43; *Trowbridge v. Dean*, 40 Mich. 687; *Brown v. Brown*, 8 Metc. (Mass.) 573; *Willmering v. McGaughy*, 30 Iowa, 205; *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136; *Silberman v. Clark*, 96 N. Y. 522; *Holt v. Collyer*, L. R. 16 Ch. Div. 718.

¹ *Buchanan v. Andrew*, 2 L. R. H. L. Sc. App. 286. "The first rule to lay down is that words are to be understood in their plain and literal meaning." *Anson on Contracts*, 252; *1 Chitty on Contracts* (11th Am. ed.), 113; *Smith on Contracts*, 561.

² *Mallan v. May*, 13 M. & W. 511, per Pollock, C. B.; *Kirby v. Wabash*, etc., R. Co., 109 Ill. 412; *Stanley v. Western Ins. Co.*, L. R. 3 Ex. 71, question as to the meaning of the

word "gas;" *Price v. Livingstone*, L. R. 9 Q. B. D. 679; *Scott v. Bourdillion*, 5 B. & P. (2 New R.) 213; *Roberts v. Brett*, 34 L. J. C. P. 241; *Tielens v. Hooper*, 5 Exch. 830.

³ *Galena Insurance Co. v. Kupfer*, 28 Ill. 332. A special term, like the word "assessment," in a contract relating to assessments on real estate, construed in view of the meaning fixed by usage, and the cause of legislation. *Stephani v. Catholic Bishop*, 2 Ill. App. 249.

⁴ *Bell v. Bruen*, 1 How. 169; *Holmes v. Martin*, 10 Ga. 503; *Vaughan v. Porter*, 16 Vt. 266; *Baxter v. State*, 9 Wis. 38.

⁵ *Hoffman v. Ætna Ins. Co.*, 32 N. Y. 405; *Harper v. New York City Ins. Co.*, 22 N. Y. 441; *Kelley v. Upton*, 5 Duer, 336; *Livingston v. Stickles*, 7 Hill, 255.

⁶ *Moran v. Prather*, 23 Wall. 492.

Where the intention requires, a word or phrase may be disregarded or given a construction contrary to the ordinary meaning. Thus the word "and" is often construed to mean "or."¹ Where a word has a defined statutory meaning, this meaning will be taken to be its ordinary and common meaning, and courts will assume that it is used by contracting parties in its statutory sense.² However terms may be understood in their ordinary sense, if the parties have attached other or unusual, or arbitrary, meaning to them, to be derived from their fair interpretation in the contract, they have the right so to employ them. But to accomplish such purpose, and to vary the common understanding, the meaning ought to be plain and free from reasonable doubt.³

§ 716. Technical words.—Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate,⁴ unless clearly used in a different sense.⁵ In construing a contract, the court will use the terms employed according to their popular signification, if to apply them according to technical or scientific rules would defeat the manifest intention of the parties.⁶ If it appears that a term used in a contract has an established meaning among those engaged in the business to which the contract has reference, and, unless it is given that meaning, is indefinite and equivocal, it should be treated, in interpreting the

¹Chicago, etc., R. Co. v. Bartlett, 120 Ill. 603. Lord Ellenborough, in *Robertson v. French*, 4 East, 135, says that the "words of every agreement are to be understood in their plain, ordinary and popular sense, unless they have generally, in respect to the subject-matter, as by the known usages of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the par-

ties to that contract, be understood in some other and peculiar sense."

²Green v. Moffett, 22 Mo. 529, where a statute fixed the meaning of the word "ton."

³McCoy v. Erie & Western Trans. Co., 42 Md. 498.

⁴Dana v. Fiedler, 12 N. Y. 40; *Gauch v. St. Louis, etc., Ins. Co.*, 88 Ill. 251; *Ellmaker v. Ellmaker*, 4 Watts, 89; *Potter v. Phenix Ins. Co.* (1894), 63 Fed. Rep. 382.

⁵Wynkoop v. Cowing, 21 Ill. 570.

⁶Mansfield, etc., Co. v. Veeder, 17 Ohio, 385.

contract, as used according to that understanding.¹ Mercantile contracts are to be understood in their ordinary mercantile meaning.² Commercial letters are not to be construed upon the same principle as bonds, but ought to receive a fair and reasonable interpretation, according to the true import of the terms, or to what is fairly to be presumed to have been the understanding of the parties.³ Bonds are entered into with caution, and often after taking legal advice. They contain the entire contract, beyond which courts rarely look for circumstances to aid in their construction; and, if there be sureties bound by them, and the meaning is doubtful, the construction is restricted and made most favorable to the sureties.⁴ When terms of law are used in defining the obligations assumed by the parties, their technical legal sense should be preferred.⁵

§ 717. Where the contract is capable of two meanings.—Where a contract is fairly open to two constructions, by one of which it would be lawful and by the other unlawful, the former must be adopted.⁶ The presumption is in favor of the legality of contracts. The law does not assume an intention to violate the law, nor will an agreement be adjudged to be illegal where

¹ *Metropolitan Exhibition Co. v. Ewing* (1890), 42 Fed. Rep. 198, where the contract was with defendant for his services as a base-ball player. The case turned upon the meaning and effect of the clause which gave the club the "right to reserve" the defendant for the season next ensuing. "The promise of a base-ball player to reserve himself for a particular club for a given season would hardly, without more, convey any definite meaning of the understanding of the parties."

² *Hawes v. Smith*, 12 Maine, 429. A guarantee is a mercantile instrument, and to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety. *Lee v. Dick*, 10 Pet. 482.

³ *Bell v. Bruen*, 1 How. 169; *Lawrence v. McCalmon*, 2 How. 426, stating the principles which should govern the construction of commercial guarantees.

⁴ *Bell v. Bruen*, 1 How. 169.

⁵ *Ellmaker v. Ellmaker*, 4 Watts, 89; *Findley v. Findley*, 11 Gratt. 434.

⁶ *Walters v. McGuigan*, 72 Wis. 155; *Belden v. Burke* (1893), 72 Hun, 51; *Coyne v. Weaver*, 84 N. Y. 386; *Lessley v. Phipps*, 49 Miss. 790; *Merrill v. Melchior*, 30 Miss. 516; *Chittenden v. French*, 21 Ill. 598; *Pitney v. Bolton*, 45 N. J. Eq. 639; *Easton v. Mitchell*, 21 Ill. App. 189; *Hobbs v. McLean*, 117 U. S. 567; *Shore v. Wilson*, 9 Cl. & F. 355; *Best's Evidence*, 6 Eng. ed., 1st Am. ed., §§ 346, 347; *Wharton on Evidence*, §§ 1249, 1250.

it is capable of a construction which will uphold it and make it valid.¹ When, therefore, a contract is capable of two constructions, such construction shall be adopted as will render the contract capable of execution, rather than render it inoperative and void.²

§ 718. **Repugnancy.**—Clauses or words which appear repugnant to each other must, if practicable, receive such an interpretation as will give them operation consistent with the general purpose.³ Words which in view of the purpose of the transaction are meaningless or inconsistent with the manifest intent may be rejected as surplusage, if without them the contract may be sustained, and be given effect according to the intent.⁴ Where two clauses, apparently repugnant, may be reconciled by any reasonable construction, or by regarding one as a qualification of the other, that construction must be given, because it can not be assumed that the parties intended to insert inconsistent provisions.⁵ Effort should be made to reconcile each provision with every other, because the whole agreement, must, if possible, stand.⁶ The court may disregard one part

¹ *Lorillard v. Clyde* (1881), 86 N. Y. 384, per Andrews, J.; *Muir v. City of Glasgow Bank*, 4 L. R. 4 App. Cas. 337. A contract susceptible of two constructions will not upon demurrer be given the construction which will make it illegal and void. *Standard Oil Co. v. Schofield*, 16 Abb. N. Cas. (N. Y.) 372.

² *Field v. Leiter*, 118 Ill. 17; *Sheffler v. Nadelhoffer*, 133 Ill. 536; 23 Am. St. Rep. 626; *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6; 16 Am. St. Rep. 298; *Hughes v. Lane*, 11 Ill. 123; 50 Am. Dec. 436; *Thrall v. Newell*, 19 Vt. 202; 47 Am. Dec. 682; *Powers v. Clarke*, 127 N. Y. 417; *Lincoln v. Field*, 54 Ark. 471; *Brown v. Slater*, 16 Conn. 192; *Steinspring v. Bennett*, 16 La. Ann. 201; *Ormes v. Dauchy*, 82 N. Y. 443; *Curtis v. Gokey*, 68 N. Y. 300; *Guernsey v. Cook*, 120 Mass. 501; *Hunt v. Elliott*, 80 Ind. 245; *Mills v. Dunham* L. L. (1891), 1 Ch. 576.

³ *City of Decorah v. Kesselmeier*, 45 Iowa, 166; *Ward v. Whitney*, 8 N. Y. 442; *Casler v. Conn. Mut. Life Ins. Co.*, 22 N. Y. 427; *Harper v. New York City Ins. Co.*, 22 N. Y. 441.

⁴ *Walker v. Douglas*, 70 Ill. 445; *Holmes v. Parker*, 25 Ill. App. 225.

⁵ *Miller v. Hannibal, etc.*, R. Co., 90 N. Y. 430.

⁶ *Coyne v. Weaver*, 84 N. Y. 386; *Holmes v. Hubbard*, 60 N. Y. 183; *Moore v. Griffen*, 22 Maine, 350. In *Barhydt v. Ellis*, 45 N. Y. 107, *Rapallo, J.*, said: "Effect must be given, if possible, to every part of an agreement, and it is only when there is an inconsistency, or repugnancy which is totally irreconcilable that a discrimination will be made as to which part will be made to yield to another." *Benedict v. Ocean Ins. Co.*, 31 N. Y. 389; *Stewart v. Lang*, 37 Pa. St. 201.

of the instrument in which there is a mistake, when the intent is clear from other parts of the instrument.¹ Thus an absurd and repugnant clause in a bill of exchange may be rejected as surplusage.²

§ 719. Effect to be allowed to surrounding circumstances.—

Where the language of an instrument is ambiguous and susceptible of more than one construction, that construction will be adopted which, in the light of surrounding circumstances and upon a view of the whole instrument, is in accordance with the apparent intent of the parties.³ In order to arrive at the intention of the parties, inquiry may be made as to their situation at the time the contract was entered into, and the purpose to be accomplished by its execution.⁴ Previous and cotemporary transactions and facts may be taken into consideration to ascertain the subject-matter and the sense in which the parties have used particular terms, but not to modify the plain language.⁵ In the construction of contracts, it is the duty of the court to put itself as near as may be in the situation of the parties, and, from a consideration of the surrounding circumstances and the occasion and apparent object of the parties, determine therefrom the meaning and intent of the language employed in framing their agreement.⁶ It is proper to look at all the surrounding circumstances and the pre-existing relation between the parties, and then to see what they mean when they speak.⁷ Courts are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of

¹ *Mercantile Ins. Co. v. Jayns*, 87 Ill. 199.

² *Henschel v. Mahler*, 3 Hill, 132; 3 Den. 428.

³ *Springsteen v. Samson*, 32 N. Y. 703; *United States v. Gibbons*, 109 U. S. 200.

⁴ *Vincennes v. Citizens' Gas Light Co.* (1892), 132 Ind. 114; *Illges v. Dexter*, 77 Ga. 36.

⁵ *Brawley v. United States*, 96 U. S. 168.

⁶ *Smith v. Kerr* (1888), 108 N. Y. 31; 2 Am. St. Rep. 362; *Mathews v. Phelps*, 61 Mich. 327; 1 Am. St. Rep. 581; *Merriam v. United States*, 107 U. S. 437.

⁷ *Matter of the New York, etc., R. Co.*, 49 N. Y. 414; *Nash v. Towne*, 5 Wall. 689; *Pittsburgh, etc., Ry. Co. v. Columbus, etc., Ry. Co.*, 8 Biss. 456; *Reed v. Insurance Co.*, 95 U. S. 23.

the language to the things described.¹ Accordingly an indemnity bond given to a sheriff may be read in the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties.² But the rule of viewing a contract in the light of surrounding circumstances is a rule of interpretation merely, and does not permit the making of a new contract, nor a reformation of it, nor a disregard of its terms. It authorizes only a just construction of those terms and a fair inference as to the common understanding of both the contracting parties.³ An obscure and ambiguous oral contract may be interpreted in the light of the conversations of the parties making it.⁴

§ 720. The same subject continued.—Where the language of a contract is susceptible of two meanings, the court will infer the intention of the parties, and their relative rights and obligations, from the circumstances attending the transaction.⁵ In construing such a contract, courts are not only required to look at the language employed, but at the subject-matter and the surrounding circumstances, and thus avail themselves of the same light which the parties possessed when the contract was made.⁶

¹ *Goddard v. Foster*, 17 Wall. 123. A contract made within the Confederate States during the war of 1861-65 to pay a certain sum in "dollars," without specifying the kind of currency in which payment was to be made, may be shown by the nature of the transaction and the attendant circumstances, as well as by the language of the contract itself, to have contemplated payment in Confederate currency. *Rives v. Duke*, 105 U. S. 132.

² *Bancroft v. Winspear*, 44 Barb. 209; *Griffiths v. Hardenbergh*, 41 N. Y. 461.

³ *Clark v. Woodruff*, 83 N. Y. 518.

⁴ *Jennings v. Whitehead, etc., Co.*, 138 Mass. 594.

⁵ *United States v. Gibbons*, 109 U. S. 200; 3 Sup. Ct. Rep. 117.

⁶ *Merriam v. United States*, 107 U. S.

437; *Brawley v. United States*, 96 U. S. 168; *Nash v. Towne*, 5 Wall. 689; *Barreda v. Silsbee*, 21 How. (U. S.) 146, 161; *Shore v. Wilson*, 9 Cl. & F. 355; *MacDonald v. Longbottom*, 1 El. & El. 977; *Carr v. Montefiore*, 5 B. & S. 407. In *McMillen v. Pratt*, 89 Wis. 612; 62 N. W. Rep. 588, Pinney, J., said: "For the purpose of determining whether the defendant was bound to cut and deliver from the lands described in the contract, as an entirety, to *McMillen & Co.*, twenty-five million feet of logs and timber of the kind and quality therein specified, or only one-half of the amount thereon of that kind and quality, whatever that amount might be, less than that quantity, the deed from *Pratt* to *McMillen & Co.*, the notes, the contract, and the two mortgages executed by

§ 721. Construction by the parties.—If the words or terms of a contract are equivocal, resort may be had to the circumstances under which the contract was executed, and to the contemporaneous construction given to the contract by the parties, as evidenced by possession or similar acts.¹ The subsequent acts are admitted to show how the parties understood their contract and are a practical construction of it.² It makes no

Pratt to McMillen & Co., which were all executed at the same time, and all related to the same subject, must be considered and read together. It is evident that they not only relate to the same subject-matter, but represent a single transaction. They must therefore be considered and construed together in arriving at what the parties intended by what they have thus expressed. Elphinstone's Rules for the Interpretation of Deeds, 6; Smith v. Chadwick, L. R. 20 Ch. Div. 27. This is really a familiar rule, and there has been no contention against it. The situation of the parties and the subject-matter with which the parties were dealing, and the circumstances attending the transaction, are also to be considered, so that the court may be placed in the situation of the parties, so far as may be, so as to consider the transaction in the same light and as far as possible from the same standpoint from which the parties must have regarded it; for, when the language of a contract is susceptible of two meanings, the court will infer the intention of the parties from the circumstances attending the transaction so far as they throw any light upon the language used. Chicago, etc., Railway Co. v. Hoyt, 89 Wis. 314; 62 N. W. Rep. 189; Barreda v. Silsbee, 21 How. 146, 161; Merriam v. United States, 107 U. S. 437; 2 Sup. Ct. Rep. 536; Chicago R. I. & P. Ry. v. Denver & R. G. R. Co., 143 U. S. 596; 12 Sup. Ct. Rep. 479. And the manner in which the parties have dealt with and

treated the subject-matter, and the construction they have placed on the instrument, with the actual or presumed knowledge or assent of each other, often have an important bearing on the subject. Knox Co. v. Ninth Nat. Bank, 147 U. S. 91, 100; 13 Sup. Ct. Rep. 267."

¹ White v. Amsden, 67 Vt. 1; 30 Atl. Rep. 972.

² Gray v. Clark, 11 Vt. 583; Barker v. Troy, etc., Railroad Co., 27 Vt. 766; Vermont, etc., R. Co. v. Vermont C. R. Co., 34 Vt. 1; Hammerquist v. Swenson (1891), 44 Ill. App. 627. In Chapman v. Bluck (1838), 5 Scott's Reports, 515, Tindal, J., says: "But we are also at liberty to look at the acts of the parties, than which there can not be a better means of ascertaining their intention;" and Park, J., after laying down the general rule as given by Lord Ellenborough, "that the intention of the parties, as declared by the words of the instrument, must govern the construction," adds that subsequent acts and declarations of the parties may be looked to in aid of the construction. Where the language is ambiguous, the practical interpretation of it by the parties is entitled to great, if not controlling influence. Topliff v. Topliff, 122 U. S. 121; Chicago v. Sheldon, 9 Wall. (U. S.) 50; Coleman v. Grubb, 23 Pa. St. 393; St. Louis Gas Light Co. v. St. Louis, 46 Mo. 121; Syms v. Mayor, 105 N. Y. 153; Mayor v. N. Y. Refrigerating Construction Co. (1894) (N. Y.), 8 Misc. 61; 59 State Rep. 295; 28 N. Y. Supl.

difference whether those acts are contemporaneous or subsequent. It is allowable to look to them for assistance in ascertaining the true meaning of the agreement.¹ It is a familiar doctrine that when the terms of an agreement are in any respect doubtful or uncertain, and the parties to it have, by their own conduct, placed a construction upon it which is reasonable, such construction will be adopted by the court,² because it is the duty of the court to give effect to the intention of the parties, where it is not wholly at variance with the correct legal interpretation of the terms of the contract.³ Thus where a contract provided that a theater should be operated as "a strictly first-class place of amusement," the court, in order to determine whether there has been a breach of this condition, will take, as a standard of first-class attractions, one which the par-

614, citing *Power v. Village of Athens*, 26 Hun, 282; *Easton v. Pickersgill*, 55 N. Y. 310. The practical construction put upon a contract by the parties to it, is sometimes almost conclusive as to its meaning. *Nicoll v. Sands* (1892), 131 N. Y. 19; *Woolsey v. Funke*, 121 N. Y. 87.

¹ *Vermont Street M. E. Church v. Brose*, 104 Ill. 206.

² *Burgess v. Badger* (1888), 124 Ill. 288; *Davis v. Sexton*, 35 Ill. App. 407; *Dwellely v. Dwellely*, 143 Mass. 509. In ordinary cases a practical construction given to a contract by the parties will be adopted by the courts as the correct one. *Dwenger v. Geary*, 113 Ind. 106; *Johnson v. Gibson*, 78 Ind. 282, and authorities cited; *Willcuts v. Northwestern, etc., Ins. Co.*, 81 Ind. 300; *Etna Life Ins. Co. v. Nexsen*, 84 Ind. 347; 43 Am. Rep. 91; *Franklin, etc., Ins. Co. v. Wallace*, 93 Ind. 7; *City of Indianapolis v. Kingsbury*, 101 Ind. 200; 51 Am. Rep. 749; *City of Vincennes v. Citizens' Gaslight, etc., Co.*, 132 Ind. 114; *Gronstadt v. Withoff* (1884), 21 Fed. Rep. 253; *Jackson v. Perrine*, 35 N. J. Law, 137; *Stone v. Clark*, 1 Metc. (Mass.), 378; *Nickerson*

v. Atchison, etc., R. Co., 3 McCrary U. S. 455; *Butler v. Moses*, 43 Ohio St. 166; *Forbes v. Watt*, L. R. 2 Sc. & D. 214. In *Thompson v. Prouty*, 27 Vt. 14, *Bennet, J.*, in speaking of whether a contract should have a certain construction, says: "I, for one, should have some doubt; * * * but, the defendant having given a different, practical construction to it, we are disposed to adopt his in that particular." "We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price." *District of Columbia v. Gallaher* (1888), 124 U. S. 505, per *Matthews, J.* "There is no surer way to find out what parties meant than to see what they have done." *Insurance Co. v. Dutcher*, 95 U. S. 269, per *Swayne, J.*

³ *Deutmann v. Kilpatrick* (1891), 46 Mo. App. 624; *Mathews v. Danahy*, 26 Mo. App. 660; *Sedalia Brewing Co. v. Sedalia Waterworks Co.*, 34 Mo. App. 49.

ties themselves thought first-class.¹ And where mail-transportation service has been rendered in a certain way for nearly twelve years, under three successive contracts, the court will adopt the construction given by the parties, although in the abstract inclined to a different one.²

§ 722. The same subject continued.—But where the contract is free from ambiguity, and its meaning is clear in the eye of the law, such mode of construction is inadmissible.³ The practical construction of a contract adopted by the parties thereto will not control or override language that is so plain as to admit of no controversy as to its meaning. In such cases the intent of the parties must be determined by the language employed, rather than by their acts; but if the language employed is of doubtful import, or if the contract contains no provisions on a given point, or if it fails to define with certainty the duties of the parties with respect to a particular matter or in a given emergency, then it is proper to consider how the parties have construed the instrument with respect to such debatable points.⁴ In holding that the acts of the parties performed under a written contract are admissible for the purpose of ascertaining the construction placed upon it, there is no encroachment upon the rule that contemporaneous parol evidence is not admissible to vary a written instrument, for acts done in execution of the contract are subsequent in time to the execution of the instrument, and different from mere verbal statements.⁵ If the contract was not written, its nature and terms must be ascertained as matter of fact from the conversations,

¹ *Leavitt v. Windsor, etc., Co.* (1893), 54 Fed. Rep. 439; 4 C. C. A. 425.

² *Carr v. United States*, 22 Ct. Cl. 152.

³ *Davis v. Shafer* (1892), 50 Fed. Rep. 764; *Railroad Co. v. Trimble*, 10 Wall. 367; *Michael v. St. Louis, etc., Insurance Co.*, 17 Mo. App. 23; *Crisman v. Hodges*, 75 Mo. 413; *Miller v. Dunlap*, 22 Mo. App. 97; *St. Paul, etc., R. v. Blackmar*, 44 Minn. 514.

⁴ *Central Trust Co. of N. Y. v. Wabash, etc., Ry. Co.* (1888), 34 Fed. Rep.

254, where a contract between two railway companies operating a joint line did not expressly provide how cars should be obtained or supplied for the use of the line. The fact that one company for several years paid the other for the use of its cars was considered as a construction placed on the contract by the parties and enforced accordingly.

⁵ *Lyles v. Lescher* (1886), 108 Ind. 382.

negotiations and acts of the parties by whom it was made.¹ Where the terms of a parol agreement are in doubt, the acts of the parties in the execution of it are the best guides for its interpretation.² Where one party to a contract writes the other stating his construction of it, and the latter makes no reply, he may be taken as acquiescing in that construction.³

§ 723. The object of construction.—The great object, and indeed the only foundation, of all rules of construction of contracts is to come at the intention of the parties. If the words or terms of a contract are equivocal, resort may always be had to the circumstances under which the contract was executed, and to the contemporaneous construction given to the contract by the parties, as evidenced by possession or similar acts. The subsequent acts of the parties have always been admitted to show how the parties understood their contract, and as a practical construction of it.⁴ It is only when the terms of the contract are ambiguous that this rule of construction is resorted to, and then the intention of the parties must be determined from the words of the contract; but a reference to the situation of the parties and the subject-matter, under the circumstances, is always proper.⁵ The practical construction placed upon a

¹ *Massey v. Belisle*, 2 Ired. L. 170; *Edwards v. Goldsmith*, 16 Pa. St. 43.

² *Robbins v. Kimball* (1892), 55 Ark. 414; 29 Am. St. Rep. 45. A verbal agreement will be construed according to the facts and circumstances of the case. *Arbuckle v. Smith*, 74 Mich. 568; *Thompson v. Andrus*, 73 Mich. 551.

³ *Bourland v. Gibson*, 7 Ill. App. 227.

⁴ *Gray v. Clark*, 11 Vt. 583; *Thompson v. Prouty*, 27 Vt. 14; *Barker v. Troy, etc., Railroad Co.*, 27 Vt. 766; *Vermont & C. R. Co. v. Vermont C. R. Co.*, 34 Vt. 1.

⁵ *White v. Amsden*, 67 Vt. 1; 30 Atl. Rep. 972, per Taft, J.: "In the mortgage under which defendant claims, there is no reference in the description, in express terms, to that

portion of the water power created for the purpose of being stored and used by the parties owning the middle and lower privileges. The description is by reference to former deeds, and adding thereto: "Together with the various shops, mills, dwelling houses, and other buildings thereon standing, and the steam engine, boiler, and appurtenances thereto belonging, and the main shafting in said buildings, and all the water power; meaning to convey," etc. We think this description covers the water power which belongs and is appurtenant to the other property conveyed, and not to all the water power created by the great dam. There is no description of the great dam, or the water power created by it, and no reference to it; and when we take into considera-

contract in the performance of it by the parties who made it should in case of doubt have great weight in its construction by the courts; but the construction placed upon it by the successors of those who made it or by public officers is entitled to much less weight.¹

tion the circumstances connected with the great dam and the middle power, we think it is apparent that the parties intended to convey only the water power connected with the buildings at the upper dam, without infringing upon any of the rights which the middle and lower powers had under the by-laws of the corporation, to which all of the conveyances theretofore were subject. The defendant took possession of the upper power in December, 1884, and, during the following year, made repairs upon the great dam, and claimed that the middle and lower powers were chargeable with one-half of the amount paid for such repairs, upon the basis of the values of the three respective powers, which he claimed to be as follows: The upper power, five-tenths; the middle power, three-tenths; and the lower power, two-tenths, and the owner of the middle and lower power paid the respective amounts, in accordance with the defendant's claim. This act of the defendant, as late as the year 1885, indicated the practical construction that he put upon the deed under which he claims title, for it was only by force of the by-laws that he could call upon the lower powers to contribute to the repairs of the great dam. Upon the construction of the deed in question, the remarks of Bennett, J., in *Thompson v. Prouty*, 27 Vt. 14, are quite apropos. In speaking of whether a contract should have a certain construction, he says: 'I, for one, should have some doubt; * * * but, the defendant having given a different, practical construc-

tion to it, we are disposed to adopt his in that particular.' "

¹ *City of Cincinnati v. Cincinnati Gas Co.* (Ohio, 1895), 41 N. E. Rep. 239, Burket, J.: "There is some looseness of expression in some of the reported cases as to what course of dealing will supply a practical construction. The case of *Robinson v. United States*, 13 Wall. 363, cited and relied upon in *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 34 Fed. Rep. 254, as a case of practical construction, is a case involving the admission of evidence as to the existence of a custom in trade, and is not at all founded upon the doctrine of practical construction. To have any value as a practical construction, the course of dealing should be uniform, unquestioned, and fully concurred in by both parties. A right claimed by one party, and from time to time denied or disputed by the other, although, for the time being, conceded, can not, from such concessions, be regarded as established. And when, as in this case, each concession for over two years is coupled with an admission by both parties that the right claimed is in dispute, it is clear that such concessions can not be used to establish the right. It is not every captious doubt as to the meaning of a written instrument that will warrant a court in concluding that the instrument is ambiguous, and therefore to disregard its words, and seek the intention of the parties in the course of business growing out of an attempted performance. The most exact and skillfully drawn document may, by able counsel, be so construed as to create what would seem to be

§ 724. Construction by parties—Estoppel.—When the language of a written contract is so equivocal or ambiguous as to be open to either of two interpretations, parol evidence of the subsequent conduct of the parties, showing the construction put upon it by them, is admissible.¹ A contract for the im-

reasonable doubts, when in fact it is perfectly clear to the parties, and, aside from the strained construction of counsel, also to the court. In such cases it is the duty of courts to disregard the strained construction of counsel, and to enforce the instrument according to the reasonable, plain, and manifest intention of the parties. Business does not usually deal in fine-drawn distinctions, but in plain, practical transactions. The reason of the rule of practical construction has its origin in the presumption that the parties to the contract, at and after the making thereof, knew what they meant by the words used, and that their acts and conduct in the performance thereof are consistent with their knowledge and understanding, and that, therefore, their acts and conduct show the sense in which the words were used and understood by them. In such cases acts sometimes speak louder than words. But the reason of the rule ceases when the acts or conduct are not those of the parties who made the contract, and are not presumed to know in their own minds what was in fact meant by the words used. The acts and conduct of the parties following after the parties who made the contract must, in the nature of the case, be only their own construction of the words used, and not an acting out of the understanding of the words by the parties who used them. The same is true of public officers. They may put their own construction upon the words used, but in so doing they are not acting out the mental understanding of the sense in which the words were used by those

who made the contract or written instrument."

¹ *Engel v. Scott, etc., Lumber Co.* (Minn. 1895), 61 N. W. Rep. 825. In *Streppone v. Lennon* (1894), 143 N. Y. 626, Finch, J., says: "Evidence was given, under objection, to show what the parties themselves meant and understood by the disputed language, and also what it meant in the usage of the trade; the defendant insisting that such proof was inadmissible, because the written contract required plaintiff to furnish the brick, and, needing no explanation, could not be contradicted; while the plaintiff insists that the writing requiring him to do the brickwork did not include the furnishing of the material, and at all events was sufficiently ambiguous to justify a parol explanation. An agreement to 'do' an amount of 'brickwork' may mean simply to perform the work of laying the brick, or, in addition, to furnish the brick as well as lay them. A recurrence to another part of the contract throws some light upon the interpretation. The plaintiff, in agreeing to do the stonework, describes it as 'masonwork,' but adds, 'and furnish all the building stone for same.' He evidently understood that masonwork meant only the labor, unless coupled with an agreement to furnish the materials; and, since no such agreement accompanied the proposition to do the brickwork, it is a natural supposition that only the labor was intended. Plaintiff called upon defendant for cement, which the latter furnished, and concedes he was to furnish, and in exactly the same manner he was called upon to fur-

provement of a street provided that, to prevent all disputes and litigation, the city engineer's decision as to the work shall be final and conclusive. It was held that one of the parties could not avoid being bound by the engineer's decision by showing merely that he was negligent and made mistakes.¹ Where the terms of a contract were not clear as to whether royalties on ore were to be computed when the ore was wet or dry, the acceptance by the mine owner for seven years of settlements on a dry weight, with full knowledge of the facts, estops him to claim a different construction.²

§ 725. Parol evidence to show the construction of the parties.—Parol evidence is admissible to show the contemporaneous understanding of the parties to a written contract of the words "to work a street," as used therein.³

nish, and did furnish, the brick, making no objection and expressing no surprise; and in making payments he seriously overpaid the plaintiff if the latter was to be charged with the brick. The plaintiff's construction is, therefore, both the possible and reasonable one, and at all events shows that the contract language, if not conclusive in plaintiff's favor, was at least ambiguous and open to explanation." In *Paxton v. Smith*, 41 Neb. 56; 59 N. W. Rep. 690, Post, J., said: "A preliminary question, with respect to the character of the instrument through which King claims, may be briefly disposed of. Said contract has, from the first, been, by both parties, treated as a mortgage from McClain & Sons to King; and, in the plaintiffs in error's mortgage, it is recited that it is 'subject to a mortgage given August 26, 1889'—evidently, the contract with King. The construction thus adopted by the parties will be adhered to by this court. *School Dist. v. Estes*, 13 Neb. 52; 13 N. W. Rep. 16; *Rathbun v. McConnell*, 27 Neb. 239; 42 N. W. Rep. 1042." See also, *Hill v. Duluth City*, 57 Minn. 231; 58 N.

W. Rep. 992; *Webster v. Clark*, 34 Fla. 637; 16 So. Rep. 601, 605; *Matchette v. Colburn*, 166 Pa. St. 265; 31 Atl. Rep. 74.

¹ *Bowman v. Stewart*, 165 Pa. St. 394; 30 Atl. Rep. 988, per White, J.: "When the parties agreed to make his decision final and conclusive, they waived the risk of negligence and mistakes. The principle governing cases of this kind has been sustained by numerous decisions, from *Monongahela Navigation Co. v. Fenlon*, 4 Watts & S. 205, to *Hartup v. City of Pittsburgh*, 131 Pa. St. 535; 19 Atl. Rep. 507."

² *American Manganese Co. v. Virginia, etc., Co.* (Va. 1895), 21 S. E. Rep. 466.

³ *In re Curtis*, 64 Conn. 501; 30 Atl. Rep. 769, per Anderson, C. J.: "The controversy turned on the meaning to be given to the expression 'to work a street,' as used in that contract. Curtis claimed that it was a business or a trade term, and that the arbitrators should take judicial notice of its meaning; or, if they were not able to do so, that only expert testimony was admissible to inform them of its meaning. Castle, on the other hand,

§ 726. **The rule *contra proferentem*.**—If there is any ambiguity in the language used, it must be construed against the party using it.¹ The reason of the rule *contra proferentem* is

claimed that the expression was not a trade or business term, but was an expression used by them in the contract with a special meaning, perfectly understood by the parties, and agreed upon by them at the time the contract was made, and offered parol testimony of what that special meaning was. To this Curtis objected, but the arbitrators admitted it. We understand that there are cases in which parol testimony is admissible to show the contemporaneous understanding of the parties to a contract of the meaning of the terms used by them in the contract. Thus in *Thorington v. Smith*, 8 Wall. 1, it was held competent to show that the parties to a written contract by the word 'dollars' intended Confederate dollars, and not lawful dollars of the United States. This decision was applied and extended in the *Confederate Note Case*, 19 Wall. 548. In *Excelsior Needle Co. v. Smith*, 61 Conn. 56-64; 23 Atl. Rep. 693, it is clearly implied that, if the term 'needle business' had been used in a special sense by the parties in their contract, such sense might have been shown by parol. In *Macdonald v. Longbottom*, 1 El. & El. 977, the defendant, by a written contract, had purchased of the plaintiffs, who were farmers, a quantity of wool which was described in the contract simply as 'your wool.' Some time previously a conversation had taken place in which the plaintiffs stated that they had a quantity of wool consisting partly of their own clip and partly of wool they had contracted to buy of other farmers. In an action for not accepting the wool, this conversation was held admissible in evidence for the purpose of explaining what the parties meant by the

term 'your wool.' In *Shore v. Wilson*, 9 Clark & F. 355, 566, the chief justice, Tindal, in giving the opinion, says: 'The true interpretation, however, of every instrument, being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always has been considered as an exception, or, perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party.' See also, *Hotchkiss v. Barnes*, 34 Conn. 27; *Avery v. Stewart*, 2 Conn. 69. Cases of this kind are analogous to latent ambiguities. But they are something more than such ambiguities. In these cases the parol testimony is used, not only to explain the surrounding circumstances, but also to enable the court to look in upon the mind of the contracting parties, and to read the written words of their contract in that very sense in which they wrote them."

¹ *Chambers v. United States*, 24 Ct. Cl. 387; *Edsall v. Camden, etc., Co.*, 50 N. Y. 661; *Cobb v. McElroy*, 79 Iowa, 603. In the common law, this rule of construction, at the present day, has a very limited operation. *Metcalf on Contracts*, 360.

that men may be supposed to take care of themselves, and that he who gives, and chooses the words by which he gives, ought to be held to a strict interpretation of them, rather than he who only accepts.¹ Where a charter-party is prepared by the charterers of a vessel, and contains a clause manifestly inserted for their benefit, ambiguities, if any there are in its phrasing, should be resolved against them.² A vendor is bound to express himself clearly as to the extent of his obligations, and an obscure or ambiguous clause must be interpreted against him.³ This rule is not properly applicable to any case but one of strict equivocation, where the words used will bear either one of two or more interpretations equally well. In such a case, if there be no other legitimate mode of determining the equipoise, this rule might well enough decide the case.⁴ If the language of the promisor is capable of a double interpretation, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee.⁵ Where the words may have been used in an enlarged or restricted sense, they will in general be construed in the sense most beneficial to the promisee,⁶ or covenantee. The words of a covenant are to be taken most strongly against the covenantor, but that must be qualified by the observation that a due regard must be paid to the intention of the parties as collected from the whole context of the instrument.⁷ Contracts are to be construed liberally in favor of the public, when the subject-matter concerns the interest of the public.⁸

¹ *Mayer v. Isaac*, 6 M. & W. 605, per Alderson, B.

² *MacAndrews v. Mignano* (1893), 14 U. S. App. 10. He who is obliged ought to speak clearly, or otherwise, in general, the other party has a right to explain the clause to his own advantage. 1 Powell on Contracts, 395.

³ *Delogny v. Mercer*, 43 La. Ann. 205.

⁴ *Adams v. Warner*, 23 Vt. 395, per Redfield, J. This rule is the last to be resorted to, and is never to be relied upon but where all other rules of exposition of words fail. Bacon Max. Reg., 3; *Patterson v. Gage*, 11 Colo. 50.

⁵ *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405; 88 American Decisions, 337; *Barlow v. Scott*, 24 N. Y. 40; *White v. Hoyt*, 73 N. Y. 505; *Fowkes v. Manchester, etc., Assurance Association*, 3 B. & S. 917.

⁶ *Belden v. Burke* (1894), 72 Hun, 51; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405; *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 758.

⁷ *Browning v. Wright*, 2 B. & P. 13, per Lord Eldon; *Earl of Shrewsbury v. Gould*, 2 B. & Ald. 487.

⁸ *Joy v. St. Louis* (1890), 138 U. S. 1.

§ 727. **Grants.**—The construction of grants should be favorable to the grantee.¹ That doubtful words and provisions are to be taken most strongly against the grantor is an ancient principle of the common law,² inasmuch as the fault is assumed to be in the grantor, and he shall not take advantage of a difficulty which he has himself created.³ A more liberal rule of construction is allowable in interpreting a grant from one state or political community to another than is permitted in interpreting a private grant.⁴ The grant of a patent for a useful invention under the laws of the United States is not the exercise of any prerogative to confer upon the subject exclusive property in that which would otherwise be of common right. It more nearly resembles a contract, which, under the authority conferred by the constitution, Congress authorizes to be entered into between the government and the inventor, securing to him for a limited time the exclusive enjoyment of the practice of his invention, for disclosing his secret and

¹ *Doe v. Williams*, 1 H. Bl. 25; *Winslow v. Patten*, 34 Maine, 25. The king's grant is taken most strongly in favor of the king and against the grantee. *Willion v. Berkley*, Plowd. 223, 243; *Att. Gen. v. Ewelme Hospital*, 17 Beav. 366; *Carroll v. Norwood*, 5 Harr. & J. 155; *Clough v. Bowman*, 15 N. H. 504; *Sanborn v. Clough*, 40 N. H. 316; *Vance v. Fore*, 24 Cal. 436; *Dodge v. Walley*, 22 Cal. 224.

² *Hogg's Appeal*, 22 Pa. St. 479; *Watson v. Boylston*, 5 Mass. 411; *Marshall v. Niles*, 8 Conn. 369; *Pike v. Munroe*, 36 Maine, 309.

³ "It is a well known rule in the construction of private grants, if the meaning of the words be doubtful, to construe them most strongly against the grantor." Story, J., in *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 589; *Lincoln v. Wilder*, 29 Maine, 169; *Cocheco, etc., Co. v. Whittier*, 10 N. H. 305; *Mills v. Catlin*, 22 Vt. 98. *Jes-*

sel, M. R., in *Taylor v. Corporation of St. Helens*, L.R. 6 Ch. D. 264, says: "I do not see how, according to the now established rules of construction as settled by the house of lords, in the well known case of *Grey v. Pearson* (6 H. L. C. 61), followed by *Roddy v. Fitzgerald* (6 H. L. C. 823), and *Abbott v. Middleton* (7 H. L. C. 68), that maxim can be considered as having any force at the present day. The rule is to find out the meaning of the instrument according to the ordinary and proper rules of construction. If we can thus find out its meaning we do not want the maxim. If, on the other hand, we can not find out its meaning, then the instrument is void for uncertainty, and in that case it may be said that the instrument is construed in favor of the grantor, for the grant is annulled."

⁴ *State of Indiana v. Milk*, 11 Biss. 197 (1882), *Gresham, J.*

relinquishing his invention to the public at the end of the term.¹

§ 728. Contracts partly written and partly printed.—In the construction of an instrument partly written and partly printed, greater weight is to be attached to the written than to the printed parts, but they must, if possible, be reconciled.² The written portions are presumed from the circumstance of their special and deliberate insertion by the parties to embrace the real meaning and intent.³ While the written provision of a contract should prevail over one which is inconsistent with it, and which is part of a printed form adopted for general use, yet only so far as it is apparent that the parties intended to modify or disregard the printed stipulations will the latter give way.⁴ The rule is only resorted to from necessity when the written and printed clauses can not be reconciled.⁵ Under a contract by which defendant agreed to sell and deliver “all the hops grown on his farm, not to exceed fifteen acres, now under cultivation, for the term of three years,” the words “now under cultivation” being printed in the form and the rest in writing, and defendant had at the time only eight acres under cultivation, but in the last of the three years had more, but less than fifteen acres, it was held that the buyer was entitled to receive the additional product, the written words “all the hops grown” being taken to control.⁶

¹ *Attorney - General v. Rumford Chemical Works*, 32 Fed. Rep. 608, Shepley, J.

² *Bolman v. Lohman*, 79 Ala. 63; *Hill v. Miller*, 76 N. Y. 32; *Bryant v. Poughkeepsie, etc., Ins. Co.*, 17 N. Y. 200; *Harper v. Alb. Mut. Ins. Co.*, 17 N. Y. 194; *Harper v. N. Y. City Ins. Co.*, 22 N. Y. 441; *Amer. Express Co. v. Pinckney*, 29 Ill. 392; *Gilbert v. Stockman*, 76 Wis. 62; 20 Am. St. Rep. 23, where written portion of contract for sale of land was inconsistent with the printed form upon which the contract was drawn. *Thornton v. Sheffield, etc., R.*, 84 Ala. 109; *Holmes v. Parker*, 25 Ill. App. 225; *Dick v. Ireland*, 130 Pa. St. 299.

³ *Chadsey v. Guion* (1884), 97 N. Y. 333. The written words are the terms selected by the parties themselves to express their meaning in the particular case. *Duffield v. Hue*, 129 Pa. St. 94. A printed billhead can not be allowed to control, modify or alter the terms of a contract which is clearly expressed in writing below it. *Sturm v. Boker*, 150 U. S. 312; *Schenck v. Saunders*, 13 Gray, 37.

⁴ *Frost's, etc., Lumber Works v. Millers', etc., Insurance Co.*, 37 Minn. 300; 5 Am. St. Rep. 846.

⁵ *Miller v. Hannibal & St. Joe R. Co.*, 90 N. Y. 430; *Barhydt v. Ellis*, 45 N. Y. 107.

⁶ *Hutt v. Zimmer* (1894), 78 Hun, 23.

§ 729. **The same subject continued.**—Where there is a conflict or inconsistency between the written and printed parts of a contract the written part will control.¹ Accordingly a printed billhead can not be allowed to control, modify, or alter the terms of a contract which is clearly expressed in writing below it.²

§ 730. **Punctuation.**—The punctuation of a written contract may be looked to, as affording light upon the meaning of the parties, but is never permitted to overturn the plain meaning of the instrument.³ Punctuation is a most fallible standard by which to interpret a writing. It may be resorted to when all other means fail, but the court will first take the instrument by the four corners in order to ascertain its meaning, and, if it is apparent, the punctuation will not change it.⁴

In *Magee v. Lavell*, L. R. 9 C. P. 107, Coleridge, J., said: "If a contract be partly printed and partly written, the relative value to be assigned to the parts, on account of their different form, is a question of construction for the court to determine with reference to the particular circumstances." In *Clark v. Woodruff*, 83 N. Y. 518, where the written recital of a bond differed from the printed condition, Finch, J., said: "This ambiguity it was proper to solve by throwing upon the language used the light of surrounding circumstances."

¹ *Murray v. Pillsbury*, 59 Minn. 85; 60 N. W. Rep. 844.

² *Sturm v. Boker* (1893), 150 U. S. 312; 14 Sup. Ct. Rep. 99, Jackson, J.: "In *Schenck v. Saunders*, 13 Gray (Mass.), 37, there were unsigned bills like those in the present case. The supreme court of Massachusetts, speaking by Bigelow, J., held that the transaction was not a sale, and that 'the bills of parcels which were sent from time to time with the merchandise were susceptible of explanation by parol evidence, and did not change the terms of the written agree-

ment under which the property was sent to Howe. They were sent only as memoranda of the amount and value of the merchandise transmitted. *Hazard v. Loring*, 10 Cush. 267.' 'An invoice,' as said by this court in *Dows v. Nat., etc., Bank*, 91 U. S. 618, 'is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, or cost of the goods, or price of the things invoiced, and it is as appropriate to a bailment as a sale. Hence, standing alone, it is never regarded as evidence of title.' "

³ *Osborn v. Farwell*, 87 Ill. 89; *Bunn v. Wells*, 94 N. C. 67; *Joy v. St. Louis*, 138 U. S. 1. Punctuation does not control. *English v. McNair*, 34 Ala. 40; *Central Trust Co. v. Wabash, etc., R.*, 29 Fed. Rep. 546. Neither do rules of grammar. *Nettleton v. Billings*, 13 N. H. 446; *Tucker v. Meeks*, 2 Sweeny, 736; *Gray v. Clark*, 11 Vt. 583; *Northrup v. Smothers* (1890), 39 Ill. App. 588. Strict rules of grammar will not control a writing made by men who are not grammarians. *Watson v. Blaine*, 12 S. & R. 131; 14 Am. Dec. 669.

⁴ *Ewing v. Burnet*, 11 Pet. 41.

Words must be taken to express the meaning of the parties to a contract, and punctuation may aid in ascertaining the true reading; but its absence can not vitiate the contract, and the meaning of the words may be ascertained without its aid.¹ When the meaning of a clause in an instrument is doubtful, the court may insert punctuation as a means of showing what construction the words are capable of, and if, by such aid, the court is enabled to see that the language can bear an interpretation which will make the whole instrument rational and self-consistent, it is bound to adopt that interpretation in preference to another which would attribute to the parties an intention utterly capricious, insensible and absurd.²

§ 731. Whether a contract is entire or severable.—A familiar and well settled principle of the common law is that an entire contract can not be apportioned.³ The good sense and reasonableness of the particular case must always guide and govern courts in determining whether a contract is divisible or entire.⁴ The question depends, to some extent, upon the intention of the parties, and this must be discovered in each case by considering the language employed and the subject-matter of the contract.⁵ No precise rule can be laid down for the solution of the question. When the price is expressly apportioned by the contract, or the apportionment may be implied by law, to each item to be performed, the contract will generally be held to be severable.⁶ A contract consisting of several distinct items and founded on a consideration which is apportioned to each item, is severable.⁷ Thus, if A enters into a contract to supply machinery to B for a certain price, and to keep it in order for a yearly payment, he becomes entitled to recover the price of the

¹ *White v. Smith*, 33 Pa. St. 186; 75 Am. Dec. 589; *Ketchum v. Spurlock*, 34 W. Va. 597.

² *In re Denny's Estate*, 8 Ir. R. Eq. Series, 427; *Burgess v. Badger*, 124 Ill. 288.

³ The reason seems to be, that as the contract is founded upon a consideration dependent upon the entire performance of the act, and if from any cause it is not wholly performed, the *casus fœderis* does not arise, and

the law will not make provision for exigencies which the parties have neglected to provide for themselves. Story's Equity Jurisprudence, § 470.

⁴ *Dugan v. Anderson*, 36 Md. 567; 11 Am. Rep. 509; *Jones v. Dunn*, 3 Watts & S. 109.

⁵ *Southwell v. Beezley*, 5 Ore. 458.

⁶ *More v. Bonnet*, 40 Cal. 251.

⁷ *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 351.

machinery as soon as he delivers it, without waiting for the performance of the rest of the contract.¹ But if the consideration to be paid is single and entire, the contract must be held to be entire, although the subject thereof may consist of several distinct and wholly independent items.² In a fire insurance policy, where the performance is a gross sum, the contract is held to be entire and not divisible, although the amount of insurance on the different items is fixed in the policy.³

§ 732. Whether a contract is several or joint.—Plaintiff contracted to build for defendants a factory for a sum specified, defendants stipulating that “we, the subscribers hereto,” agree to pay for the factory when completed. The contract provided that defendants, as soon as the sum specified was subscribed, should incorporate with a capital stock of not less than the amount subscribed, to be issued to the subscribers in proportion to the amount of their paid-up interest, and that each stockholder should be only liable for the amount subscribed by him. It was held that the contract was a several contract with each subscriber, to the amount of his subscription, and not a joint contract, by which each subscriber became liable for the whole contract price of the factory.⁴ A contract by a

¹ *Rapalje & Lawrence Law Dictionary*; *Merchant Banking Co. v. Phoenix, etc., Steel Co.*, L. R. 5. Ch. Div. 205.

² *Fullmer v. Poust* (1893), 155 Pa. St. 275.

³ *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202; *Plath v. Minnesota, etc., Association*, 23 Minn. 479.

⁴ *Davis Bldg., etc., Co. v. Cupp*, 89 Wis. 673; 62 N. W. Rep. 520, Winslow, J.: “We construe the building contract to be a several contract with each subscriber to the amount of his subscription, and not as a joint contract, by which each subscriber would become liable for the whole consideration. Although not in the same language, the purport of the contract is much the same as the one construed in *Gibbons v. Grinsell*, 79 Wis. 365;

48 N. W. Rep. 255, and which was held to be a several contract. A contract in the identical language of the one before us was construed by the supreme court of Michigan to be several and not joint. *Davis, etc., Mfg. Co. v. Murray*, 60 N. W. Rep. 437. Such was the conclusion reached by the federal court in the case of *Davis, etc., Mfg. Co. v. Barber*, 51 Fed. Rep. 148.” In *Davis Bldg., etc., Co. v. Jones* (1895), 66 Fed. Rep. 124, *Thayer, J.*, said: “This contract, or one nearly identical with it in form, has been before the courts for construction on several previous occasions, and the question whether the subscribers thereby bound themselves jointly to pay the full contract price, or severally to pay the sums by them respectively subscribed, has been consid-

dairyman to ship whatever milk he may have, at a certain price per gallon, for a year, is a several contract.¹ To make a contract a personal one, requiring individual performance by the contracting party, the contract must itself show, or inevitably suggest, that a personal confidence or trust was reposed in him.²

ered at length, and often decided. In the following cases it was held that the contract simply required each subscriber to pay the amount of his individual subscription: *Davis v. Belford*, 70 Mich. 120; 37 N. W. Rep. 919; *Davis, etc., Mfg. Co. v. Barber*, 51 Fed. Rep. 148; *Gibbons v. Grinsel*, 79 Wis. 365; 48 N. W. Rep. 255; *Davis & Rankin Co. v. Hillsboro Co.*, 10 Ind. App. 42; 37 N. E. Rep. 549; *Davis, etc., Mfg. Co. v. Booth*, 10 Ind. App. 364; 37 N. E. Rep. 818; *Davis, etc., Mfg. Co. v. McKinney*, 11 Ind. App. 696; 38 N. E. Rep. 1093; *Frost v. Williams*, 2 S. D. 457; 50 N. W. Rep. 964,—while in the following case the contrary view was taken, and the contract was held to impose a joint liability: *Davis v. Shafer*, 50 Fed. Rep. 764. It is worthy of notice, however, that in the case last cited (*Davis v. Shafer*) the conclusion reached, that the contract imposed a joint liability, was influenced to some extent by the view entertained by the court of the effect of a local statute of the state of Missouri, where the contract was executed. Revised Statutes of Missouri, § 2384. We have felt constrained to concur in the views taken in those cases, above cited, which hold that the liability imposed by the contract is several, and not joint."

¹ *McLaughlin v. Hess*, 164 Pa. St. 570; 30 Atl. Rep. 491.

² *Nixon v. Zuricalday* (1895), 144 N. Y. 300; 39 N. E. Rep. 340, per Gray, J.: "In order that a contract shall bear the impress of being a per-

sonal contract, or one which involves personal considerations, something must appear from it, or it must inevitably suggest that a personal confidence or trust was reposed in the person contracted with. Such was the case in *Stevens v. Benning*, 1 Kay & J. 168. In that case Vice Chancellor Wood suggested a case which aptly shows how the inference of a personal trust can be made from the transaction itself. He says: 'Take, for instance, the case of a merchant in the West Indies consigning goods to a person in London, for the purpose of having them sold there; such person alone would have a right to sell them.' No such element can be presumed to enter into the transaction in question. There was no such duty necessarily or inferentially devolved upon the defendants as to permit the court to presume that any personal confidence was involved, or that the exercise of some personal skill on their part was expected. In view of the manner of a sale at auction, and what would ordinarily be done, that would be an irrational presumption. In the case of *Spalding v. Rosa*, 71 N. Y. 40, cited by the learned trial judge, the defendants' contract to furnish the 'Wachtel Opera Troupe' could only be fully performed by the appearance of the great tenor singer himself, who gave his name to the company, and whose presence was of the essence of the contract as of the success of a performance. So in *Wolfe v. Howes*, 20 N. Y. 197, the contract with the mechanic contem-

§ 733. **The same subject continued—Illustrations.**—A contract for the sale of several distinct things, as for the sale of a town lot and personal property, but all for one consideration, is an entire contract, and not divisible except by the consent of both parties thereto, and the making of a new contract.¹ Where the mate of a ship engaged for a voyage at thirty guineas, and died during the voyage, it was held that at law there could be no apportionment of the wages.² A contract to hire a person for a year for a certain sum per week, payable weekly, is entire and indivisible.³ The common law rule of the non-apportionment of contracts which are entire is simply a rule of construction founded upon the intention of the parties, and not a rule of law controlling such intention. Consequently, parties may by apt words make contracts which shall be apportionable.⁴

§ 734. **Laws, customs and usages.**—The laws which exist at the time and place of making a contract, and at the place where it is to be performed, affecting its validity and con-

plated his personal services, because not only it was 'evident, both from the nature of the business and the amount of compensation agreed to be paid him,' but, as Judge Allen adds, 'it is also manifest from the evidence on both sides. The business of pot-making required skill and experience * * * The execution of the work required his consent and personal supervision and labor.' "

¹ *Scheland v. Erpelding*, 6 Ore. 258.

² *Cutter v. Powell*, 6 T. R. 320.

³ *Olmstead v. Bach* (1893), 78 Md. 132; 22 *Lawyer's Rep. Ann.* 74. The plaintiff was employed at \$50 per week, payable weekly, and it was expressly provided that this employment and this weekly payment of wages should continue for one year. It was not fifty-two separate independent contracts, but one indivisible agreement, covering the period of a year. A hiring for one year with monthly payment of wages is an en-

tire contract. *Larkin v. Hecksher*, 51 N. J. Law, 133. A contract for a specific service at an agreed price is entire, and the price does not become payable until the service is wholly rendered. *Rockwell v. Newton*, 44 Conn. 333.

⁴ 2 *Parsons on Contracts*, 521. As to entire and separable contracts and apportionments, see *Huey v. Grinnell*, 50 Ill. 179; *Shinn v. Bodine*, 60 Pa. St. 182; *Allen v. Brown*, 43 Ga. 305; *Coburn v. Hartford*, 38 Conn. 290; *Hollis v. Chapman*, 36 Texas, 1; *McDaniels v. Whitney*, 38 Iowa, 60; *Maryland Fertilizing, etc., Co., v. Lorentz*, 44 Md. 218; *Clark v. Sawyer*, 121 Mass. 224; *Quigley v. DeHaas*, 82 Pa. St. 267; *Scott v. Kittanning Coal Co.*, 89 Pa. St. 231; *Butler v. Butler*, 77 N. Y. 472; *Burckhardt v. Burckhardt*, 36 Ohio St. 261; *Murphy v. St. Louis*, 8 Mo. App. 483; *Tenny v. Mulvaney*, 8 Ore. 129.

struction, enter into and form a part of it.¹ Parties making contracts must be considered as looking to the municipal law for remedies to enforce their rights, hence this law must be considered as entering into and forming part of the obligation.² To explain an equivocal and obscure expression resort may be had to the well-defined and known usages of trade as an aid in reaching a true interpretation.³ Parties who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary. Where a party agreed to deliver so many bushels of "first quality clear barley," the contract not stating whether the barley was to be delivered in sacks or in bulk, *i. e.*, loose, it was held that evidence was properly received to show a usage of trade to deliver in sacks, such evidence tending not to contradict the agreement, but only to give it precision on an important point, where by its terms it had been left undefined.⁴ The allowance of days of grace is a usage which pervades the whole commercial world. It is universally understood to enter into every bill or note of a mercantile character, and to form so completely a part of the contract that the bill does not become due in fact or in law on the day mentioned on its face, but on the last day of grace.⁵ Parol evidence of custom is generally admissible to enable the court to arrive at the real meaning of the parties, who are naturally presumed to have contracted in conformity with the known

¹ Walker *v.* Whitehead, 16 Wall. 314.

² Lessley *v.* Phipps, 49 Miss. 790.

³ South Bend Iron Works *v.* Cottrell (1887), 31 Fed. Rep. 254; Bullock *v.* Finley (1886), 28 Fed. Rep. 514.

⁴ Robinson *v.* United States, 13 Wall. 363. "The ancient, established, uniform, and known custom of persons engaged in any trade, makes a law for that trade, although it is not applicable to other trades. It is their way of doing business. It is the rule to which all who enter that trade are understood to consent." Wilcocks *v.* Phillips, 1 Wall. Jr. 47, per Baldwin, J. Barnard *v.* Kellogg (1870), 10 Wall. 383. This principle is illustra-

ted in a great variety of commercial cases. See note to Wigglesworth *v.* Dallison, 2 Smith's Leading Cases, 9th Am. ed., 842, 872, where the cases are collected. Proof of usage can be received to show the intention or understanding of the parties only in the absence of a special agreement, or to explain the terms of a written contract. Tilley *v.* County of Cook, 103 U. S. 155; Hutchinson *v.* Tatham, L. R. 8 C. P. 482; Field *v.* Lelean, 30 L. J. Ex. 168; Baywater *v.* Richardson, 1 Ad. & E. 508.

⁵ Bank of Washington *v.* Triplett, 1 Pet. 25.

and established usage.¹ Where the language used is plain and its meaning free from obscurity, proof of custom or usage, in contradiction thereof, is not admissible.² "Usage," said Lord Lyndhurst, "may be admissible to explain what is doubtful, but it is never admitted to contradict what is plain."³

§ 735. Construction of deeds.—The construction of deeds follows the rules of law in regard to the construction of other contracts in writing.⁴ A deed of conveyance, like all other instruments, will be read by the court in the sense of the meaning of the parties. The intention will prevail whenever such intention is unmistakably manifested, having regard to all parts of the instrument, unless the law requires the use of technical terms to effectuate such intention, or unless such intent is contrary to legal rules.⁵ In determining the meaning

¹ *Bliven v. New England Screw Co.*, 23 How. 420, per Clifford, J.

² *South Bend Iron Works v. Cottrell*, 31 Fed. Rep. 254, per Shiras, J.; *Moran v. Prather*, 23 Wall. 492.

³ *Blackett v. Royal Exch. Assur. Co.*, 2 Crompt. & J. 244. "Every legal contract is to be interpreted in accordance with the intention of the parties making it. And, usage, when it is reasonable, uniform, well settled, not in opposition to fixed rules of law, not in contradiction of the express terms of the contract, is deemed to form a part of the contract and to enter into the intention of the parties, when it is so far established and so far known to the parties that it must be supposed that their contract was made in reference to it." *Walls v. Bailey*, 49 N. Y. 464; *Newhall v. Appleton* (1889), 114 N. Y. 140; *Starkie on Evidence*, 637, 710; 1 *Greenleaf on Evidence*, §§ 292, 294; *Broom's Legal Maxims*, 682, 889, 890; 2 *Parsons on Contracts*, 541.

⁴ 5 *Lawson's Rights, Remedies and Practice*, § 2282. It is an established rule of interpretation of deeds that the intention of the parties should control,

unless inconsistent with some rule of law. *Bunn v. Wells*, 94 N. C. 67.

⁵ *Sisson v. Donnelly*, 36 N. J. Law, 432; *Allen v. Holton*, 20 Pick. 458; *Rutherford v. Tracy*, 48 Mo. 325; *Walsh v. Trevanion*, 15 Ad. & El. N. S. 733; *Moore v. Magrath*, 1 Cowp. 9; *Thorpe v. Thorpe*, 1 Lord Ray. 235. In the often quoted case of *Lord Say and Seal's Case*, 10 Mod. 40, an omission, by an evident mistake, of the name of the grantor in a deed of bargain and sale, was supplied by intendment, and the court was of opinion that this deed passed the freehold, because such was the intention of it. In *Cholmondeley v. Clinton*, 2 Jac. & W. 1, Sir T. Plumer, master of the rolls, says: "That the primary object of inquiry is the intention of the parties, and that where that is on the face of the instrument, clearly and satisfactorily ascertained, and found not to be contrary to any rule of law, the court is bound, if the words will admit of a construction conformable to the intention, to adopt that construction, however contrary it may be to technical meaning and inference."

of the parties, recourse must be had to the whole instrument, the granting part, the covenants, the attestation clause and the acknowledgment, as well as the manner of signing.¹ The intention as gathered from the whole instrument must prevail. Although in one part formal and apt words of conveyance be used, if, from other parts of the writing taken and compared together, it appears that a mere agreement for a conveyance is all that was intended, this intent must prevail.² Inconsistencies are to be reconciled if possible. If there are two clauses which are so repugnant as not to stand together, the first is held to prevail over the last, unless there is some special reason to the contrary.³ But, between an introductory clause and the granting clause, the latter determines what interest is intended to be granted.⁴ The rules of construction applied in cases of repugnancy give effect to every part of a deed, when consistent with the rules of law and the intention of the parties. When this is impossible, the part which is repugnant to the intention is rejected; and, whenever the language used is susceptible of more than one interpretation, the courts will look at the circumstances existing at the time of the transaction, such as the situation of the parties, the subject-matter of the conveyance, and the acts of the parties contemporaneous with and subsequent to the deed. To this extent extraneous evidence is admissible to aid in the construction.⁵ If it is apparent that the grantor has used a technical word to express an idea different from its technical signification, a court will construe it according to the intention of the grantor.⁶

¹ *Inhabitants of Nobleboro v. Clark* (1878), 68 Maine, 87.

² *Lindley v. Groff*, 37 Minn. 338.

³ *Waterman v. Andrews*, 14 R. I. 589; *Sheppard's Touchstone of Common Assurance*, 88; *Brown's Legal Maxims*, 580. Judge Metcalf remarks in 23 *American Jurist*, 277, that this rule has very little operation in modern times, a reason to the contrary being almost always found. The clauses may be transposed so as to

give the apparent construction. *Stanton v. Mullis*, 92 N. C. 623.

⁴ *Webb v. Webb*, 29 Ala. 588.

⁵ *Waterman v. Andrews*, 14 R. I. 589; *Wilson v. Troup*, 2 Cow. 195; *Bradley v. Washington, etc., Packet Co.*, 13 Pet. 89; *Winnipisseegee, etc., Co. v. Perley*, 46 N. H. 83; *Bell v. Woodward*, 46 N. H. 315; *Gibson v. Tyson*, 5 Watts, 34.

⁶ *Central Pacific R. Co. v. Beal*, 47 Cal. 151.

§ 736. The same subject continued.—In construing deeds, no regard is had to punctuation, since no estate ought to depend upon the insertion or omission of a comma or semicolon.¹ The grammatical sense is not adhered to where a contrary intent is apparent.² If a deed will inure several ways, the grantee may elect which way to take it.³ Thus it was held that a lease to one, “to hold for seven, fourteen, or twenty-one years,” gave to the lessee, and him alone, the option at which of the periods named the lease should terminate.⁴ A conveyance of land, by necessary legal consequence, conveys the buildings thereon, and evidence will not be received of a contrary intention on the part of the grantor.⁵ The grant of a house passes the land on which it stands.⁶ The grant of “a well” carries the land itself which it occupies.⁷ Where a deed can not operate in the way intended by the parties, it will be construed so as to operate in some other way, if possible.⁸ If the description in a conveyance be so uncertain that it can not be known what estate was intended, the conveyance is void. But in a deed poll, where there is doubt, the construction must be against the grantor.⁹ A deed is not to be held void for uncertainty, if by any reasonable construction it can be made available. Parol evidence can not be admitted to contradict or

¹ 3 Washburn on Real Property, 628; *Ewing v. Burnet*, 11 Pet. 41; *Doe v. Martin*, 4 T. R. 39.

² *Hancock v. Watson*, 18 Cal. 137; *Jackson v. Topping*, 1 Wend. 388. “Omitted words may be supplied, repugnant words may be rejected, words may be transposed, and false grammar or incorrect spelling may be disregarded, if the intention of the parties sufficiently appears from the context.” *Elphinstone on Interpretation of Deeds*, Rule 17.

³ *Jackson v. Hudson*, 3 Johns. 375; *Esty v. Baker*, 50 Maine, 325; *Melvin v. Proprietors of the Locks, etc.*, 5 Metc. 15.

⁴ *Dann v. Spurrier*, 3 B. & P. 399.

⁵ *Isham v. Morgan*, 9 Conn. 374.

⁶ *Wilson v. Hunter*, 14 Wis. 683;

Shephard's Touchstone, 90. By the grant of a mill, the land under the mill and adjacent thereto, so far as necessary to its use, and commonly used with it, will pass by implication. *Forbush v. Lombard*, 13 Metc. 109.

⁷ *Johnson v. Rayner*, 6 Gray, 107. In this respect differing none from the term “house,” or “barn,” or “mill,” or “cottage,” or “wharf,” or “town-pound,” all of which are familiar instances of a conveyance of a fee in land by a general term of description, applicable only to the purpose for which the land is used at the time of the grant.

⁸ 2 *Greenleaf & Cruise on Real Property*, 601, § 33.

⁹ *Worthington v. Hylyer*, 4 Mass. 196. See § 569.

control the language of a deed, but latent ambiguities may be explained by such evidence.¹

§ 737. Construction of insurance policies.—Policies of insurance are governed by the same rules applicable to other simple contracts.² When the terms of the policy are explicit they must control. Contracts of this kind are to be construed fairly, and according to the words in which the parties have contracted.³ When the policy contains plain and unambiguous language, courts must look to it alone to find the intention and meaning of the parties, and parol proof is inadmissible.⁴ A policy of insurance is to be construed as a whole. One part is to be elucidated by another, so as to reconcile them, if possible, to one common intent or design, and so as to carry out the intention of both parties, as gathered from the whole instrument.⁵ Reference is to be had to the presumption that it was entered into in good faith by the parties, to effectuate the evident purpose for which it was made.⁶ Words will be given their plain, natural and obvious meaning, unless it appears that it was not the intention of the parties that they should have such meaning.⁷ Ambiguous words may be construed by extrinsic

¹ 3 Washburn on Real Property, 426. As to parol evidence being admissible to vary the consideration expressed in a deed. *O'Neale v. Lodge*, 3 Harris & McHenry, 433; 1 Am. Dec. 377, and note; note to *Schemerhorn v. Vanderheyden*, 3 Am. Dec. 304, 306. See § 581.

² *St. John v. American, etc., Ins. Co.*, 13 N. Y. 31; 64 Am. Dec. 529; *Beach on Law of Insurance*, § 650. As to construction of policies see, *Piedmont & Arlington Life Insurance Co. v. Young*, 58 Ala. 476; *Insurance Co. of North America v. Garland*, 108 Ill. 220; *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644; *Schroeder v. Trade Ins. Co. of Camden*, 109 Ill. 157; *Brigham v. Home Ins. Co.*, 131 Mass. 319; *Arkell v. Commerce Ins. Co.*, 69 N. Y. 191; *Stout v. Commercial Union Assurance Co.*, 12 Fed. Rep. 554; *Wil-*

liamson v. Hand-in-Hand Mutual Fire Ins. Co., 26 Upp. Can. C. P. 266; *Cusack v. Mutual Ins. Co.*, 6 Low. Can. Jur. 97 (a marine policy); *State Ins. Co. v. Hughes*, 10 Lea, 461; *Miller v. Ins. Co.*, 12 W. Va. 116; *Johnson v. Northwestern National Ins. Co.*, 39 Wis. 87 (a marine policy).

³ *Bell v. Western, etc., Ins. Co.*, 5 Robinson (La.), 423; 39 Am. Dec. 542.

⁴ *Hough v. People's Ins. Co.* (1872), 36 Md. 398.

⁵ *Ins. Co. v. Slaughter*, 12 Wall. 404; *Merchants Ins. Co. v. Edmond*, 17 Gratt. (Va.) 138; *Wood on Fire Insurance*, § 69.

⁶ *Ins. Co. v. Slaughter*, 12 Wall. 404.

⁷ *Supreme Council of R. T. of T. v. Curd*, 111 Ill. 284; *Moore v. Phoenix Ins. Co.*, 62 N. H. 240; the word "void" has not required by usage a different signification from the ordi-

evidence of accompanying circumstances, and the usages of the business in which the property insured was employed.¹

§ 738. The same subject continued.—Insurance policies are liberally construed in favor of the assured and exceptions therein are strictly construed against the underwriters.² If there is a seeming inconsistency between two provisions, the courts will endeavor to give effect to both; if the meaning is ambiguous, that interpretation will be adopted which is most favorable to the insured.³ Conditions providing for disabilities and forfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced.⁴ No rule in the interpretation of a policy is more fully established, or more imperative and controlling, than that which declares that in all cases it must be liberally construed in favor of the insured, so as not to defeat, without a plain

nary one. In *Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184, the subject for construction was a condition in a fire insurance policy that the policy should be void if the premises became "vacant and unoccupied." Earl, J., said: The words "should not be taken in any technical or narrow sense. They need not be taken in the sense in which they may have been understood by underwriters, as both parties to the contract were not underwriters, supposed to be familiar with the meaning of such words when used in the business of fire insurance. But they must be taken in their ordinary sense as commonly used and understood."

¹ *New York Belting & Packing Co. v. Washington Fire Ins. Co.* (1863), 10 Bosw. 428.

² *Western Ins. Co. v. Cropper*, 32 Pa. St. 351; 75 Am. Dec. 561; *Grant v. Lexington, etc., Ins. Co.*, 5 Ind. 23; 61 Am. Dec. 74; *Brink v. Merchants' Ins. Co.*, 49 Vt. 442.

³ *Allen v. St. Louis Ins. Co.*, 85 N. Y. 473; *Metropolitan Life Ins. Co. v. Drach*, 101 Pa. St. 278; *Grandin v. Rochester German Ins. Co.*, 107 Pa.

St. 26; *Northwestern Mutual Life Ins. Co. v. Hazelett*, 105 Ind. 212; *Commonwealth Ins. Co. v. Berger*, 42 Pa. St. 285; *Franklin Fire Ins. Co. v. Updegraff*, 43 Pa. St. 350; *McClure v. Watertown Ins. Co.*, 90 Pa. St. 277; *Teutonia Ins. Co. v. Mund*, 102 Pa. St. 89; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; *Germania Fire Ins. Co. v. Deckard* (1891), 3 Ind. App. 361; *Rogers v. Phoenix Ins. Co.*, 121 Ind. 570; *Wallace v. German-American Ins. Co.*, 41 Fed. Rep. 742. As the insurance company prepares the contract, and embodies in it such conditions as it deems proper, it is in duty bound to use language so plain and clear that the insured can not mistake or be misled as to the burdens and duties imposed upon him. *Wood on Insurance*, 140.

⁴ *Blumer v. Phoenix Ins. Co.*, 45 Wis. 622; *Wakefield v. Orient Ins. Co. of Hartford*, 50 Wis. 532. Courts of equity lean strongly in favor of granting relief from forfeitures. *Smith v. Mariner*, 5 Wis. 551; 68 Am. Dec. 73, and extended note thereto.

necessity, his claim to the indemnity, which, in making the insurance, it was his object to secure.¹ Where one stipulation is printed, and the other written, if repugnant, the written stipulation will prevail,² although both will be upheld if possible.³ If the words in the policy have received a judicial construction, and also a peculiar commercial construction by usage at variance with such judicial construction, the judicial construction is to control.⁴

§ 739. Building contracts.—The general rule, which requires that written agreements be followed according to the intention of the parties and the true spirit and meaning of the stipulations, applies to building contracts.⁵ All prior agreements in respect to changes of specifications are regarded as merged in the contract as signed.⁶ Where specifications are attached to a building contract at the time of signing, they are merged into the contract and become part of it.⁷ Where a building contract provided a mode of determining as to extras, and the specifications, referred to by and made a part of it, provided a different and inconsistent mode, it was held that the contract prevailed.⁸ A letter annexed to a written contract to do all the

¹ May on Insurance, § 175. "Courts will not be astute to find ways to work a forfeiture of a contract of insurance; rather they will strive to uphold it, and will construe conditions and provisions in a policy strongly against an underwriter, and will incline to uphold the agreement." *Hennessey v. Manhattan, etc., Co.*, 28 Hun, 98; *McMaster v. Ins. Co. of North America*, 55 N. Y. 222.

² *Niagara Ins. Co. v. De Graff*, 12 Mich. 124; *Coster v. Phoenix Ins. Co.*, 2 Wash. C. C. (U. S.) 51; *Consolidated F. Ins. Co. v. Cashow*, 41 Md. 59; *Schroeder v. Stock, etc., Ins. Co.*, 46 Mo. 174; *Frederick Co. Mut. Ins. Co. v. Deford*, 38 Md. 404; *Blake v. Exchange Mut. Ins. Co.*, 12 Gray, 265.

³ *Stokes v. Cox*, 1 H. & N. 533.

⁴ *Bargett v. Orient, etc., Ins. Co.*, 3 Bos. (N. Y.) 385.

⁵ *Hayward v. Leonard*, 7 Pick. 181; *Jennings v. Camp*, 13 Johns. 94; *White v. Oliver*, 36 Maine, 92; *Nolan v. Whitney*, 88 N. Y. 648; *Ellis v. Hamlen*, 3 Taunt. 52.

⁶ *Coe v. Lehman*, 79 Ill. 173; *McCormick, etc., Co. v. Wilson*, 39 Minn. 467; *Taylor v. Fox*, 16 Mo. App. 527; *Stuart v. Cambridge*, 125 Mass. 102; *Stees v. Leonard*, 20 Minn. 494.

⁷ *City of Lake View v. MacRitchie*, 134 Ill. 203; *Smith v. Flanders*, 129 Mass. 322; *Dermott v. Jones*, 2 Wall. 1. Actual annexation of specification to the contract is not necessary, however. *Cook v. Allen*, 67 N. Y. 578; *New England Iron Co. v. Gilbert, etc., R. Co.*, 91 N. Y. 153.

⁸ *Meyer v. Berlandi* (1893), 53 Minn. 59. "It is to be presumed the plans and specifications were prepared first, and that what the parties set down in

painting on certain houses agreeably to annexed specifications, signed by the painter, showing the kind and quality of the materials to be used and how they were to be applied, is a specification within the meaning of the contract, and becomes a part of it and is to be construed therewith.¹ If the original contract is deviated from in so many matters that it can hardly be regarded as controlling the parties, the original contract is treated as abandoned, and a new contract is implied to pay the fair or reasonable value of the work or materials, but the provisions of the special contract should govern as far as it applies.² Work performed "on" a building may include work in reference or relative to it.³ The rule obtains that a written contract, whether simple or under seal, can not be varied by parol evidence, but the meaning of particular phrases, technical words and provincialisms may be explained by parol testimony.⁴

§ 740. Parol evidence admissible when.—When parties reduce their agreement to writing, the written contract is presumed to contain the whole contract as agreed upon between the parties, and in the absence of fraud, mistake or accident, parol evidence will not be admitted to vary or contradict the writing.⁵ While parol evidence is not admissible to vary or change the terms of a written contract, it is frequently ad-

the contract is the last expression of what their minds settled down to on the matter, and also because, it being matter of contract, the natural place for it, and where one would naturally look for it, is in the contract, and not in the specifications." Per Gilfillan, C. J.

¹ *McGeragle v. Broemel*, 53 N. J. Law, 59.

² *Boody v. Rutland, etc., Railroad*, 24 Vt. 660; *McKinney v. Springer*, 3 Ind. 59; *Goldsmith v. Hand*, 26 Ohio St. 101. "Where a contract has been repudiated by both parties, it ceases to be the criterion for measuring the rights and liabilities of the parties to it." *Ford v. Smith*, 25 Ga. 675.

³ *Smith v. Molleson* (1893), 74 Hun, 606.

⁴ *Lloyd's Law of Building*, § 3; *Marquis v. Lauretson*, 76 Iowa, 23.

⁵ *State v. Hoshaw*, 98 Mo. 358; *Hills v. Rix*, 43 Minn. 543; *Burch v. Augusta, etc., R. Co.*, 80 Ga. 296; *Appeal of Cornwall, etc., R. Co.*, 11 Am. St. Rep. 893, note. "The rule that a formal written contract, which appears to be complete, will be presumed to be the repository of the final intentions of the parties, in regard to the subject-matter of the agreement, and that it excludes proof of any prior or contemporaneous parol stipulations which would contradict the writing, is abundantly settled, and should not, on account of its importance, be relaxed in any degree." *Singer Mfg. Co. v. Forsyth*, 108 Ind. 334.

missible for the purpose of ascertaining what was the intention of the parties, or the meaning which they intended to attach to the expressions used in the contract.¹ There are cases in which it is admissible to show the contemporaneous understanding of the parties as to the meaning of the terms used in the contract.² Thus it was held competent to show that the parties to a written contract by the word "dollars" intended Confederate dollars, and not lawful money of the United States.³ Where the defendant, by a written contract, had purchased of the plaintiffs, who were farmers, a quantity of wool, described in the contract simply as "your wool," a conversation which had taken place some time previous was held admissible in evidence for the purpose of explaining what the parties meant by the term "your wool."⁴

§ 741. The same subject continued.—Parol evidence is admissible in explanation of a written contract to show the situ-

¹ *Rhodes v. Cleveland Rolling Mill Co.*, 17 Fed. Rep. 426.

² *In re Curtis* (1894), 64 Conn. 501; 30 Atl. Rep. 769.

³ *Thorington v. Smith*, 8 Wall. 1; *The Confederate Note Case*, 19 Wall. 548.

⁴ *Macdonald v. Longbottom*, 1 El. & El. 977. In *Shore v. Wilson*, 9 Clark & F. 355, 566, Tindal, C. J., in delivering the opinion, said: "Where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself, for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party." *Hotchkiss v. Barnes*, 34 Conn. 27; *Avery v. Stewart*, 2 Conn. 69. In *Excelsior Needle Co. v. Smith* (1891), 61 Conn. 56, where the defendant upon the trial offered evidence of a conversation between the agent of the plaintiff

and himself before the written agreement was made, as to the kind and nature of the employment that would be given him under the agreement, it was held that, so far as the evidence went to contradict, alter or add to the written agreement it was inadmissible, but that it was admissible so far as it tended to show the surrounding circumstances at the time the agreement was made. The rule, that parol evidence is inadmissible to vary the legal operation of a written instrument, is not the law of Pennsylvania. We have got far away from that rule. We permit a deed absolute on its face to be proved a mortgage. We receive parol evidence to rebut a presumption or an equity—to supply deficiencies in the written agreement—to explain ambiguities in the subject-matter of writings—to prevent frauds and to correct mistakes," per Woodward, J. *Chalfant v. Williams* (1859), 35 Pa. St. 212; *Bank v. Fordyce*, 9 Pa. St. 275; 49 Am. Dec. 561; *Rearich v. Swinehart*, 11 Pa. St. 233; 51 Am. Dec. 540, and note.

ation of the parties, the object in view, and the consideration, but not to contradict or control the same.¹ Parol proof may be given of any or all of the circumstances surrounding the transaction showing the relation of the parties to each other, their knowledge of the subject-matter of the contract, and the state or condition of that subject-matter as bearing on the intention of the parties which may suggest a meaning where none was apparent before, or which may show what construction shall be placed upon the language used which is susceptible of more than one interpretation.² In such cases, the parol testimony is used, not only to explain the surrounding circumstances, but also to enable the court to look in upon the mind of the contracting parties, and to read the written words of their contract in the sense in which they wrote them.³ It is an exception to the general rule that parol evidence can not be introduced to vary, modify or contradict a written contract, which allows parol evidence to be introduced to show the true consideration of a deed.⁴

§ 742. Latent and patent ambiguities.—The rule as to the admissibility of evidence to explain ambiguities, including equivocations, is commonly stated as follows: “In a written instrument, if there be a patent ambiguity, it never is allowed to be explained by verbal evidence, although a latent ambiguity is so.”⁵ A patent ambiguity is when the ambiguity arises from the fact that the parties have expressed inconsistent intentions

¹ *Baldwin v. Carter*, 17 Conn. 201; 42 Am. Dec. 735.

² *Phelps v. Clasen*, 3 Nat. Bank. Reg. 22 (87). Such evidence is admissible to show the real nature and character of the consideration of a contract. *Bruce v. Slemph*, 82 Va. 352; *Moses v. Hatfield*, 27 S. C. 324; *Collar v. Collar*, 75 Mich. 414; *First Nat. Bank v. Snyder*, 79 Iowa, 191. Or to explain and supply omissions, *Pickett v. Ferguson*, 86 Tenn. 642. Or to explain descriptions, *Van Horne v. Clark*, 126 Pa. St. 411; *Black v. Pratt, etc., Co.*, 85 Ala. 504; *Central Irrigation District v. De Lappe*, 79 Cal. 351; *Rhodes*

v. Wilson, 12 Colo. 65. Or to show the situation and knowledge of the parties at the time of entering into a written contract, *McDonald v. Unaka Timber Co.*, 88 Tenn. 38. Or to prove the facts connected with the preparation of a deed, *Louisville, etc., R. Co. v. Power*, 119 Ind. 269.

³ *In re Curtis* (1894), 64 Conn. 501; 30 Atl. Rep. 769.

⁴ See § 576, note, *supra*. Note to *Carr v. Hays*, 25 Cent. Law Jour. 35; *Welz v. Rhodius*, 87 Ind. 1.

⁵ *Smith on Contracts*, 49; *Elphinstone's Interpretation of Deeds*, 112, 113.

on the face of the instrument.¹ A latent ambiguity is where you show that words apply equally to two different things or subject-matters, and then evidence is admissible to show which of them was the thing or subject-matter intended.² A gift of "my gold watch" to "the son of A." appears unambiguous, and it is not till it appears from extrinsic evidence that A. has two sons, or that the person has two gold watches, that the equivocation becomes manifest.³ To render a deed or other instrument ambiguous or void for uncertain description, the ambiguity must be patent, and appear on its face; but when the deed or instrument appears certain and without ambiguity, and the uncertainty arises by matter outside the instrument, then it contains a latent ambiguity, and may be explained by the application of extrinsic evidence.⁴ Courts do not solve patent ambiguities, but treat the ambiguous provisions as inoperative and void.⁵ If in cases of latent ambiguity the intent of the parties is not ascertained, the instrument is void for uncertainty.⁶

§ 743. Function of judge and jury respectively.—Written instruments are to receive their construction from the courts, and, for the purpose of ascertaining their meaning, are never submitted to the jury.⁷ The meaning of particular words is for the court, except in cases where there is evidence that a

¹ A patent ambiguity is that which remains uncertain after all the evidence of surrounding circumstances and collateral facts, admissible under proper rules of evidence, is exhausted. *Kretschmer v. Hard* (1893), 18 Colo. 223.

² *Smith v. Jeffries*, 15 Mees & W. 561, per Alderson, B.; *Webster v. Atkinson*, 4 N. H. 21; *Storer v. Freeman*, 6 Mass. 435; *Jackson v. Sill*, 11 Johns. 201. See on the subject of patent and latent ambiguity: *Campbell v. Johnson*, 44 Mo. 247; *Bell v. Woodward*, 46 N. H. 315; *Piper v. True*, 36 Cal. 606; *Vandevoort v. Dewey* (1886), 42 Hun, 68 (defect in a lease in omitting to insert in the

blank the amount that was to be paid to the defendant to terminate the lease; patent ambiguity).

³ *Elphinstone's Interpretation of Deeds*, 102, 103.

⁴ *Hardy v. Matthews*, 38 Mo. 121.

⁵ *Linney v. Wood*, 66 Texas, 22.

⁶ *Richardson v. Watson*, 4 B. & Ad. 787.

⁷ *Wason v. Rowe*, 16 Vt. 525, per Hebard, J.: "It is a wise and well established rule of law that the true construction of written contracts is to be declared by the court, and not submitted to the finding of a jury." *Emery v. Owings*, 6 Gill, 191, per Dorsey, J.

particular word was used in a sense peculiar to a particular trade or business, or that its meaning depends on the usage of a particular place.¹ If a doubt arises upon the construction of a phrase in a written instrument, it is to be decided by the court upon inspection, and not by the jury.² Where a written contract has been lost, and parol evidence of its contents has been received, its construction is still for the court, and not for the jury.³ In an action on a written contract, it is, therefore, error for the court to allow the question as to what was the contract to go to the jury.⁴ It is for the court to determine the legal effect of a promissory note, and it is error to leave the construction to a jury.⁵ Where, by a written agreement, the plaintiff undertook to do work to some houses of the defendant in South street and Southampton street, and it was proven that the defendant had no houses in Southampton street at the time of the agreement, and the judge asked the jury whether the parties meant to describe houses in South street only, and whether the insertion of the word "and" in the agreement was a mistake, it was held to be a misdirection to leave it to the jury to say what was the intention of the parties.⁶ Where the contract is ambiguous in any of its terms, and the ambiguity can be solved by reference to other parts of the contract, or surrounding circumstances which are uncontroverted by the evidence, it is the duty of the court to solve the ambiguity, and to declare the true meaning of the contract. But where the ambiguity can not be

¹ *Simpson v. Margitson*, 11 Q. B. 23. The construction of a contract, unless there is something peculiar to the words, by reason of the custom of the trade to which the contract relates, is for the court. *Bowes v. Shand*, 2 L. R. App. Cas. 455, per Lord Cairns. Written contract to be construed by the court. *Phillips v. Aflalo*, 43 Eng. C. L. R. 436; (4 M. & G. 846); *Nash v. Drisco*, 51 Maine, 417; *Monadnock Railroad v. Felt*, 52 N. H. 379; *Williams v. Waters*, 36 Ga. 454; *State v. Lefavre*, 53 Mo. 470; *Chicago Cheese Co. v. Fogg* (1892), 53 Fed. Rep. 72; *Barton v. Gray*, 57 Mich. 622; *Arnold*

v. Bailey, 24 S. C. 493; *State v. Fort*, 24 S. C. 510; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341; *Brady v. Cassidy*, 104 N. Y. 147. But where the making of the contract is in dispute, it is for the jury to say whether it is established. *Folsom v. Cook*, 115 Pa. 539; 9 Atl. Rep. 93.

² *Rex v. Hucks*, 1 Stark. 424.

³ *Berwick v. Horsfall*, 4 C. B. N. S. 450.

⁴ *Miller v. Dunlap* (1886), 22 Mo. App. 97.

⁵ *Terry v. Shively*, 64 Ind. 106.

⁶ *Hitchin v. Groom*, 17 L. J. C. P. 145; 5 C. B. 515.

solved by reference to other parts of the contract, and the surrounding circumstances are controverted, the court should charge the jury hypothetically as to the true interpretation of the contract.¹

§ 744. The same subject continued.—It is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed, as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained; or, conditionally, when those words or circumstances are necessarily referred to them.² Where a writing is obscure or ambiguous by reason of its containing unfamiliar abbreviations, or where it is obscurely written, or partially erased, so as to be uncertain and ambiguous, it is proper to leave it to the jury to ascertain its meaning.³ But where the ambiguity is in the words of the writing themselves, the court must determine the meaning if it can be done.⁴ When written instruments contain technical terms, or words used in a sense peculiar to some particular art, trade, or business, it is proper to leave it to the jury to ascertain and determine the sense in which such terms are employed.⁵ If there are peculiar

¹ *Deutmann v. Kilpatrick* (1891), 46 Mo. App. 624; *Fruin v. Crystal R.*, 89 Mo. 397; *Shickle v. Chouteau, etc., Co.*, 10 Mo. App. 241, affirmed 84 Mo. 161; *Ginnuth v. Blankenship* (Texas App. 1894), 28 S. W. Rep. 828, where the court below construed a provision in a contract which was near the border line of uncertainty and ambiguity, and in its charge to the jury gave it a certain meaning. It was held that the court should have left the construction of the contract in this respect to the jury. The uncertainty or ambiguity did not arise from the meaning to be given to the words used, but sprung from the fact as to what claims or persons were embraced or not embraced within the meaning of the expression, "excepting those subscribers taking stock," etc., and the ambiguity

being of that character evidence showing what was the intention of the parties was required to remove it.

² *Neilson v. Harford*, 8 M. & W. 823, per Parke, B. (action on the case for the infringement of a patent).

³ *Holland v. Long*, 57 Ga. 36; *Paine v. Ringold*, 43 Mich. 341.

⁴ *Morrell v. Frith*, 3 M. & W. 402.

⁵ *Simpson v. Margitson*, 11 Ad. & El. N. S. 23; 63 Eng. Com. Law, 23; *Hutchinson v. Bowker*, 5 M. & W. 535; *Goddard v. Foster*, 17 Wall. 123; *McAvoy v. Long*, 13 Ill. 147; *Williams v. Woods*, 16 Md. 220; *Prather v. Ross*, 17 Ind. 495; *Eaton v. Smith*, 20 Pick. 150; *Smith v. Faulkner*, 12 Gray, 251; *Sellers v. Johnson*, 65 N. C. 104. In *Morrell v. Frith*, 3 M. & W. 402, Lord Abinger, C. B., said: "One case in which the effect of a written document

expressions which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what the meaning of these expressions is, but for the court to decide what the meaning of the contract is.¹ What is the true interpretation, however, of mercantile phrases in commercial correspondence is not always a question of law, but may in many cases be properly left to the jury to decide, where the phrases admit of different meanings.²

§ 745. Oral contracts.—Where a contract is oral, the question what the contract is must, if controverted, be tried by the jury as a question of fact, but where the terms of a contract are undisputed, its construction and effect, where the contract is oral as well as where it is written, are to be determined by the court.³ When the terms of a parol agreement are given, and are unambiguous, its interpretation is as much

must be left to a jury is where it requires parol evidence to explain it, as in the ordinary case of mercantile contracts in which peculiar terms and abbreviations are employed."

¹ *Hutchison v. Bowker*, 5 M. & W. 535; *Eaton v. Smith*, 20 Pick. 150; *Brown v. Orland*, 36 Maine, 376; *Burnham v. Allen*, 1 Gray, 496; *Taliaferro v. Cundiff*, 33 Texas, 415. Questions as to the meaning of particular words used in a special sense in a written instrument are for the jury. *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6. What was intended by "a first-class longraft-line" as used in a towing contract is for the jury. *Stevenson v. Michigan Log-Towing Co.* (Mich. 1894), 61 N. W. Rep. 536.

² *Fagin v. Connolly*, 25 Mo. 94; 69 Am. Dec. 450, and note. Mr. Justice Story, in delivering the opinion of the court in *Brown v. McGran*, 14 Pet. 479, said: "It is certainly true, as a general thing, that the interpretation of written instruments properly belongs to the court, and not to the jury. But there certainly are cases in which, from the different senses of the words

used, or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, where the real objects and intentions and agreements of the parties are often to be arrived at only by allusions to circumstances which are but imperfectly developed.

³ *Globe Works v. Wright*, 106 Mass. 207; *Guptill v. Damon*, 42 Maine, 271; *Bradbury v. Marbury*, 12 Ala. 520; *Moore v. Garwood*, 4 Exch. 681; *Perth Amboy Manufacturing Co. v. Condit*, 21 N. J. Law, 659; *Rogers v. Colt*, 21 N. J. Law, 704; *Brown v. Hatton*, 9 Ired. L. (N. C.) 319; *Morrell v. Frith*, 3 M. & W. 402; *Begg v. Forbes*, 30 Eng. L. & Eq. 508. It is for the jury to determine in what sense several terms having no accepted legal signification were used by the parties in an oral agreement for a sale. *Becker v. Holm*, 87 Wis. 86; 61 N. W. Rep. 307.

a question of law for the court as the interpretation of an unambiguous written instrument.¹ Where the contract is oral the terms of the agreement are a matter of fact, and if those terms be obscure, or equivocal, or are susceptible of explanation from extrinsic evidence, it is for the jury to find the meaning of the terms employed, but the effect of a parol agreement, when its terms are given and its meaning fixed, is as much a question of law as the construction of a written agreement.² Exceptional cases arise where the contract rests partly in correspondence and partly in oral communications, in which it is held that the question whether or not there is a contract is a question for the jury.³ Statements and conduct of the parties subsequent to a conversation in which it is alleged that a contract was made are competent only as they tend to show what was their real understanding as to that transaction, and not for the purpose of controlling or in any way changing the effect of the conversation.⁴

§ 746. Contracts of sale or return—Of sale or bailment.—The class of contracts known as contracts of “sale or return” exist where the privilege of purchase or return is not dependent upon the character or quality of the property sold, but rests entirely upon the option of the purchase to retain or return. In this class of cases the title passes to the purchaser, subject to his option to return the property within a time specified, or a reasonable time; and if before the expiration of such time, or the exercise of the option given, the property is destroyed, even by inevitable accident, the buyer is responsible for the price.⁵ The recognized distinction between bailment and sale

¹ *Norton v. Higbee*, 38 Mo. App. 467; *Willard v. Siegel Gas Fixture Co.* (1891), 47 Mo. App. 1. Where a contract is oral, its construction is for the jury. *Holmes v. Chartiers Oil Co.* (1890), 138 Pa. St. 546. The construction of an oral contract is for the jury where there is any doubt about its terms. The province of the jury is to settle disputed questions of fact. If no such disputed facts exist there is nothing for them to do, and it is for the court

to determine the legal effect of the contract. *Elliott v. Wanamaker* (1893), 155 Pa. St. 67.

² *Spragins v. White* (1891), 108 N. C. 449.

³ *Scanlan v. Hodges* (1892), 52 Fed. Rep. 354.

⁴ *Potter v. Phenix Ins. Co.* (1894), 63 Fed. Rep. 382.

⁵ *Sturm v. Boker*, 150 U. S. 312, per Jackson, J.: “The true distinction is pointed out by Wells, J., in *Hunt v.*

is that, when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed. In such a case the transaction is a sale.¹

Wyman, 100 Mass. 196, as follows: 'An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case, the title will not pass until the option is determined. In the other, the property passes at once, subject to the right to rescind and return.' The cases cited and relied on by the defendants (*Moss v. Sweet*, 16 Q. B. 493, 494; *Martineau v. Kitching*, L. R. 7 Q. B. 436, 455; *Schlesinger v. Stratton*, 9 R. I. 578, 581), involved contracts of 'sale or return,' in which there was a sale followed by a destruction of the property before the option of the purchaser had expired, or had been exercised. It was properly held in these cases that the goods were at the risk of the purchaser pending the exercise of the option, and that he was responsible for the loss of the goods, or the price to be paid therefor."

¹ *Powder Co. v. Burkhardt*, 97 U. S. 110. In the case of *Hunt v. Wyman*, 100 Mass. 196, the bailee was to return the property (a horse) in as good condition as he received it, by a designated time. The property was so injured, without fault on his part, that it could not be returned within the time agreed upon, and no attempt was made to return it. Still, it was held that he was not responsible for the

property. The court said: "A mere failure to return the horse within the time agreed may be a breach of contract upon which the plaintiff is entitled to an appropriate remedy, but has no such legal effect as to convert the bailment into a sale. It might be an evidence of a determination by the defendant of his option to purchase, but it would be only evidence. In this case, the accident to the horse, before an opportunity was had for trial in order to determine the option, deprives it of all force, even as evidence." And see *Walker v. Butterick*, 105 Mass. 237. In *Middleton v. Stone*, 111 Pa. St. 589; 4 Atl. Rep. 523, A. delivered to B. two colts, under a contract that B. should safely keep and sell them, if possible, before a certain date, for A.—he fixing a minimum price to be received by him, and in addition thereto one-half of all money obtained above that price, to the extent of \$25—and, if not sold, to return the animals in good condition. *Held*, that this was not a sale, but a bailment, and it was error, therefore, to overrule the offer of B. to show that the colts were sick when they were delivered to him; that one of them died; and that he then offered to return the other to A., who refused to receive it. It was held that the horses were at the risk of A.

CHAPTER XXI.

CUSTOM AND USAGE.

- § 747. Custom as an element of contracts—General rule.
748. Mississippi doctrine.
749. Such custom illustrated—Knowledge of custom.
750. Established custom defined.
751. Knowledge of general custom presumed—As to railroads.
752. The same subject continued—Question for jury.
753. Express contract not to be contradicted or varied—Principal and agent.
754. The South Carolina rule.
755. Custom not to be contrary to law—Railway and banking customs.
756. Custom to be reasonable.
757. Plain terms not to be varied by custom.
758. Proving custom as to measurement, etc., where contract silent.
- § 759. Commercial usage defined and considered.
760. The same subject continued.
761. Knowledge of local usage essential.
762. Agent's knowledge imputed to principal—Bill of lading.
763. How usage may be proved.
764. The same subject continued.
765. Personal customs or habits.
766. Usage as to authority of insurance agents.
767. Custom construed — Charter-party—Demurrage.
768. Relating to brokers.
769. Banking custom as to collections—Evidence.
770. Excluding custom by notice—Pleading custom.

§ 747. Custom as an element of contracts—General rule.—

To be permitted to establish a custom, and make it operative upon a contract in any given case, it must be reasonable, not against the law or public policy, not opposed to any express term of the contract, and must be so generally known as to justify the presumption that the parties knew of it and contracted in reference to it.¹ It is well settled that proof of local

¹ *Desha v. Holland*, 12 Ala. 513; *Herring v. Skaggs*, 73 Ala. 446; *East Smith v. Rice*, 56 Ala. 417; *Mobile, etc., R. Co. v. Jay*, 61 Ala. 247; *Antomarchi v. Russell*, 63 Ala. 356; *Powell v. Thompson*, 80 Ala. 51; *Haas v. Haddon*, 83 Ala. 174; 3 So. Rep. 302; *Tennessee, etc., R. Co. v. Johnston*, 75 Ala. 596; *Wilkinson v. Williamson*, 76 Ala. 163; *Barlow v. Lambert*, 28 Ala. 704.

usages will not raise a presumption of knowledge of their existence on the part of one engaged generally in the business to which they pertain in a certain city, at least where the domicile of the party sought to be charged is elsewhere; or, in other words, in order to create even a *prima facie* presumption that a party has knowledge of a usage incident to a particular business about which he is engaged, the usage must be shown to be a general one in that business, in such sort as that it would be unreasonable to suppose he was ignorant of it.¹ Accordingly, on an issue as to the existence of a general custom in a certain place, as claimed by plaintiff, and as to its effect on a contract between plaintiff and defendant, an instruction was erroneous which ignored all inquiry as to the length of time the custom had prevailed, and as to defendant's knowledge of its existence, or opportunity of acquiring such knowledge.² A traveling salesman, selling by sample, for credit or cash, to be paid on receipt of the goods, has no implied authority to collect the money agreed to be paid, and a custom in the town in which the goods were sold to pay such salesman is not binding on non-resident principals, in the absence of evidence of notice to them of such custom.³

¹ *German-American Ins. Co. v. Commercial Fire Ins. Co.* (1891), 95 Ala. 469; 11 So. Rep. 117.

² *Buyck v. Schwing* (1893), 100 Ala. 355; 14 So. Rep. 48.

³ *Simon v. Johnson* (1893), 101 Ala. 368; 13 So. Rep. 491, per McClellan, J.: "It is insisted in this case that the payment was authorized and justified by a custom prevailing generally in the town of Geneva (where the contract of sale was made, the goods delivered subsequently, and the price paid, also subsequently, to the agent) for payments to be made in this way. The plaintiffs, whom this agent was representing, lived and carried on their business in New Orleans. Conceding that the usage itself was established by the evidence, it did not authorize or justify the payment to the agent, or in any manner

change or affect the rights of the principals, unless it had also been proved that they had notice of it. *German-American Ins. Co. v. Commercial Fire Ins. Co.*, 95 Ala. 469. This was not only not proved, but there was no evidence adduced which legitimately tended to prove it. The only facts relied on as having such a tendency is that some years previously the defendant had purchased a bill of goods from a firm in New Orleans; paid the bill at maturity to the traveling salesman who took the order; informed the firm of the fact; that they did not dissent from or object to this mode of payment; and that one member of that firm is now a member of the plaintiff's firm. It is, we think, too clear for discussion that, as proof of this one isolated transaction would be no evidence of the alleged custom,

§ 748. Mississippi doctrine.—The Mississippi doctrine is that a custom in regard to a certain business existing among all the persons engaged therein in a city is a general custom, with reference to which it will be presumed, in the absence of rebutting evidence, that contracts touching the business were entered into.¹

so notice of it would be no evidence of notice of such custom.”

¹ *Burbridge v. Gumbel*, 72 Miss. 371; 16 So. Rep. 792, per Whitfield, J.: “The offer of the defendants was to show not only that it was the custom of the cotton factors in the New Orleans market, but also the custom of cotton factors generally, to imply instructions as to insuring cotton only to the season or cotton year in which such instructions were given. The testimony offered was to show, not a purely local custom, but a general one, and should have gone to the jury, under proper charges. Even if the offer had been to prove only the custom of the cotton factors in New Orleans, the testimony should have been received. Says Mr. Lawson, in his work on Customs and Usages (pages 40, 41, § 17): ‘Knowledge of a usage is necessary in every case in order to bind a person by its terms. Sometimes this notice must be expressly proved, and sometimes from its generality and notoriety the law raises the presumption that it was known. It is therefore only as affecting the question of notice that the generality of the usage becomes material. And as express notice is difficult to prove, because in the majority of cases nothing has been said by the parties in their negotiations about the usage, it is obvious that in the greatest number of instances it becomes absolutely necessary to prove such a usage as the law will presume the party intended to be bound by; and, consequently, in all these cases

the generality of the custom becomes vital, and the rule that a usage must be general is applied by the courts with rigor. It becomes, therefore, of importance to determine what the courts understand by this rule. And, in the first place, it is settled that a usage may be “general,” as this term is used here, notwithstanding that it is confined to a particular city, town, or village. It may be generally known in that city, town, or village, and be understood by all persons dealing there, and yet it may not exist in any place beyond. But the usage of a single house or of one person only is insufficient. * * * A particular banking usage must apply to a place rather than to a particular bank. It must be the rule of all the banks in the place, or it can not be a valid usage.’ Again in § 24, the author quotes approvingly from Mayor, etc., of *Pittsburgh v. O’Neill*, 1 Pa. St. 342: ‘All trades have their usages, and, when a contract is made with a man about the business of his craft, it is framed on the basis of its usage, which becomes a part of it, except when its place is occupied by particular stipulations’—and refers to many instances, illustrative, where, ‘the usage being proved, it was held not material that the proof did not show, in addition, that the party to be affected by it had express notice of it,’ but ‘it would be presumed’ that they had notice. *Sewell v. Corp.*, 1 Car. & P. 392; *Given v. Charon*, 15 Md. 502; *Lyon v. George*, 44 Md. 295. In *Couch v. Watson Coal Co.*, 43 Iowa, 17, the same doctrine is ex-

§ 749. Such custom illustrated—Knowledge of custom.—

Where the purchaser of Smyrna canary seed refused to receive it at New York, not because of its deficiency as to quantity or quality, but simply because it was not brought by the specified steamer of shipment, the Aleppo, but by the Aurlia, to which it was transferred at Liverpool, it was held on appeal to be error to reject the seller's offer to show by the broker who negotiated the sale of the seed that there were not at the time, and never had been, freight steamers sailing direct from Turkey to New York, and that the invariable custom known to all persons engaged in the trade was to carry such goods to Liverpool and there trans-ship them to a steamer for New York. It was also held on appeal that this offered evidence was not contradictory to the broker's note of sale, but rather explained it, and enabled the court to choose between two possible constructions of it, and therefore should have been admitted.¹ But in an action for a balance due for work as trim-

pressly stated, saying: 'If it had been shown that operators of mines in this state, similarly situated, and using substantially the same kind of machinery, generally constructed cages with bonnets, it could be reasonably presumed that defendant had knowledge of such custom,' etc. So, in section 18, Mr. Lawson says that, in the case of particular usages, knowledge 'is to be shown by express proof or by evidence of their generality;' using the word 'generality' in the sense explained by him in section 17. And he concludes (section 24): 'If a party closes his eyes and shuts his ears to what is universally known in his community by others, he will not be allowed to shelter himself under a plea of ignorance.' If, therefore, defendants could show the custom of the cotton factors of the New Orleans market to be as insisted, they should have been allowed to do so. If they succeeded in showing such established, uniform, certain custom there, among other cotton factors in that market, a

presumption would arise (under the authorities *supra* and the following cases, cited in note 1 to section 17, to wit: Gleason *v.* Walsh, 43 Maine, 397; Thompson *v.* Hamilton, 12 Pick. 426; Perkins *v.* Jordan, 35 Maine, 23, and Clark *v.* Baker, 11 Metc. (Mass.) 186) from a custom thus general in that market that the plaintiffs (themselves cotton factors in that market) knew of that custom, and contracted with reference to it—a presumption which plaintiffs might, if they could, rebut, all the testimony touching which custom, in all its aspects, should have been submitted to the jury, the triors of the facts. See also, note to Wigglesworth *v.* Dallison, 1 Smith's Leading Cases, 9 Am. ed. 842; Adams *v.* Otterback, 15 How. 539."

¹ Iasigi *v.* Rosenstein (1894), 141 N. Y. 414; 36 N. E. Rep. 509, per Finch, J.: "This evidence was rejected, and a verdict rendered for the defendants, which the general term has affirmed. That affirmance is put upon the ground that the terms of the

mer in defendant's saw-mill, evidence that certain trimmers in defendant's employ worked under a contract containing a condition that a part of their wages was to be retained by de-

contract provide for a shipment on a named steamer from Turkey direct to New York; that an arrival of the goods at the latter port by the Aleppo is essential matter of description, and a condition precedent to the buyer's obligation to accept; and that the usage or custom sought to be proved would contradict the terms of the contract, and for that reason is inadmissible. There is no doubt of the general rule, and it may be conceded, for the present, to cover matters of description which are seemingly unimportant, but the question here is as to the application of the rule to the facts. The broker's notes do not, in explicit terms, require a shipment direct, and in the same steamer, from Turkey to New York. Such a construction is matter of inference from words which do not necessarily and inevitably involve that inference. The steamer of shipment must be the Aleppo, from Turkey. The steamer of arrival is not identified. It may or may not be the one first mentioned, or another and different one. If it must mean the Aleppo, and can mean no other, the general term were right; but if it may mean the steamer of arrival, even though not the Aleppo, then there is an ambiguity—a doubt about the real contract intention—which may be solved by proof of custom and usage. I think that is the truth. Observe the language of primary description—that intended to identify the goods, and prescribing the date and character of the shipment. There are two elements provided: First, the property bought is to be 'good merchantable Smyrna canary seed;' and, second, 'March steamer shipment from Turkey.' That

ends the description of what was agreed to be bought, for the note goes at once to the question of price, and other details of the contract. Plainly, for some reason, the parties contented themselves with saying simply 'shipment from Turkey,' and omitted to add 'to New York,' or other words indicating a direct or unbroken voyage; and this omission occurs in the formal description of the goods, and where it was not to be expected if a direct voyage was meant. The note then passes to other details. One is 'goods to be taken from dock on arrival of steamer, when ready for delivery.' This sentence, most certainly, was no part of the description of the goods bought, and was not intended to qualify or affect that description. It merely made a delivery on the dock, from the steamer having the goods, a sufficient delivery. It does not say what steamer, or dictate that it must be the Aleppo. The final provision, 'Name of steamer to be given soon as known,' undoubtedly refers back to steamer of shipment. But it is said that, in all the terms of the broker's note, but one steamer is referred to. That, however, is the precise question. Was only one referred to? The language admits of the possibility that two were referred to—the steamer of shipment and the steamer of arrival—and it is in view of that possible doubt as to the real purpose and intention of the parties that the evidence of usage and custom was offered. The moment it is shown that there was no steamer sailing direct from Turkey to New York; that all importations from that country by steam came first to Liverpool, and were there trans-shipped, and that the

fendant, and forfeited to it if they should leave its employ before the end of the sawing season, and that it was defendant's custom to retain part of the wages of all its employes, is incompetent to show that plaintiff worked under such a contract, in the absence of testimony that he had any knowledge of such custom.¹

§ 750. Established custom defined.—At the common law, a custom was not an established one unless it was shown to have existed from time immemorial. By the more recent law, the true test of such a custom is its having existed a sufficient length of time to have become generally known, and to warrant the jury in finding that the contracts were made in reference to it.² No person can be made liable by reason of a custom except when it is shown that he had knowledge of the custom. In cases where the custom is a limited or special one, actual knowledge must be proved, and every custom is a limited or special one until it is shown to have existed long enough to sustain the test above stated.³ When, in an action for a speci-

goods bought, if transported by steam, must come and could come in no other way; and that both parties and their broker knew the fact—all doubt and ambiguity disappear. We see at once that the provision for delivery, which says simply 'steamer,' does not and can not mean the Aleppo, was not so intended or understood, but refers to the steamer of arrival after the necessary and contemplated transshipment at Liverpool. The proof does not contradict the note. It simply explains it, and enables us to choose between two possible constructions, either of which the instrument will bear. We think the evidence should have been admitted, and that for the error in excluding it the judgment should be reversed and a new trial granted; costs to abide the event."

¹ *Brunnell v. Hudson Sawmill Co.* (1893), 86 Wis. 587; 57 N.W. Rep. 364; and see *Kelley v. Schupp*, 60 Wis. 76.

In *Deane v. Everett*, 90 Iowa, 294; 57 N.W. Rep. 874, Rothrock, J., said: "A number of witnesses were called by the defendant by which it was sought to prove that there was a custom or usage of wholesale merchants by which their traveling agents were authorized to bind their principals by fixing the price of goods sold. None of these witnesses claimed to have any knowledge of any such custom or usage in the sale of iron safes. This was sufficient ground for rejecting the evidence. We do not determine whether such evidence would be competent in any case."

² *Powell v. Bradlee*, 9 Gill & J. (Md.) 220; *Burroughs v. Langley*, 10 Md. 248; *Smith v. Wright*, 1 Caines, 43; *Treadwell v. Union Insurance Co.*, 6 Cow. 270; *Crosby v. Fitch*, 12 Conn. 410; *Bliven v. New England, etc., Screw Co.*, 23 How. 420.

³ *Smith v. Phipps* (1894), 65 Conn. 302.

fied contract price per foot for drilling wells, plaintiff claims to recover under a custom of the trade for drilling wells that were started and abandoned on account of striking solid bottom, in addition to those that were completed, an instruction that some evidence was offered from which it was claimed that the jury would find such a custom existed, and that, if they found there was such a known and established custom in the trade, the parties would be presumed to have contracted with the custom in view, and they might allow the claim, but it must be a universal, certain and general usage and custom of the trade, is erroneous in not stating what must be proved to show that a custom is a known and established one, and in treating the presumption that might be drawn from such a custom as one of law.¹

§ 751. Knowledge of general custom presumed—As to railroads.—Where a custom is found to be general and notorious, and to have the other requisites of a valid custom, it is a conclusion of law that the parties must have contracted with reference to it, and their knowledge is conclusively presumed.² A person dealing at a particular market will be taken to have dealt according to the known general custom and usage of that market, and, if he employs another to act for him in buying or selling at such market, he will be held as intending that the business should be conducted according to such general usage and custom, and such has been held to be the rule whether he in fact knows of the custom or not.³ Where a

¹ *Smith v. Phipps* (1894), 65 Conn. 302; 32 Atl. Rep. 367, per Andrews, C. J.: "This instruction seems to us to have been insufficient for the guidance of the jury, in that it does not state what must be proved in order to show that a custom is a known and established one, and also in treating the presumption which might be drawn from such a custom as one of law. There was no evidence that the defendant had any actual knowledge of the custom, and she was liable, if at all, by reason of the custom, because it

was a general, known, and established one."

² *Hostetter v. Park*, 137 U. S. 30; 11 Sup. Ct. Rep. 1. And see also, *Parsons on Contracts* (7th ed.), 675.

³ *Union Stock Yard Co. v. Mallory, etc., Co.*, 157 Ill. 554; 41 N. E. Rep. 888, following *Samuels v. Oliver*, 130 Ill. 73. And also see, *Bailey v. Bensley*, 87 Ill. 556; *Doane v. Dunham*, 79 Ill. 131; *Lyons v. Culbertson*, 83 Ill. 33; *Loneragan v. Stewart*, 55 Ill. 44; *Home Ins. Co. v. Favorite*, 46 Ill. 233.

contract of shipment by rail does not define what shall constitute a car load, a general custom among railroad men and shippers, by which a car load is made to consist of a certain number of pounds, governs the contract.¹ It is the usage in this country for all railroad companies receiving cars from other roads to make necessary repairs at their own expense, unless the car is inspected and branded as defective when received. In consequence of such usage, a company which claims cars belonging to another road, and, pending a judicial determination of the title thereto, is, by agreement, permitted to retain and use them subject to a rental in case the decision is against it, can not, after such decision, set off against the rental any claim for the cost of repairs.² A foreign manufacturer employing an agent to solicit orders is bound by a general custom which authorizes such agent to accept orders without conference with their principals, although he may have no actual knowledge of the custom.³ And where the payee of a draft selects a bank as his collecting agent, he is presumed to know the methods by which such transactions are effected through general banking customs, and actual ignorance of them is of no avail as an excuse.⁴

¹ *Good v. Chicago, etc., R. Co.* (Iowa, Oct. 1894), 60 N. W. Rep. 631, per Granger, C. J.: "See, in our own state, for quite an extended discussion on the subject of a custom affecting the construction of a contract, *Pilmer v. Branch of State Bank*, 16 Iowa, 321. And see, *Rindskoff v. Barrett*, 14 Iowa, 101. Neither of these cases is against the rule we announce. They deal with local customs, and with facts as to which the party sought to be bound by the custom would not be presumed to understand there was a custom, so that, in the absence of an inquiry to know what it was, he would be bound by it. It will be seen by a reference to the instructions quoted that the court deals with both general and

local customs, holding that, as to a local custom, knowledge of it must be shown, and as to the general custom, when established by evidence, that it only raises a presumption which the party may overcome by showing that he actually had no knowledge of it. Our conclusion is that if the parties do not by their contract define what shall be a car load, the general custom, where there is one, prevails, and, when proven, it conclusively, rather than presumptively, fixes the terms of the contract."

² *Central Trust Co. v. Wabash, etc., R. Co.* (1892), 50 Fed. Rep. 857.

³ *Austrian v. Springer*, 94 Mich. 343; 54 N. W. Rep. 50.

⁴ *Howard v. Walker* (1892), 92 Tenn. 452; 21 S. W. Rep. 897.

§ 752. The same subject continued—Question for jury.—

When a custom is general, every person who makes a contract is presumed to know the custom, and it enters into the contract and binds him; but, where it is a purely local custom, a stranger to the locality where it exists can not be bound by it, unless knowledge of the custom is proven.¹ It is for the jury, under proper instructions from the court, to take all the evidence in the case—that as to the existence, duration, and other characteristic of the custom or usage, and that as to the knowledge thereof by the parties—and therefrom to determine whether there is shown a custom of such age and character that the presumption of law will arise that the parties knew of and contracted with reference to it, or whether the usage is so local and particular as that knowledge in the party to be charged must be shown affirmatively or may be negatived.² There are some usages so general as to be deemed to have become a part of the common law so that no one can be heard to profess ignorance of them. On the other hand, there are usages so restricted to locality, or trade, or business, that ignorance of them constitutes a valid reason why a party may not be held to have contracted with reference to them.³ Thus, where a physi-

¹ *Horan v. Strachan*, 86 Ga. 408.

² *Walls v. Bailey*, 49 N. Y. 464; 10 Am. Rep. 407, a case reviewing *Barnard v. Kellogg*, 10 Wall. 383, and *Dodge v. Favor*, 15 Gray, 82. See, to the same effect, *Sampson v. Gazzam*, 6 Port. 123; 30 Am. Dec. 578, where the court say: "Where a custom or usage is proved to exist in relation to a particular trade or pursuit, if it be general, all persons engaged therein are presumed to contract in reference to such usage." See also, *Andrews v. Roach*, 3 Ala. 590; 37 Am. Dec. 718; *Mooney v. Howard Insurance Co.*, 138 Mass. 375; and the authorities in note to *Smith v. Clews*, 114 N. Y. 190; 11 Am. St. Rep. 627, 633; 21 N. E. Rep. 160. The evidence must not be of opinions, as in *Shackelford v. New Orleans, etc., Co.*, 37 Miss. 202, where the general doctrine is recognized and

approved, in the court's statement, of the 'foundation of the whole doctrine of custom and usage,' and in which case the mode of showing knowledge is not passed on, except as to opinions. In *Dodge v. Favor*, 15 Gray, 82, it is stated (page 83) that 'they did not offer to prove by direct testimony that the plaintiff knew of this custom, but contended that they could satisfy the jury on the evidence in the case that he knew of it.' This was allowed. It went to the jury. In *Barnard v. Kellogg*, 10 Wall. 383, the point decided was that the rule of *caveat emptor* could not be annulled by proof of custom to the contrary, on the familiar principle that custom can not be shown when it contravenes the law."

³ *Booth, etc., Granite Co. v. Baird* (1895), 87 Hun, 452; 34 N. Y. Supl. 392.

cian employs another to assist him in a case, evidence is not admissible of a custom prevailing among the physicians of the city and vicinity that, in the absence of a special agreement to the contrary, the physician so employed is to obtain his compensation from the patient, it not being shown that the custom was known to him or so general that knowledge and adoption of it might be presumed.¹ But in an action on a contract for the manufacture of candy boxes, evidence is admissible as to the mode in which such boxes are made and printed in the candy trade, in the absence of a special direction as to the mode of printing.²

§ 753. Express contract not to be contradicted or varied—

Principal and agent.—Usage will not be permitted as between principal and agent, or as between principal and third persons having notice of them, to contravene express instructions to the agent, or an express contract contrary to the usage.³ Where an agent, authorized to buy cedar logs, stated at the time of making an arrangement to pay for supplies furnished to the seller out of the money due him that he had no authority to make debts, the principal was not bound, although there was a local custom that agents authorized to buy logs should have authority to make such agreements.⁴ Where a contract to build a house calls for a good three-coat plastering, it is inadmissible to show, in an action for the balance due on the contract, that it is the custom of plasterers in that vicinity to slight their work, and do “drawn work,” which is two-coat work, when three-coat work is contracted for.⁵ Where a sale of coffee was in writing, and no mention made of samples, the seller could not show a custom making it the duty of buyers of coffee to accept or reject it immediately after the receipt of overland

¹ *Fitzgerald v. Hanson*, 16 Mont. 474; 41 Pac. Rep. 230.

² *Gair v. Auerbach* (Com. Pl. 1895), 34 N. Y. Supl. 3. In *Guillon v. Earnshaw*, 169 Pa. St. 463; 32 Atl. Rep. 545, it was held to be error to reject evidence offered to plaintiff of a custom in Spain in sales of iron ore to fix a standard of 50 per cent. with a sliding scale, and that the purchaser was obliged to receive the ore if it did not

go below 45 or 46 per cent. And see *Carey v. Bright*, 58 Pa. St. 70.

³ *Simmons v. Law*, 3 Keyes (N. Y.), 217; *Fox v. Parker*, 44 Barb. 541; *Wigglesworth v. Dallison*, 1 Doug. 201; *Rice on Evidence*, § 349.

⁴ *American Lead Pencil Co. v. Wolfe* (1892), 11 So. Rep. 488; 30 Fla. 360.

⁵ *Cook v. Hawkins* (1891), 16 S. W. Rep. 8; 54 Ark. 423.

samples, and that, consequently, the buyer had accepted the coffee by retaining such samples for two days, because to allow the admission of such a custom would, in effect, alter the contract in a particular material to defendants' rights.¹ A charter-party of a vessel to a safe port can not be controlled by evidence of a custom to consider safe a particular port which, in fact, is not reasonably safe, because to admit such custom in evidence would contradict the charter-party and would therefore be incompetent as matter of law.² In an action against a propeller for breach of a contract to make as many trips as possible, because she towed more than two vessels, the construction of the contract can not be varied by evidence of a custom for propellers of her class to tow at times as many as five vessels, where it is not shown that they always tow more than one or two.³

§ 754. The South Carolina rule.—The South Carolina rule is that evidence of custom and usage is not admissible to explain or vary the terms of an express contract, whether written or verbal, unambiguous in its terms, unless to show the meaning of certain terms used in such contract, which, by well-established custom or long usage, have acquired a meaning different from that which they primarily bear, for the reason that when parties, in making a contract, use terms which, by usage or custom, have acquired a certain meaning, they must, in the absence of any evidence to the contrary, be assumed to have used such terms in such acquired sense.⁴

¹ *O'Donohue v. Leggett* (1892), 31 N. E. Rep. 269; 134 N. Y. 40.

² *The Gazelle*, 128 U. S. 474; *Barnard v. Kellogg*, 10 Wall. 383; *Hayton v. Irwin*, L. R. 5 C. P. D. 130.

³ *The Oregon v. Pittsburg Iron Co.* (1893), 55 Fed. Rep. 666.

⁴ In *Fairly v. Wappoo Mills* (S. Car. 1895), 22 S. E. Rep. 108, the court said: "In the absence of any authority in this state upon this question (for we do not think the case of *Mordecai v. Jacobi*, 12 Rich. Law, 547, throws any light upon the question), we are compelled to resort to the authorities elsewhere. In *Globe*

Milling Co. v. Minneapolis Elevator Co., 44 Minn. 153; 46 N. W. Rep. 306, the question was whether the title to certain grain sold vested in the vendee. By the terms of the contract of sale the grain was sold for 'cash on delivery,' which had not been complied with; but vendee sought to sustain his claim by proof of a custom prevailing in that locality, whereby the title was regarded as having passed when certain things were done, whatever might be the terms of the sale agreed upon by the parties. But the court said: 'A local usage can not be proved to contradict a contract. * *

§ 755. Custom not to be contrary to law—Railway and banking customs.—A usage or custom can not be invoked by a party and introduced into a contract, as an element of it, if it is con-

If, by the contract of sale of this wheat, it was for cash on delivery, the usage can not make it a sale on a credit.' In *Page v. Cole*, 120 Mass. 37, the action was to recover damages for the breach of a contract for the sale of a 'milk-route,' and evidence as to the meaning and effect which that term had acquired by usage prevailing in that locality was held competent. In *Walls v. Bailey*, 49 N. Y. 464, the action was to recover the amount due plaintiff for plastering which he had contracted to do at so much per square yard, and it was held competent to prove that the custom was to measure the openings for windows and doors, as well as the solid walls. In that case it was said that: 'Every legal contract is to be interpreted in accordance with the intention of the parties; and usage, when it is reasonable, uniform, and well settled, not in opposition to fixed rules of law, *not in contradiction to the express terms of the contract* [italics ours], is deemed to form a part of the contract, and to enter into the intentions of the parties.' In *Hinton v. Locke*, 5 Hill, 437, the action was on a contract to pay the plaintiff so much per day for his services, and it was held competent to show that the universal custom in that locality was to count a day as 10 hours. Of course, the term 'day' could not be regarded as meaning 24 hours, and hence it was competent to show how many hours were regarded as a day. In that case, however, *Branson, J.*, in delivering the opinion of the court, expressly disapproves of the case of *Smith v. Wilson*, 3 Barn. & Adol. 728, where, upon a contract to pay so much a thousand for all the rabbits

in a certain warren, it was held competent to show that in that part of the country the custom was to construe the term 'thousand' as meaning 100 dozen or 1,200, because he said that would be allowing the custom to contradict the express terms of the contract. His language is: 'No usage or custom can be set up for the purpose of controlling the rules of law. Nor is such evidence admissible where it contradicts the agreement of the parties.' In *Ware v. Hayward Rubber Co.*, 3 Allen, 84, the plaintiff claimed one-half commissions on goods consigned to him for sale, but not sold, and turned over to consignor, basing his claim upon a custom prevailing in that locality. *Held*, that evidence of such a custom was incompetent. *Chapman, J.*, in delivering the opinion of the court, used this language: 'This being a written and express contract, the evidence offered in respect to the usage of commission merchants to charge one-half commissions when goods consigned to them in the ordinary way for sale are taken back is not applicable to this case, for an express contract can not be controlled or varied by usage.' And this was the point upon which the case turned. In *Ford v. Tirrell*, 9 Gray, 401, the action was upon a contract to build an octagon cellar wall at 11 cents per foot, and the question was as to the mode of measurement to be adopted in order to ascertain the amount of work done. The court seems to have held that, as the contract was silent as to the mode of measurement, it was competent to introduce evidence as to the custom or usage in such cases by which the mode of measurement should be de-

trary to law. Accordingly a failure to comply with the Texas statute requiring railroad companies to deliver freight, upon a tender by the owner of the freight charges, as shown by the bill of lad-

terminated: citing 1 Greenleaf on Evidence, § 292. In *Barton v. McKelway*, 22 N. J. Law, 165, the action was on a written contract for the delivery of a specified number of morus multi-caulis trees, of not less than one foot in height, and the question was as to the mode of measuring the height of the trees. Held, that it was competent to show that it was the universal custom prevailing among dealers in such articles to measure only the ripe, hard wood, rejecting the green, immature top. The court, in its opinion, says that the true office of such evidence is 'to interpret the otherwise indeterminate intention of the parties, and the nature and extent of their contract, and fix and explain the meaning of words.' In *Wilcox v. Wood*, 9 Wend. 346, the question was as to when—at what hour—a lease from the 1st of May to the 1st of May in a succeeding year terminated; and it was held competent to show that, by universal custom, such a lease would terminate at 12 M. on the 1st of May. In *Grant v. Maddox*, 15 Mees. & W. 737, the court went as far as in any other case which we have examined. In that case the action was upon a contract to pay the plaintiff, for her services as an opera singer, so much per week for each week in the three years for which she engaged; and the controversy was as to whether plaintiff was entitled to receive the stipulated sum for each week during the whole of the three years, or only for each week during the theatrical season of those years. The court held that it was competent to prove a custom by which a year was regarded as only the theatrical season, and not the whole calendar year. In *Higgins*

v. Moore, 34 N. Y. 417, the question was whether a purchaser of grain in the city of New York, negotiated by a broker, would be discharged by the payment of the purchase price to the broker. Held, that he would not, as the broker's agency terminates when he makes the sale, and he has no authority to receive the purchase-money, and that evidence of any local usage in New York to the contrary was not admissible to control the general rule of law. In *Bower v. Jones*, 8 Bing. 65, 21 E. C. L. 447, it was held that, where there was an express agreement that the principal should be responsible for bad debts, proof that the custom of the trade was that commissions should not be allowed on bad debts could not be received, because in violation of the express terms of the agreement. From this review of the cases cited above, as well as from the examination of others, which we have not deemed it necessary to cite, it is obvious there is not entire harmony in the decisions. Our next inquiry is whether the contract which constitutes the basis of this action is of such a character as to require or warrant a resort to evidence of custom or usage in order to explain any ambiguity therein, or to interpret the meaning of terms used therein which have acquired some secondary meaning. We are unable to discover any ambiguity in the terms of the contract. The amount of the article sold, the price, the times of delivery and the time and mode of payment are all distinctly specified; and we are equally unable to discover any terms used therein which require any interpretation."

ing, is not excused by the refusal of the owner to surrender the bill of lading, or to give an indemnity bond in lieu of such surrender; and it is immaterial that there is a general custom among railroads requiring the surrender of the bill of lading.¹ It has been held in Alabama that evidence of a general custom of passing checks payable to an existing person or bearer, by delivery only, will not affect the operation of the Alabama statute providing that all bills or notes payable to an existing person or bearer must be construed as if payable to such person or order.² A custom can not make a contract where there is none, nor prevent the effect of settled rules of law.³ A party can not invoke and have the benefit of a local usage inconsistent with the law merchant which he himself

¹ *Gulf, etc., R. Co. v. McCown* (Texas 1894), 25 S. W. Rep. 435, per Collard, J.: "Upon both points the court was correct. The carrier can not refuse to deliver freight on the ground that the bill of lading is not surrendered to him. *Dwyer v. Gulf, etc., Ry. Co.*, 69 Texas, 707; 7 S. W. Rep. 504. Nor can he require an indemnity bond upon failure of the owner to surrender it. It can not coerce the owner into giving indemnity for refusal to do what the law declares he is not bound to do. The law protects him in the refusal, and the carrier can not force burdens upon him because he insists upon his rights. As to custom: It can not deprive one of a legal right without his consent and without compensation; it can not make contracts for parties; it can in some cases construe the terms used in a contract; but it is not a good custom if it is unreasonable, or contrary to law. The custom contended for can not be enforced. *Missouri, etc., Ry. Co. v. Fagan*, 72 Texas, 127; 9 S. W. Rep. 749; 2 *Greenleaf on Evidence*, 251."

² *First. Nat. Bank v. Nelson* (Ala. 1894), 16 So. Rep. 707, Haralson, J.: "It has been argued that by the general custom, bank checks, when payable to an existing person or bearer,

pass from hand to hand by delivery merely, and are payable to the holder without indorsement, and that this circumstance shows the construction which the general public has placed upon this statute—a fact, as urged, which should have great weight with courts in determining the true construction of this statute. It is not to be denied, that if the meaning of words of a statute be uncertain, usage may be resorted to for the purpose of interpreting them (*Lawson on Usages and Customs* 462, § 223; *South. St. Const.*, § 308); but popular disregard of a statute, or a custom opposed to it, will not repeal it; and a custom or usage which would contradict the commands of a statute ought not to be considered. *Lawson on Usages and Customs*, § 216; *South. St. Const.*, § 137; *Richmond, etc., R. Co. v. Hisong*, 99 Ala. 187; 13 So. Rep. 211; *East Tenn., etc., R. Co. v. Johnston*, 75 Ala. 596; *Barlow v. Lambert*, 28 Ala. 704."

³ *National Bank v. Burkhardt*, 100 U. S. 686; *Bliven v. New Eng., etc., Co.*, 23 How. 420; *Adams v. Goddard*, 48 Maine, 212; *Thompson v. Riggs*, 5 Wall. 663; *Dykers v. Allen*, 7 Hill (N. Y.), 497; *Tilley v. County of Cook*, 103 U. S. 155.

had ceased to observe. Thus, plaintiffs doing a banking business, after abandoning a practice to give notice of the dishonor of notes by mail notwithstanding that the indorser and holder lived in the same town, could not rely on such custom, even though it continued to prevail among other banks; and an allegation by plaintiffs, doing a banking business, that a general custom prevailed among all the local banks to give notices of dishonor by mail, notwithstanding that the indorser and holder lived in the same town, is not supported by proof of a practice prevailing among other banks, in which plaintiffs did not participate.¹ Where a check is payable to a named person or bearer, and the payee indorses it in blank and delivers it to a bank and receives credit for it, in an action by the indorsee against the maker, evidence that, by a custom among bankers, where a check is drawn on a bank and presented to another bank, it is passed to the credit of the customer, but that the credit so given is treated as a receipt for the check, and not as a payment, is inadmissible, as the indorsement and check evidence the agreement between the payee and indorsee, and the transfer of the check is governed by the law merchant.² In North Carolina, a local custom of merchants, warranting the taking of interest greater than that allowed by statute, can not be allowed to supersede or modify the statute.³ A custom on the part of a carrier or of carriers generally at a particular place to deliver goods to one other than the consignee, who merely holds the bill of lading without any indorsement, does not justify such delivery, as the carrier is bound by law to deliver only to the person who has title to the bill of lading.⁴ Proof of a custom is not ad-

¹ *Isbell v. Lewis*, 98 Ala. 550; 13 So. Rep. 335.

² *Shaw v. Jacobs* (Iowa 1893), 55 N. W. Rep. 333.

³ *Gore v. Lewis* (1891), 109 N. C. 539; 13 S. E. Rep. 909.

⁴ *Louisville, etc., R. Co. v. Barkhouse*, 100 Ala. 543; 13 So. Rep. 534, per McClellan, J.: "A bill of lading does not pass by delivery, and the possession of it by one other than the consignee without indorsement will

not authorize or justify the carrier in delivering the consignment to such person. *Hutchinson on Carriers*, § 344; 2 Am. and Eng. Encyc. of Law, pp. 230, 231. The obligation to deliver only to the party having title to the bill of lading is imposed by law on the carrier, and is absolute. Any custom of a particular carrier or of carriers generally at a particular place to make deliveries to persons merely in possession of the bill of lading is a

missible to enlarge the powers of officers whose authority is defined by statute.¹ A usage of trade for banks to take pledges from factors as security for the payment of the general balance of account between them, of goods known to be held by them as factors, is unlawful, and can not be invoked by the parties.²

§ 756. Customs to be reasonable.—Evidence to show that an agreement in writing to serve as traveling salesman imposes upon the salesman, according to the usages and customs of trade, the duty of making up samples necessary for his business, is admissible in an action for breach of such contract.³ Parties are bound to act in reference to a reasonable custom, although they have not expressly agreed to do so.⁴ In an ac-

bad custom, and can not be adduced in evidence to exempt such carrier or carriers from liability for deliveries to wrong persons."

¹ *Walters v. Senf* (1893), 115 Mo. 524; 22 S. W. Rep. 511; *Walters v. Brooks* (1893), 115 Mo. 534; 22 S. W. Rep. 514.

² *Allen v. St. Louis Bank*, 120 U. S. 20, per Gray, J.: "The usage can not aid the plaintiff because it was contrary to law in that it undertook to alter the nature of the contract between the factors and their principals which authorizes them to sell but not to pledge and in that it would sustain a pledge by a factor of the goods of several principals to secure the payment of his own general balance of account to a third person. *Irwin v. Williar*, 110 U. S. 499; *Newbold v. Wright*, 4 Rawle, 195; *Lehman v. Marshall*, 47 Ala. 362; *Leuckhart v. Cooper*, 3 Bing. N. C. 99; *Robinson v. Mollett*, L. R. 7 H. L. 802."

³ *Brown v. Baldwin & Gleason Co.* (1891), 13 N. Y. Supl. 893. A coke manufacturing company agreed by written contract to furnish to defendant at his furnaces fifteen cars of coke per day for six months at an

agreed price per ton. The coke company, however, were "not to be held in damages for the railroad company's failure to supply transportation." It was held that the contract was subject to a custom prevailing among coke producers of that region, and known to both parties, to distribute, in case of shortage of cars, all the cars received proportionately among the orders on hand; and defendant had no ground of complaint if he received his proper proportion of cars during the period of the shortage. *McKee-frey v. Connellsville Coke Co.* (1893), 56 Fed. Rep. 212, and see *Howard v. Walker* (1892), 92 Tenn. 452, as to banking customs in collecting drafts for customers.

⁴ In *Cleveland, etc., R. Co. v. Zider* (1894), 61 Fed. Rep. 908, it appeared that an employe of a car company, working on one of its cars placed on the side track of a railroad, was killed by the railroad company's switching engine running into the car. In an action against the railroad company therefor, the complaint alleged that the car company's unfinished cars were accustomed to be placed, with defendant's knowledge and consent,

tion on a contract under which plaintiff excavated earth and rock from defendant's lots, and which provided that he should be paid on estimates made by a surveyor, it was not error to permit plaintiff to prove the custom of surveyors in making allowances to excavators on their being obliged to excavate below the depth mentioned in the contract to reach a level, where such custom was a reasonable one, and known to both parties before entering into the contract.¹ A local custom that insurance agents, after the termination of their agency, may cancel any of the policies issued through them, and transfer the insurance to other companies represented by them, is unreasonable, and subversive of the principles governing the relation of principal and agent, and is therefore void and inadmissible in evidence.²

on its side tracks, to be there finished and made ready for shipment. It was held that evidence of an agreement between the companies for the use by the car company of the side tracks as a delivery track, but not for constructing or completing cars thereon, was immaterial, as it was not inconsistent with the alleged custom, and the railroad company would be bound to act in reference to such custom, whether it originated in an agreement or grew up independently.

¹ *Pucci v. Barney* (Com. Pl. N. Y. 1893), 21 N. Y. Supl. 1099.

² *Merchants' Ins. Co. v. Prince* (1892), 52 N. W. Rep. 131; 50 Minn. 53. In *Tilley v. County of Cook*, 103 U. S. 155, Woods, J., said: "The custom certainly did not bind the party who offered prizes for plans after having paid the prizes to pay also for plans which he never used and for the superintendence of a building, which he never erected merely because he had selected a particular plan, and announced his purpose to build in accordance with it. If such were the custom of architects in Chicago it was an absurd and unreasonable custom, and therefore not binding. United

States v. Buchanan, 8 How. 83." In an action on a contract for the erection of a house, defendant pleaded a set-off for failure to build the same in a workmanlike manner. Defendant's evidence showed that the floors were not level; that the windows were not vertical, nor at equal heights from the floor, though intended to be on the same level; that they had embrasures above them; that bricks were put in the outer wall that had to be removed; and that one room had so many holes in the wall that daylight could be seen at seventeen different places. Plaintiffs' evidence was that the house was constructed according to the local custom, but did not greatly qualify the facts shown by defendant. It was held that an instruction that "if a man in a given section of country contracts to build a house in a workmanlike manner, that means a house built in a workmanlike manner, construed according to the customs and usages of the section of country in which the contract is made," was erroneous, since a custom that justifies the erection of a house in the manner shown by defendant's evidence is unreasonable. *Anderson v. Whittaker* (1892), 11 So.

§ 757. **Plain terms not to be varied by custom.**—Where the words and terms of a contract are not technical, but are in common use and have a well-defined meaning, they are not to be explained or varied, or a different meaning given to them, by the evidence of any custom or usage whatever. Thus, where a contract of sale names a price “f. o. b. cars” at a certain place, although evidence is admissible to show what these letters mean, it can not be shown by proof of custom or otherwise that these letters have a meaning or effect different from what would have attached to the full words “free on board” if they had been inserted in the contract.¹ In an action for a

Rep. 919; 97 Ala. 690, per McClellan, J.: “The usage relied on is one which honest men would deem unfair and unrighteous and hence is not reasonable. *Paxton v. Courtney*, 2 Foster & T. 131; *Metcalf v. Weld*, 14 Gray, 210; *Coleman v. Chadwick*, 80 Pa. St. 81.”

¹ *Sheffield Furnace Co. v. Hull Coke Co.* (1894), 101 Ala. 446; 14 So. Rep. 672, 680, per McClellan, J.: “The trial court admitted evidence of a general custom in the coke trade, in line with plaintiff’s contention, to the effect that, under contracts like this, it was upon the buyer to advance the freight, and take a credit for the aggregate of such bills paid during a month on settlement the tenth day of the succeeding month, and, upon the writings and this extrinsic evidence, submitted it to the jury to determine what the contract was in this regard. The action of the court on this subject clearly and confessedly can be sustained only on the assumption that the expressed or implied terms of the contract, as reduced to writing, were ambiguous in respect to this matter. We think this assumption is not justified by the language the parties have set down in the writings. It was mainly, if not entirely rested, upon the use of the letters ‘f. o. b.’ in the connection shown above. These were supposed

to be of such doubtful meaning as to authorize and require a resort to extraneous evidence in their interpretation. We do not so understand the principle on which the court acted. These letters have long been used, and have now come into such general use in contracts of sale, where the property sold is to be transported, that their significance is a matter of common knowledge, and hence of judicial cognizance. It is commonly known, and therefore courts must be held to know, that these are but the initial letters of three several words, and that these words, in connections like this, are ‘free on board.’ And even were it conceded that courts do not judicially know what they stand for and mean, and evidence *aliunde* is resorted to, as in this case, such evidence could go no further than to supply the missing letters of the words of which these letters are by such evidence shown to be the initials. The necessity, in other words, to show by extrinsic evidence what the full words are, is met when the completed words are put before the court; and it affords no occasion or justification for giving, by proof of custom or usage, or other extrinsic fact, a different meaning or operation to them than would have attached to them had they been originally inserted in full

breach of warranty upon a sale of baled cotton, a usage of the trade as to a buyer's returning cotton found defective, and as to the notice required to lay a claim for damages, is not admissible for the purpose of showing that the conduct of plaintiff,

in the writings. Thus, in a case where parol evidence was admitted to show that the letters 'C. O. D.' (and which are not better understood than the letters 'f. o. b.') in a receipt given by an express company for a package to be transported by it, were the initials of the words 'Collect on delivery,' the court held, these words being proved, it was not competent to prove by parol what the full words meant, or to change their natural significance and effect in the case by evidence of custom or usage, or of previous dealings between the parties, so as to relieve the carrier from the duty of collecting the price of the goods from, before delivering them to, the consignee. *American Express Co. v. Lesem*, 39 Ill. 312. And in another case where the carrier, the Adams Express Company, was under a contract to carry goods from New York to Boston, the package was marked thus: 'A. King, Windsor, N. S., C. O. D. \$375, from Turner's Express, Boston, Mass.;' and in the receipt given for the goods was contained the directions as marked on the package. The package was delivered to Turner's Express at Boston, by the Adams Express Company, without collecting therefor. The consignor sued the latter company, alleging a breach of the contract, and on the trial 'the defendant was allowed to prove that the whole direction meant that Turner's Express should collect of the consignee; also, what was the custom existing among express companies receiving packages with a C. O. D. from connecting lines.' It was

held by the court of appeals that the admission of this evidence was erroneous; that 'while it was competent to give parol evidence to explain the meaning of the letters "C. O. D.," and thus remove all ambiguity, the contract, being thus made clear, could not be varied; that the additional words, being of familiar and ordinary, and not of technical, use, and having a well-defined meaning, could not be explained or varied, or a different meaning given them, nor was it competent to prove a custom or usage inconsistent therewith.' *Collender v. Dinsmore*, 55 N. Y. 200. As has been indicated, our own opinion is that the meaning of the letters 'C. O. D.,' in express carriage contracts, and 'f. o. b.,' in contracts like that involved in the case at bar, is a matter of judicial knowledge, and that parol evidence is not needed or admissible in their interpretation. *State v. Intoxicating Liquors*, 73 Maine, 278; *United States Express Co. v. Keefer*, 59 Ind. 263; *Moseley v. Mastin*, 37 Ala. 216. But, whether the words of which the letters are initials are filled in by drawing upon judicial knowledge or by extrinsic evidence, the effect and result are the same. The perfected words, in either case, are inserted in the writing, instead of the letters, and the instrument is to be read and construed precisely as if the words had been originally embodied in it. These plain terms of the contract can not be changed or varied in any way by evidence of a custom existing in the coke trade, according to which the purchaser is to pay freight charges."

who knew of such usage, was not consistent with the existence of the claim made by him in the action.¹

§ 758. Proving custom as to measurement, etc., where contract silent.—Where a written contract for laying brick is in controversy, and it is silent as to the method of measuring the quantity of the brick, parol evidence is admissible to show the custom in respect to such measurement.² So also, where, in an action

¹ *Gage Mfg. Co. v. Woodward* (1891), 17 R. I. 464; 23 Atl. Rep. 16. Tillinghast, J., quoted from 3 Kent's Commentaries, 260, note b, that parol evidence to explain by custom and usage is admissible "if the words used in the contract be technical, local, generic, indefinite or equivocal. If there be no such ingredient of uncertainty, then the evidence is not admissible"—citing *Yates v. Pym*, 6 Taunt. 446; *Blackett v. Royal, etc., Assurance Co.*, 2 Crompt. & J. 244; *Fowler v. Aetna, etc., Insurance Co.*, 7 Wend. 270; *Dow v. Whetten*, 8 Wend. 160; *Astor v. Union Insurance Co.*, 7 Cow. 202; *Coit v. Commercial Insurance Co.*, 7 Johns. 385; *Barnard v. Kellogg*, 10 Wall. 383, 390; *Dawson v. Kittle*, 4 Hill, 107; *Collender v. Dinsmore*, 55 N. Y. 200. And see *The Reside*, 2 Sumn. 567, Fed. Cas. No. 11657, where Story, J., reflected upon the habit of varying the liabilities of parties to contracts by setting up particular usages.

² *Richlands Glass Co. v. Heltebeitel* (Va. 1895), 22 S. E. Rep. 806, Riley, J.: "As the contract in this case contains no stipulation as to the method by which the quantity of bricks was to be ascertained for settlement, but is silent, or at least ambiguous, in that respect, parol evidence was admissible to show whether there was any agreement between the parties as to this matter, and, if so, what it was, and, if there was no agreement between them, then to show what was the custom of the lo-

cality where the contract was made, or the usage of trade, and with reference to which, in the absence of any special agreement, they are to be deemed to have contracted. In *Lowe v. Lehman*, 15 Ohio St. 179, the contract was to furnish and lay bricks at a certain price per 1,000. The controversy there was as to the proper mode of counting, as in the case at bar. The court held that evidence was admissible to show a custom to estimate the quantity of bricks by a measurement of the walls on a uniform rule, based on the size of the bricks, and deducting for openings in the walls, but not for chimneys or jambs. In *Ford v. Tirrell*, 9 Gray, 401, the contract was to build the wall of an octangular cellar at the rate of 11 cents per foot. The only question was as to the mode of measurement. It was held that, the agreement as to the compensation being equivocal and obscure, it was competent to prove a local usage of measuring cellar walls, in order to interpret the meaning of the language, and to ascertain the extent of the contract. *Hinton v. Locke*, 5 Hill, 437, was an action on a contract by which the defendant had promised to pay to the plaintiff, who was a carpenter, 12 shillings per day for every man employed by him in repairing the defendant's house. The parties differed as to how many hours made a day's work; that is, what should be the measurement of the day. It was held that parol evidence was admissible to show that, by a universal usage

to foreclose a mechanic's lien on an irrigating ditch, the contract for the construction of the ditch was silent as to the basis of estimates of work and labor, testimony of custom was admissible.¹ And in an action for the price of tobacco, in the absence of an express agreement between the parties in regard to the manner of ascertaining the net weight, it was held competent for plaintiffs to show that, according to the custom of the tobacco trade, defendant was required to take it at the last ascertained weight, looking to plaintiffs to make good any loss or diminution.² Where the plaintiff sold to the defendant granite blocks at specified prices per "square yard," with the understanding that they were to be used in the construction of a sewer, and there was no express agreement as to how the number of "square yards" should be determined, whether by a measurement of the area of the completed stone work in the sewer, or by taking the aggregate measurement of the faces of

among carpenters, ten hours' labor constituted a day's work. So that the plaintiff was entitled to charge $1\frac{1}{4}$ days for every 24 hours within which the men worked 12 hours and a half. In *Walls v. Bailey*, 49 N. Y. 464, the plaintiff had contracted to do the plastering work of the defendant's house, in Buffalo, at a certain price per square yard. He charged and claimed pay for the full surface of the walls, without deduction for doors, windows, cornices, and base boards, while the defendant contended that under the contract he was only to pay for the plaster actually laid on. Evidence of a custom among plasterers in Buffalo to measure and charge for the entire surface of the walls, without deductions for doors, windows, cornices, and base boards, was held to be proper. It is shown by the testimony in this case that, at the making of the contract, nothing was said as to the manner by which the quantity of bricks was to be ascertained; and it is further shown by the testimony that, where there is no stipulation as to the mode by which the

quantity of bricks is to be ascertained, it is to be done, according to the custom of the locality and the usage of trade, by measuring the work, and allowing 22 bricks to the cubic foot. It was also proved that the appellee had previously laid bricks on other buildings for the same person who represented the appellant company in making the contract in this case, and that the quantity of bricks was ascertained by measurement, and the appellee settled with accordingly. The court, therefore, did not err in overruling the objections of the appellant to the parol testimony in the cause on the ground that it tended to contradict the written contract between the parties, and in holding that the complainant was entitled to have the number of bricks in the glass factory laid by contract work estimated and paid for by measurement, computing the same at 22 bricks to the cubic foot."

¹ *Bradbury v. Butler* (1892), 1 Colo. App. 430; 29 Pac. Rep. 463.

² *Thompson v. Brannin* (1893), 94 Ky. 490; 21 S. W. Rep. 1057.

the blocks, it was held, in an action for the price of the blocks, that the circumstances with reference to which the contract was made might be considered for the purpose of discovering the real intention of the parties, and that proof of a local custom under such circumstances, to measure stone in the completed structure, was admissible, although such a custom had not been pleaded.¹ And in an action for mason work, at a specified price per perch, where the dispute is as to the number of perches contained in the work, a uniform, universal and notorious custom of measurement among masons is binding, although the result of such measurement is greater than the actual contents.²

§ 759. Commercial usage defined and considered.—Usage comprehends the habits, modes, and course of dealing, which are generally observed, either in any particular branch of trade or in all mercantile transactions. A usage must be established, known, certain, and uniform, and reasonable, and not contrary to law. The office of a usage is to interpret the otherwise indeterminate intentions of parties, and to fix and to explain the meaning of words and expressions of doubtful or various senses.³ Custom or usage may be proved, not only to

¹ *Breen v. Moran* (1892), 51 Minn. 525; 53 N. W. Rep. 755. And see *Walls v. Bailey*, 49 N. Y. 464, that the local usage in such a case need not ordinarily be pleaded. See *Lowe v. Lehman*, 15 Ohio St. 179.

² *McCullough v. Ashbridge* (1893), 155 Pa. St. 166; 26 Atl. Rep. 10. Plaintiffs entered into a written contract to purchase a large quantity of potatoes on Brown's island, paying part of the purchase price. Subsequently high waters destroyed the potatoes, and plaintiffs then brought suit to recover back the amount of money paid. Defendants answered by a counter-claim, stating that it is the custom for the purchasers of potatoes on such island to furnish a boat for their shipment, and notify the seller when it will be there, which

plaintiffs, though knowing of such custom, had failed and neglected to do, in consequence of which the potatoes were destroyed. It was held that it was proper to admit evidence of such custom, if known to plaintiffs at the time the contract was made, as such contract was silent as to the consignee or place of destination of the potatoes, or who should furnish the boat on which they should be shipped. *Holmes v. Whitaker*, 23 Ore. 319; 31 Pac. Rep. 705.

³ *Woldert v. Arledge*, 4 Texas C. App. 692; 23 S. W. Rep. 1052: "A usage of trade, of which all dealers in that line of trade are bound to take notice, must be known, must be uniform and certain. In this case the plaintiff insisted that by the usage of the trade a car load of bacon meant

explain the meaning of terms to which is affixed a peculiar and technical meaning, but also to supply evidence of the intention of the parties regarding matters as to which their con-

twenty-five thousand pounds, while the defendant insisted that by usage a car load meant twenty thousand pounds. The court, under this state of case, should have submitted under instructions, in conformity with the law as above outlined, the issue of the existence or non-existence of a usage obtaining among those engaged in the bacon trade at Kansas City, which fixed and determined the quantity of bacon contained in a car load; and, if the jury found that such usage did exist, and that it determined the number of pounds of bacon by the expression 'a car load of bacon' to be twenty-five thousand, their verdict should have been for the plaintiff, if they further found from the evidence that the plaintiff was able and ready to deliver the bacon free of charge on the cars at Kansas City at the times mentioned in the correspondence between the parties, for transmission to Crockett, Tex., on defendant's account; and, on the other hand, if the jury found that by the usage of the trade of that city a car load of bacon meant twenty thousand pounds, the verdict should have been for the defendant; and so, if the jury found that there was no established usage obtaining among those engaged in the bacon trade at Kansas City, by which the number of pounds contained in a car load was fixed and determined, the verdict should have been for the defendant. If there be no usage determining the number of pounds of bacon intended by the expression 'a car load,' then the correspondence between the plaintiff and the defendant can not be held to constitute a contract binding between them, because

both the proposal to purchase and the acceptance of the proposals were indefinite as to the quantity of the commodity which was the subject of their negotiations. If the usage fixed the number of pounds to a car load to be twenty thousand, the plaintiff should not recover, because he tendered for execution a contract different from the one created by the telegrams, and this gave the defendant the privilege of declining to make a purchase on any terms with the plaintiff. The latter not having complied with the terms of defendant's proposal, he had the right to refuse to treat further with the plaintiff. If, however, a usage exists which fixes the term 'a car load' to mean any number of pounds between certain limits, and twenty-five thousand pounds be within those limits, the plaintiff would be entitled to a recovery if he was able and ready to deliver the bacon at the place and at the times and on the terms proposed by him in his correspondence with the defendant. But no such issue as this was raised by the pleadings or the evidence. The court did not err, as contended by appellant, in refusing to instruct the jury that the correspondence between the parties established a contract binding upon them. As we have seen, a usage must be shown to exist in the place where the contract is to be executed, and that place, in this case, is Kansas City. Evidence, therefore, tending to show the habit and custom of individuals engaged in business at Crockett, in conducting that business at Crockett, was immaterial and irrelevant, and should not have been submitted to the jury."

tract makes an insufficient provision. Thus when the sellers of logs, and those who have a right to collect toll on them, after stipulating for measurement by "board measure," do not choose to express their intention, in the contract, as to the mode of establishing the board measure, custom and usage will be admitted to supply the omission.¹

§ 760. The same subject continued.—In an action on an account for polished marble slabs, ordered by defendant to be of a specified thickness, plaintiff may show that in the marble trade such an order means slabs of the stated thickness as they come from the saw, and does not require them to be of such thickness when prepared for use. And this admission of evidence as to usage is not inconsistent with the general rule that a written contract is not to be contradicted or varied by parol evidence.² The customer of a warehouseman is liable

¹ *Destrehan v. Louisiana Lumber Co.*, 45 La. Ann. 920; 13 So. Rep. 230, per Breaux, J.: "There is no possibility of determining the board measure of each log without reference to rules of measurement established by custom. The act contains no statement upon the subject. Both as relates to the 'average diameter' and to defective logs, the parties not having agreed, custom must be consulted in determining the number of boards each log will yield. If 'board measure' had been omitted from the contract, the question would arise as to the actual dimensions of a round log, without allowing for saw kerfs, worthless saps, crooked or otherwise defective logs; but, being inserted in the act, it must be determined by reference to custom, and the actual quantity of lumber must be ascertained which a log will produce under a competent sawyer."

² *Evans v. Western Brass Mfg. Co.*, 118 Mo. 548; 24 S. W. Rep. 175, per Black, C. J.: "The general rule undoubtedly is that parol evidence can not be admitted to contradict, add to, or vary a written contract; and it is

the duty of the court to construe the writing. *Bunce v. Beck*, 43 Mo. 266; *Black River Lumber Co. v. Warner*, 93 Mo. 374; 6 S. W. Rep. 210; *State v. Hoshaw*, 98 Mo. 358; 11 S. W. Rep. 759. But it is equally well settled that proof of usage is often admitted to interpret the meaning of the language used, for under many circumstances the parties may be supposed to contract with reference to a usage or custom, as they are presumed to use words in their ordinary signification. 1 Greenleaf on Evidence, § 292. 'The courts,' says Starkie, 'have long allowed mercantile instruments to be expounded according to the usage and customs of merchants, who have a style and language peculiar to themselves, of which usage and custom are the legitimate interpreters.' Starkie on Evidence (10th ed.), p. 701. Hence it has been held by this court that it may be shown, by way of a general and well-established custom, that two packs of shingles of a certain size constitute a thousand. *Soutier v. Kellerman*, 18 Mo. 509. See also, *Blair v. Corby*, 37 Mo. 313; *Kimball v. Braw-*

for his proportionate share in the expenses incurred by the warehouseman in prosecuting suits for the recovery of insurance money for goods destroyed in the warehouse, where the customer is chargeable with knowledge of a general custom of warehousemen to keep a customer's goods insured in open policies, in favor of the warehousemen, on goods held in trust, and to charge each customer for such insurance at a certain monthly rate on his goods covered by such policies.¹

§ 761. Knowledge of local usage essential.—A custom among underwriters in New York city to class certain stores as distinct buildings for purposes of insurance, and to insure them severally as separate risks, is not binding on an insurance company domiciled in Alabama, without proof that the latter had knowledge of such custom when a contract was made with another company for re-insurance in that city.² So

ner, 47 Mo. 398; *Fruin v. Crystal R. Co.*, 89 Mo. 397; 14 S.W. Rep. 557; *Wolff v. Campbell*, 110 Mo. 114; 19 S.W. Rep. 622; *Robinson v. United States*, 13 Wall. 363. It is true, as some of the cases just cited show, that usage can not be permitted to control the terms of a special contract by introducing something which is repugnant to or inconsistent with the contract. But it does not follow that evidence of usage can only be received where the words of the contract are ambiguous. Such evidence is often received to show that words are used in a sense different from their ordinary meaning, as in *Soutier v. Kellerman*, *supra*. Such evidence is received on the theory that the parties knew of the usage or custom, and contracted in reference to it, and in such cases the evidence does not add to or contradict the language used, but simply interprets and explains its meaning. It was therefore competent for the plaintiffs to show that in the marble trade an order for slabs of a specified thickness, prepared for use, means slabs of the stated thickness as they

come from the saw; and, the evidence being admissible, there was no error in refusing to instruct it out of the case, for that is what the refused instruction seeks to do. A custom or usage, to be of any avail, ought to be shown to be well established, but the defendant did not seek to have this matter explained by instructions. We do not know what the evidence of the alleged custom and usage was, for very little of it is preserved in the bill of exceptions. Although such evidence ought to be admitted with care, still we can not say the court erred in admitting the evidence or in refusing the instruction."

¹ *Buyck v. Schwing* (1893), 100 Ala. 355; 14 So. Rep. 48.

² *German-American Insurance Co. v. Commercial Fire Insurance Co.* (1891), 11 So. Rep. 117; 95 Ala. 469, per *McClellan, J.*: "No general usage is proved and the defendant can not be held beyond the terms of its contract dissociated from any effect of the alleged usage. *Cobb v. Lime Rock, etc., Ins. Co.*, 58 Maine, 326; *East Tennessee R. Co. v. Johnston*, 75 Ala. 596;

also, a steamboat company, in contracting, through its agent, to pay plaintiff and his assistants an agreed sum per day to clear a river of snags for navigation purposes, is not chargeable with knowledge of a local custom existing among lumbermen to pay the board of their men in cleaning out streams for the purposes of running logs, even though the agent resided in that vicinity. In order to bind the company in such a case, if the custom was not made known to its agent when the contract was made, it must appear that defendant or its agent had been engaged in a business, before the contract was made, in some manner connected with the business in which the custom is sought to be established.¹ In an action for the price of goods sold, evidence by plaintiff of its custom of dealing, and that defendant knew it, is admissible to show the meaning of the term "net" weight.²

§ 762. Agent's knowledge imputed to principal—Bill of lading.—A bill of lading must be assumed to have been made between the parties to it with reference to a settled usage of

Smith v. Rice, 56 Ala. 417; *Herring v. Skaggs*, 73 Ala. 446; *Higgins v. Moore*, 34 N. Y. 417; *Child v. Sun Mut. Ins. Co.*, 3 Sandf. 26." And see *Holmes v. Whitaker*, 23 Ore. 319; 31 Pac. Rep. 705. A Wisconsin corporation, owning a cattle ranch in Wyoming, appointed an agent in Wyoming, with power to hire and pay for necessary help, and pay current expenses with money remitted on his statement, and to care for and round up the cattle, and ship them, when fit for market, to Chicago, in care of a particular commission house. It was held, in replevin by said corporation to recover cattle purchased by defendants from the agent, that evidence that it was the custom or usage of managers of cattle companies doing business in Wyoming to sell the cattle from the ranches of such companies was inadmissible, in the absence of proof that the plaintiff had knowledge of such usage. *Milwaukee Invest. Co. v. Johnston* (1892), 35 Neb. 554; 53 N. W. Rep. 475, where

in favor of the rule that a usage may be proved if so well settled as to create a reasonable presumption that it was known to both parties the court cited *Hopper v. Sage*, 112 N. Y. 530; *Paine v. Smith*, 33 Minn. 495; *Globe Milling Co. v. Minneapolis Elevator Co.*, 44 Minn. 153; *Corcoran v. Chess*, 131 Pa. St. 356; *Brown v. Foster*, 113 Mass. 136; *Power v. Kane*, 5 Wis. 265; *Hall v. Storrs*, 7 Wis. 253; *Pickert v. Marston*, 68 Wis. 465; *Raisin v. Clark*, 41 Md. 158; *Steamboat Keystone v. Moies*, 28 Mo. 243; *Steele v. McTyer*, 31 Ala. 667; *Reynolds v. Continental Insurance Co.*, 36 Mich. 132.

¹ *Pennell v. Delta Transp. Co.* (1892), 53 N. W. Rep. 1049; 94 Mich. 247. And see also *Van Hoesen v. Cameron*, 54 Mich. 609.

² *Nonantum Worsted Co. v. North Adams Manufg. Co.* (1892), 31 N. E. Rep. 293; 156 Mass. 331. And see *McKeefrey v. Connellsville Coke Co.* (1893), 56 Fed. Rep. 212.

trade existing at the place where it was entered into, if such usage does not contradict, but is explanatory of it. In such a case, a shipper of merchandise, having knowledge of such a usage when he receives a bill of lading, is as much bound by it as he would be if it were written in the bill of lading; and, if the shipment is made by an agent of the shipper, the agent's knowledge of the usage is to be imputed to and is binding upon his principal.¹

¹ *Robertson v. National Steamship Co.* (1893), 139 N. Y. 416. Per Earl, J.: "If we read the shipping bill alone it is not entirely certain that the merchandise was to be transported from Havre to London all the way by water on board the steamer. The language in the bill of lading is, 'to be forwarded by the steamer Wolf to London,' and in a real sense goods received on board the Wolf may be said to have been forwarded by that steamer to London by carrying them to Southampton, and then sending them by rail to London. The bill seems to provide for a carriage upon land, as it exempted the defendant from loss or injury from perils by land transportation of any kind, and the only land transportation upon this route was from Southampton to London. Thus it appears that the shippers and the defendant, when they made the contract, contemplated not only a carriage upon water, but upon land also. But when the circumstances surrounding the making of the contract for the carriage are considered, it becomes entirely plain that the parties contemplated a contract for a carriage by the Wolf to Southampton, and thence by rail to London. The London and Southwestern Railroad Company had a regular line of transportation from Havre to London, by steamer to Southampton and thence by rail to London, and for that purpose they had three vessels, making three trips weekly between those points, of

which the Wolf was one. Those vessels never went further than Southampton, and the London and Southwestern Railroad Company never carried any goods by water to London, and neither did the defendant, and the business had been carried on this way for many years, and the mode of doing it was notorious and well known. It was advertised in the newspapers at Havre, and was specified in way bills used in Havre by the agents of the London and Southwestern Railroad Company in the transaction of its business. The mode of doing the business was such, and so open and notorious, that it must have been known generally at Havre, and particularly by persons there dealing with the agents of the defendant and of the London and Southwestern Railroad Company. It must be assumed that the contract between the parties was made with reference to this well known usage, and it is binding upon the shippers just as if written in the bill of lading. In this particular case the proof of the usage does not contradict the bill of lading, but is simply explanatory of it. (*Hostetter v. Gray*, 11 Fed. Rep. 179; *Lowry v. Russell*, 8 Pick. 360; *Phillips on Insurance* [5th ed.], § 980.) In *Lowrey v. Russell*, it was held that a 'bill of lading, like other contracts, is to be construed according to the intention of the parties. Usage of trade is always presumed to be within the knowledge of the parties, and their

§ 763. How usage may be proved.—Custom or usage is a matter of fact, not of opinion. It is proved, not by the opinions of witnesses, but from facts within their knowledge, obtained by observation of what is practiced by themselves and others in the trade or business to which it relates.¹ It is no

contracts are supposed to be made with reference to it.' But it is said that the owner of this merchandise was J. Kalmes, Jr., living at Ham-
burgh; that it does not appear that he made the contract at Havre; that he can not be supposed to have known the usage, and that he can not, therefore, be bound thereby, and that as to him it can not be read into the contract of transportation. There are four complete answers to this position: (1) If Kalmes was the owner and shipper of this merchandise it was incumbent upon him to show that he was ignorant of this notorious and uniform usage. *Johnson v. De Peyster*, 50 N.Y.666. (2) It does not appear that he owned this merchandise at the time the contract for transportation was made. In the bill of lading Isabelle and Munster are described as the shippers from whom the merchandise was received, and with whom the contract for its transportation was made. They did not contract as agents or, so far as the record shows, disclose any agency. After the bill of lading was issued to them they indorsed it to another party and that party indorsed it to Kalmes, and it appears by the invoice of the goods obtained from the custom-house and proved upon the trial, that the plaintiff bought the merchandise of Kalmes at Ham-
burgh, on the 12th of June, four days after the bill of lading was issued to Isabelle and Munster. It appears, therefore, *prima facie*, that Isabelle and Munster were the owners of the goods, and that Kalmes became the purchaser from them by indorsement

and assignment of the bill of lading. (3) But if Isabelle and Munster were not the owners they made the contract as principals, disclosing to the defendant no agency, and giving up no principal. Therefore, the defendant has the right to treat them as principals, and the contract, as to its force and effect, must be construed precisely as if they were principals, and not agents. But, if we assume, which is the only other alternative, that they were the agents of Kalmes and made the contract really for his benefit, he being the owner of the merchandise, then he is affected by the same knowledge which they possessed, and if the law attributes knowledge of this usage to them at the time they made the contract for their principal, then the same knowledge must be attributed to him, and binds him. Therefore, in any view that can be taken of this case, if the parties when they entered into this contract of carriage did it with knowledge of this uniform and notorious usage, then the owner or owners of the merchandise and the plaintiff who claims under them, were bound by it."

¹ *Haskins v. Warren*, 115 Mass. 514. Usage must be proved by evidence of facts, not by mere speculative opinions, and by witnesses who have had frequent and actual experience of the usage, and who do not speak from report alone, and they must speak as to the course of the particular trade. 2 Greenleaf on Evidence, §§ 248, 251, 252, citing. As to the difference between a local and general usage in respect to the sufficiency of the proof

valid objection to the competency of a witness that his knowledge is derived from his own business, if the knowledge thus derived is sufficiently extensive to enable him to testify to the fact of usage.¹ A person who has purchased and shipped potatoes from a certain island, and can testify to a custom in shipping potatoes therefrom from his own experience and his observation of the practice of others for three years, as well as one who has lived on the island for ten years, raising and selling potatoes during that time, is competent to testify to such custom.² Although the existence of a usage may be established by the uncontradicted testimony of one witness, when he is explicit as to its duration, certainty and notoriety, the testimony of an insurance broker as to the authority of agents in a certain locality to make binding preliminary contracts, which is based wholly on the practice of his own office, is not sufficient to go to the jury.³ It has also been held that

required, see *Booth, etc., Granite Co. v. Baird* (1895), 84 Hun, 452; 34 N. Y. Supl. 392; *Walls v. Bailey*, 49 N. Y. 464.

¹ *Hamilton v. Nickerson*, 13 Allen, 351.

² *Holmes v. Whitaker* (1892), 31 Pac. Rep. 705; 23 Ore. 319.

³ *Greenwich Ins. Co. v. Waterman* (1893), 54 Fed. Rep. 839, per Taft, J.: "It is well settled that a usage or custom, to affect the construction of contracts, or to extend the apparent authority of agents beyond their actual authority, must be uniform, notorious and well defined. *Black v. Ashley*, 80 Mich. 90; 44 N. W. Rep. 1120; *Reynolds v. Continental Insurance Co.*, 36 Mich. 131; *Schurr v. Savigny*, 85 Mich. 144; 48 N. W. Rep. 547; *Stringfield v. Vivian*, 63 Mich. 681; *Lamb v. Henderson*, 63 Mich. 302; 29 N. W. Rep. 732; *Bowling v. Harrison*, 6 How. 248; *United States v. Buchanan*, 8 How. 83. The evidence of usage shown in the record is not at all satisfactory, and does not fulfill the requirements above named. In answer to a leading question, Ralph does say

that there was a well-defined usage in Detroit that applications for insurance to take effect at once, if accepted by local agents, bound the company; but his cross-examination clearly discloses that his evidence is based rather on his opinion of what the local agent's authority ought to be than the knowledge that the existence of such authority was recognized, notoriously and uniformly, in Detroit. He virtually admits that his knowledge of agents' authority is largely confined to his own office. His opinion of the usage is based on the fact that when an application is filed for insurance to date from the day of the application, a policy is subsequently returned to the applicant dated accordingly. It has been held that such action by the company is not a recognition of the right of the local agent to bind the company by a preliminary contract, unless it has been brought home to the company that before issuing the policy the agent has attempted so to do. *Morse v. St. Paul, etc., Insurance Co.*, 21 Minn. 407."

the rules of the chamber of commerce established for the purpose of maintaining uniformity in commercial usages of the place are admissible to show the existence or non-existence of a particular usage in that place.¹

§ 764. The same subject continued.—But a person is not competent to testify as to an alleged custom of trade, unless he is either engaged in such trade, or it is shown that he knows what the custom is.² A custom is not shown to be established where the testimony of the witnesses who aver that the custom exists is met by an almost equal number of witnesses, with equal facilities of knowing, who testify to never having heard of such custom.³ Where a witness has testified that the striking out of the name in a bank pass-book was not, in his opinion, done at the bank, it is incompetent to prove what the custom of the bank was in the matter.⁴

§ 765. Personal customs or habits.—Where it is shown to be the general custom for local agents selling mill machinery to warrant the same, the buyer may recover from the principal for a breach of the agent's warranty.⁵ In a case of doubt as to what a person has done, it may be considered more probable

¹ *Kershaw v. Wright*, 115 Mass. 361.

² *Kugelman v. Levy* (Com. Pl. 1893), 24 N. Y. Supl. 559.

³ *The Harbinger* (1892), 50 Fed. Rep. 941. The evidence as to an alleged custom of railroad companies operating connecting lines, to receive from each other and transport freight in the cars in which it was tendered, showed that, except where the cars of the receiving company were all in use, or where the freight would suffer by being transferred, the question whether the freight should be so received or should be transferred to the cars of the receiving company was, as a general rule, dependent upon contracts between the companies, or upon circumstances, such as the condition and equipment of the cars and the road over which they were to be

transported, the determination resting with the receiving company, and the amount received in one way or the other constantly varying. It was held that no controlling custom was shown. *Oregon Short Line R. Co. v. Northern Pac. R. Co.* (1892), 51 Fed. Rep. 465.

⁴ *O'Brien v. Weiler* (1893), 68 Hun, 64; 22 N. Y. Supl. 627.

⁵ *Larson v. Aultman Co.*, 86 Wis. 281; 56 N. W. Rep. 915. In *Eastern Granite Co. v. Heim*, 89 Iowa, 698; 57 N. W. Rep. 437, Rothrock, J., said: "Evidence that it is usual to use the Latin letter in German inscriptions on granite monuments is admissible to show compliance with a contract for erection of a granite monument, inscriptions thereon to be in German."

that he has done what he has been in the habit of doing than that he has acted otherwise; hence, the particular habit or custom of an individual may be shown where there is conflicting evidence as to whether he has or has not done some act material to the issue.¹

§ 766. Usage as to authority of insurance agents.—A well-defined local usage, whereby marine insurance agents can make binding contracts to take effect on the day of application, without consulting their superiors, is presumably known to a foreign company engaged for years in insurance business at the place where the usage obtains, and is sufficient to prevail over the private instructions of such agents when the insured is in ignorance thereof, and is without notice of facts sufficient to put him upon inquiry.² An offer to show a general custom by which general agents of life insurance companies exercised an authority to grant short credits on first premiums, without offering to show that the custom prevailed in the issuance of a policy which provided that it should not go into effect until the premium had actually been paid, and

¹ *Denver Tramway Co. v. Owens*, 20 Colo. 107; 36 Pac. Rep. 848; *Lawson on Usages and Customs*, § 46; *State v. Manchester & L. R. Co.*, 52 N. H. 528.

² *Greenwich Ins. Co. v. Waterman* (1893), 54 Fed. Rep. 839, per Taft, J.: "If such a definite usage in respect to local agents of foreign insurance companies had been proved the Greenwich Insurance Company would have been charged with notice of it, and by establishing Ward as its local agent the company would have given him apparent authority to bind it in accordance with that usage, if reasonable. *Goodenow v. Tyler*, 7 Mass. 36; *Fisher v. Sargent*, 10 Cush. 250; *Graves v. Legg*, 2 Hurl. & N. 210; *Mechem on Agency*, § 281. The evidence discloses that the Greenwich Insurance Company had been doing a marine insurance business in De-

troit for 10 years at least, and it could be fairly presumed that the company was familiar with any local usage obtaining there in the insurance business. If, as testified by several witnesses, millions of dollars of insurance were placed on the day of sailing, it would be extraordinary if vessel-owners would consent to an arrangement by which no insurance should be binding on their vessels until time enough had elapsed after the day of sailing for their applications to be forwarded to the general agents of the insurance companies at distant points, and by them approved, with the arbitrary right thus secured to the insurance companies, in case of a loss meantime, to reject the application. A usage by which local agents could make binding preliminary contracts for the company would seem to us, therefore, to be reasonable."

expressly stated that the agent could not waive the stipulation, is properly rejected in the case of such a policy.¹

§ 767. Custom construed—Charter-party—Demurrage.—The construction of a custom as to the discharge of merchandise from a vessel, which affects the payment of demurrage for a delay of the vessel, is not to be governed by another usage in relation to the sale of the merchandise; thus, in a charter-party the words “to discharge with customary dispatch, cargo to be * * * discharged according to the custom of the port,” do not include a custom whereby all cargoes of fruit are sold at auction by one firm, not more than one cargo being sold in one day, and no cargo being discharged until it has been thus sold, since such custom manifestly has its origin in the sale, and not in the discharging of cargoes; and for demurrage caused by such a custom the cargo is liable.² A custom of the

¹ *Smith v. Provident Assurance Society* (1895), 65 Fed. Rep. 765. And see also, *Greenwich Insurance Co. v. Waterman* (1892), 54 Fed. Rep. 839.

² *Milburn v. Thirty, etc., Boxes Oranges and Lemons* (1893), 57 Fed. Rep. 236, *Lacombe, J.* “There is no question of fact in this case. The existence of the custom set up in defense is conceded, and the only point to be decided is whether it is imported into the contract between the parties by the language they have used. The learned district judge did not discuss this point in the brief memorandum he filed with his decision. He had precisely the same custom before him, however, in the case of *Liverpool, etc., Steam Co. v. Suiter*, 17 Fed. Rep. 695, and there held that the existence of such usage of trade did not affect the right of the ship-owner to insist upon reasonable promptness in discharging; that it was ‘unreasonable, and contrary to public policy, to permit the time of discharging a ship of her cargo to depend upon the ability of a single auction house, in the accumulation of business and of other engagements, to

effect a sale of such cargo for the owners thereof.’ The question whether a clause in the charter-party providing for ‘discharge with customary dispatch’ was affected by a substantially similar custom at the port of New Orleans, where it was the practice of fruit dealers to receive their fruit from the vessels no faster than they could sell it at the wharves, was also carefully considered by the district and circuit courts in the eastern district of Louisiana. *Lindsay v. Cusimano*, 10 Fed. Rep. 302; 12 Fed. Rep. 503, 505. It was therein held as follows: ‘The obligations of the owners and charterers, where the charter-party is silent as to time to be occupied in discharging, are reciprocal; each shall use “reasonable dispatch.” This obligation is here qualified by changing “reasonable” into “customary” dispatch. This enlarges the source of delay, and makes it include all those usages at the port of delivery which the carrier can not control—such as the working hours, the order in which vessels must come up to the wharf, the observance of holidays,

port of Mobile, by which vessels taking on additional cargo at a deeper anchorage bear the cost of lightering, although not so notorious or so acquiesced in as to have the force of law, is binding on a vessel whose charter-party provides that the custom of the port is to be observed in all cases not especially provided for.¹

the allowance of three days to obtain a berth, provided one can not be sooner obtained; but here their force stops. They can not be held to include any delay which is purely voluntary on the part of the charterers, although such delay is customary in the fruit trade. The phrase must be confined in its meaning to excuse the parties for want of opportunity by reason of the custom prevailing at the port. This is the substance of the decision in *Kearon v. Pearson*, 7 Hurl. & N. 386. There the question was as to the meaning of the words "usual dispatch" as applied to loading. Martin, B., before whom the case was tried, whose ruling was affirmed by all the judges, says, page 387: "They meant that the vessel should be loaded with the usual dispatch of persons who have a cargo ready at Liverpool for loading." Here these words "customary dispatch" meant the usual dispatch of persons who are ready to receive a cargo, and exclude all customs in accordance with which these charterers might claim the right to decline to receive, simply because it was more advantageous to postpone.

* * * Delivery should take place with dispatch, limited or qualified by the customs prevailing at the port of delivery, which created barriers not under the control of the party who here urges them.' *Lindsay v. Cusimano*, 10 Fed. Rep. 303. The distinction thus pointed out is a sound one. The custom here set up to sell only one fruit cargo a day, and none on Saturdays, is not an outgrowth of the business of discharging ships, but rather of

the business of selling their cargoes. It is manifestly intended to prevent a glut in the market, to keep up prices by holding back newly-arrived fruit till the earlier arrivals have been absorbed by the consumer. It does not interfere with a discharge of the ship, as did the customs as to hours and times of labor, as to routine of access to a single elevator, as to a second change of berth, which have been held applicable in the cases cited by the appellant. The consignee could have discharged this cargo in seasonable weather on January 2 and 3, removed it from the dock and warehoused it; and, when the only excuse he gives for not doing so is that, by the custom of his trade, he could not sell it in the ordinary way to consumers until other fruit had been first so sold, he may not turn the ship into a temporary warehouse to hold his goods until he finds a market for them. We do not determine whether the custom of selling fruit by a single firm of auctioneers, and in restricted quantities, which seems to have existed many years, is or is not reasonable, but do hold it is not the kind of custom which the use of the phrase 'customary dispatch in discharging' imports into the contract of affreightment between the parties, being concerned, not with the business of discharging, but with the business of selling, and not creating any impediment to a discharge with dispatch, which the charterer would not have overcome by the use of mere ordinary diligence."

¹ *Nordaa v. Hubbard* (1892), 48 Fed. Rep. 921.

§ 768. Relating to brokers.—A person who employs a broker must be supposed to give him authority to act as other brokers act, whether he himself is or is not acquainted with brokers' rules.¹ A person who deals in a certain market must ordinarily be taken to deal according to the custom of that market, and this is the rule, although he deal through an agent or broker.² Where a broker represents that he has certain stock in his possession, when, in fact, he has no such stock, and a sale is closed on the faith of this representation, in an action to recover the price paid, evidence of a custom among brokers to sell stock in their own name, and to become personally liable to perform the contract, is inadmissible, for the alleged custom is irrelevant to the actual issue.³ And so evidence of the custom of brokers, when collateral security is put up as a margin, and the account becomes reduced sufficiently to jeopardize it, to advertise and sell the collateral, and charge the customer with the balance, is properly excluded where the broker sells his customer's stocks upon the latter's express order, and not to protect himself from a shrinking margin.⁴ A custom of dealers in bonds and stocks, whereby an option to sell at the end of a given period expires on the last day of such period, does not apply to the case of an option to demand a rescission of the sale of bonds and stocks after their obligatory retention for a year by the purchaser.⁵

§ 769. Banking custom as to collections—Evidence.—The custom of banks in regard to making collections and remitting therefor is so well established, and has become so universally known, that knowledge thereof must be imputed to the courts; and they are therefore required to take judicial notice of the fact that a bank, when it makes a collection for a foreign correspondent, never, unless specially directed so to do, remits the specie collected, but takes the specie to its own use, and

¹ *Sutton v. Tatham*, 10 Ad. & El. 27; 114; 19 S. W. Rep. 622. And see also, *Greaves v. Legg*, 11 Exch. 642.

² *Bayliffe v. Butterworth*, 1 Exch. 425.

³ *Wolff v. Campbell* (1892), 110 Mo.

⁴ *De Cordova v. Barnum* (1892), 130 N. Y. 615; 29 N. E. Rep. 1099.

⁵ *Weld v. Barker* (1893), 153 Pa. St. 465; 26 Atl. Rep. 239.

sends its draft or certificate of deposit to such correspondent.¹ And where plaintiff sued the receiver of a bank for the amount of a draft collected by it, and claimed that the bank held the amount in trust for plaintiffs at the time of its suspension, it was held to be a reversible error for the court below to exclude evidence of the general banking custom above mentioned.² A banking custom, however, to be binding must be general as to place, and not confined to a particular bank, and must have become notorious.³

§ 770. Excluding custom by notice—Pleading custom.—In an action against a warehouse company for the value of tobacco destroyed by fire while deposited with it, where plaintiff alleged a custom that warehousemen should insure their customers' tobacco, and that plaintiff deposited his tobacco with defendant with reference to such custom, it is proper to charge that, if defendant notified plaintiff that the tobacco was held at the warehouse at plaintiff's risk, and plaintiff acquiesced therein, the finding should be for defendant, although there was such a custom as was alleged.⁴ In the absence of evidence that the contract between an engineer and his employer prohibited the engineer from employing his assistants, evidence is com-

¹ Morse on Banks and Banking, §248; *Jockusch v. Towsey*, 51 Texas, 129; *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Marine Bank v. Rushmore*, 28 Ill. 463; *Tinkham v. Heyworth*, 31 Ill. 519. In *Fowler v. Brantly*, 14 Pet. 318, the court laid down the following rule in respect to the binding force of banking customs as to the discount of notes: "The known customs of the bank and its ordinary modes of transacting business, including the prescribed forms of notes offered for discount, were matters of proof and entered into the contract; and the parties to it must be understood as having governed themselves by such customs and modes of doing business; and this whether they had actual knowledge of them or not, and it was especially the duty of all those dealing for

the paper in question to ascertain them if unknown. Such is the established doctrine of this court as laid down in *Renner v. Bank of Columbia*, 9 Wheat. 581; *Mills v. United States Bank*, 11 Wheat. 431; *Bank of Washington v. Triplett*, 1 Pet. 25."

² *Bowman v. First Nat. Bank* (1894), 9 Wash. 614; 38 Pac. Rep. 211.

³ *Adams v. Otterback*, 15 How. 539, per McLean, J.: "It must be the rule of all the banks of the place, or it can not consistently be called a usage. If every bank could establish its own usage, the confusion and uncertainty would greatly exceed any local convenience resulting from the arrangement."

⁴ *Western Warehouse Co. v. Hayes* (Ky. 1895), 29 S. W. Rep. 738.

petent to show that it was the custom for engineers to hire their assistants, in order to establish the relation of master and servant between the engineer's employer and his assistant.¹ A guarantor of the payment of freight bills, which may become due to a railroad company from a certain shipper, is not relieved from any part of his liability because the company failed to enforce against such shipper its custom of collecting its bills weekly.² A custom must be pleaded, or evidence of it is not admissible to make it a part of the contract sued upon.³

¹ *White v. San Antonio Waterworks Co.* (Texas App. 1895), 29 S. W. Rep. 252, James, C. J.: "We are of opinion that there was evidence from which the jury might have found that Willis was an employe of the Waterworks Company in respect to the pump house and machinery, and, there being no evidence of a contract which excluded the power of this employe to employ assistants, it was competent for plaintiff to show that his employment carried with it this power, by proving that by

a universal custom men employed as he was exercised the power. *Lawson on Usages and Customs*, 371; *Moore v. Kennedy*, 81 Texas, 144; 16 S. W. Rep. 740; *Mechem on Agency*, § 281; *Harrell v. Zimpleman*, 66 Texas, 292; 17 S. W. Rep. 478; *Birmingham, etc., Manufacturing Co. v. Gross*, 97 Ala. 220; 12 So. Rep. 36."

² *Philadelphia R. Co. v. Snowdon*, 166 Pa. St. 263; 30 Atl. Rep. 1129.

³ *Anderson v. Rogge* (Texas App. 1894), 28 S. W. Rep. 106.

CHAPTER XXII.

CHANGE AND TERMINATION.

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| § 771. Ending or changing contracts by conduct. | § 780. Effect of parol modification of written contract. |
| 772. Election between ending and enforcing contract—Right to abandon. | 781. Parol extension or waiver of time of performance. |
| 773. Effect of death—Of destruction of subject of contract. | 782. Explaining written receipt by parol evidence. |
| 774. The same subject continued—Exceptions. | 783. Where time of the essence—Abandonment — Waiver of condition. |
| 775. Revoking agency by death. | 784. Writing not to be varied by contemporaneous oral agreement. |
| 776. Varying or terminating written by subsequent oral contracts. | 785. Cases where contracts have been held not terminated or modified by parol. |
| 777. As to the consideration of the parol contract. | 786. Novation. |
| 778. Writing ended by parol although not thus to be varied—Statute of frauds. | 787. The same subject continued. |
| 779. Terminating contracts under seal by parol. | 788. Breaking contract of sale by sale to another. |

§ 771. Ending or changing contracts by conduct.—The evidence that a written contract has been abandoned and terminated may be supplied by the conduct and acts of parties, as well as by their words.¹ A contract between plaintiff and defendant provided that defendant might terminate the contract at any time upon five days' notice, and, in such case, plaintiff should be entitled to payment for work done, and also to a certain sum as liquidated damages. It was held that a finding that the contract had been terminated by defendant was supported by a finding of fact sustained by proof that defendant ordered plaintiff to discontinue work, and refused thereafter to allow him to continue.² Where a contract pro-

¹ *Peeples v. McTeer* (1891), 35 S. C. 63 Hun, 628; 17 N. Y. Supl. 714. And see also, *Porter v. Swan*, 17 N. Y. Supl. 610; 14 S. E. Rep. 828.

² *Curnan v. Delaware R. Co.* (1892), 351.

vided that a corporation should employ a certain patentee for ten years, subject to termination by either party on one year's notice, or by the patentee's death or inability to act, and that, in the event of the contract's termination, the corporation might use his patents on payment of a royalty, it was held that a wrongful discharge of the patentee, although a breach of contract, did not terminate the contract so as to render the corporation liable to pay the royalty.¹ An agreement not to sell stock in a corporation without giving the other party notice provided that it should terminate when either of the parties thereto should have parted with his interest. It was held that, where a party to the agreement indorsed on her certificate of stock a transfer of the stock to her sons, with the knowledge of the other parties to the agreement, and the transfer was noted on the stock book of the corporation, the agreement was terminated, although no new certificate of stock issued to the sons.² In an action for milk sold and delivered, defendant counter-claimed for damages sustained by reason of plaintiff's failure to deliver at the place agreed. It appeared that defendant received the milk at a substituted locality for five months without objection, and renewed his contract for another year without dissent as to the place of delivery. It was held that defendant's course constituted an implied assent to a modification of the agreement, and that the objection that the change in the contract was invalid for want of consideration was not tenable.³ Contracts which are binding upon a party upon the condition that others also sign become operative as soon as the others sign, and, one having signed, can not revoke it after it becomes operative without

¹ *Miller v. Union Switch Co.* (1892), 132 N. Y. 562; 29 N. E. Rep. 964; *Johnson v. Union Switch Co.*, 129 N. Y. 653.

² *In re Argus Co.* (1893), 138 N. Y. 557, 575; 34 N. E. Rep. 388.

³ *Gibson v. Donnelly* (1891), 13 N. Y. Supl. 808. And see *Tallman v. Earle* (1891), 13 N. Y. Supl. 805. Where the parties to an ejectment suit performed all the conditions of the verdict there-

in, and for about forty years they, and those claiming under them, held possession and conducted themselves in accordance with the adjustment of the boundaries of their land as set forth in such verdict, it was held that their rights and privileges under an anterior contract had ceased. *Bascom v. Cannon* (1893), 158 Pa. St. 225; 27 Atl. Rep. 968.

the consent of the others bound with him, and as to whom the contract is binding because of his obligation.¹

§ 772. Election between ending and enforcing contract—Right to abandon.—By bringing an action or taking legal steps to enforce a contract, a party elects not to rescind the contract on account of anything then known to him, and such election is conclusive against him.² Where a party to whom several notes are payable, under a contract, gives written notice that he “terminates and rescinds” the contract because of the non-payment of some of the notes, but at the same time returns only the notes that are not yet due, it has been held that the notice should be construed as terminating the contract as to the future only, and not as rescinding it so as to cut off the accrued rights on the notes that are due, and that in such a case the word *rescind* is to be regarded as mere tautology and synonymous with the word *terminate*.³ Where one of the parties to a written executory contract renounces and refuses to perform it, the other party may, at his election, act upon the assumption of a breach before the time of performance arrives and treat it as abandoned for the future.⁴ But, on the other hand, he may elect to keep the contract in force for the purpose for which it was made, and in such case his own obligation, as well as that of the other party, will continue until the time of performance.⁵ Where a person agrees to sell the fur-

¹ *Current v. Fulton*, 10 Ind. App. 617; 38 N. E. Rep. 419; *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6; 21 N. E. Rep. 981.

² *Conrow v. Little*, 115 N. Y. 387, per Danforth, J.: “By bringing the first action after knowledge of the fraud the plaintiffs waived the right to disaffirm the contract and the defendants may hold them to their election. The principle applied in *Equitable, etc., Foundry Co. v. Hersee*, 103 N. Y. 25, and *Hays v. Midas*, 104 N. Y. 602, require this construction.”

³ *Hurst v. Trow's Printing Co.*, 30 Abb. N. C. 1.

⁴ *Windmuller v. Pope*, 107 N. Y. 674.

⁵ *Bernstein v. Meech* (1891), 130 N. Y. 354, per Bradley, J.: “Whatever view may have been taken of the defendants' right to treat the contract as at an end, they disposed of that question by their letter to him. By this it appeared that the defendants elected to keep the contract in force. This operated alike upon the rights of both parties and the plaintiff was justified in so understanding it.” *Johnstone v. Milling*, L. R. 16 Q. B. D. 460; *Frost v. Knight*, L. R. 7 Exch. 111; *Zuck v. McClure*, 98 Pa. St. 541.

niture in his hotel at an appraisement to be made by a third party, and, while present himself, refuses to allow the purchaser to be present, the latter has the right to abandon the agreement.¹

§ 773. Effect of death—Of destruction of subject of contract.—The general doctrine is, that when a party voluntarily undertakes to do a thing without qualification, performance is not excused because, by inevitable accident or other contingency not foreseen, it becomes impossible for him to do the act or thing which he agreed to do.² It is, however, now well settled that when performance depends on the continued existence of a given person or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation. Executory contracts for personal services, for the sale of specific chattels, or the use of a building, are held to fall within this principle.³ The cases just referred to are not exceptions to the rule that contracts voluntarily made are to be enforced, but the courts, in accordance with the manifest intention, construe the contract as subject to an implied condition that the person or thing shall be in existence when the time of performance arrives.⁴ Thus an obligation in a contract providing for the organization of a corporation, and that defendant shall have the management of it, and in consideration shall guaranty plaintiff a dividend of not less than seven per cent. per annum for seven years, terminates *prima facie* with the dissolution of the corporation.⁵ It is a general rule, also, that if,

¹ *Tibbetts v. Sartwell* (N. H. 1893), 29 Atl. Rep. 411. See also, *Hook v. Philbrick*, 23 N. H. 288.

² *Lorillard v. Clyde* (1894), 142 N. Y. 456; 37 N. E. Rep. 489, per Andrews, C. J.. "This doctrine protects the integrity of contracts, and one of the reasons assigned in its support in the early case of *Paradine v. Jane*, Aleyn, 26, is that, as against such contingencies, the party could have provided by his contract. See *Harmony v. Bingham*, 12 N. Y. 99; *Ford v. Cotes-*

worth, L. R. 4 Q. B. 127; *Jones v. United States*, 96 U. S. 24."

³ *Dexter v. Norton*, 47 N. Y. 62; *People v. Globe Mut. Life Ins. Co.*, 91 N. Y. 174; *Taylor v. Caldwell*, 113 E. C. L. 826.

⁴ *Lorillard v. Clyde*, 142 N. Y. 456.

⁵ *Lorillard v. Clyde*, 142 N. Y. 456, per Andrews, C. J.: "The question whether the obligation of the defendants under their guaranty continued in force as to the part of the seven years unexpired at the time of the

after a contract is made, the law interferes, and makes subsequent performance impossible, the party is held to be ex-

dissolution of the corporation, in the absence of any responsible agency of either party for the causes which led to the dissolution, must be determined by the intention of the parties as ascertained from the language of the contract, and, if ambiguous, from such language and the surrounding circumstances. It is incontrovertible that the right to manage the business of the corporation and to earn and to receive the commissions on freight were the considerations upon which the guaranty rested. The plaintiff conceded these rights to the Clydes for this equivalent. The defendants could receive the benefits of the contract only in case the corporation should continue in being during the running of the guaranty. The death of the corporation would terminate their management; prevent their earning commissions; the business would end, and the court, in administering the assets, would return to each party his proportion of the capital remaining for distribution. The death or dissolution of the corporation would withdraw all the capital invested, so far as it remained, and take away for the future the whole consideration upon which the guaranty was based. There would thereafter be no corporation earning or capable of earning dividends, and nothing left upon which the obligation to pay them could be predicated. It must be conceded that it is difficult to draw the line and to determine the exact limitations of the principle. When the executory contract relates to specific chattels, and the subject-matter is destroyed without fault of the party, the implied condition arises, and excuses performance. But where the contract is based on the assumed existence and continuance of a certain

condition, or upon the continuance of a subject-matter which, however, is not the direct object of the contract, is the principle in such cases excluded? The present case illustrates what we have in mind. The contract in question was not with the corporation whose life was extinguished by the judgment of dissolution. But the guaranty assumed that the corporation would continue in existence during the seven years period. The liability which the defendants assumed was in consideration of the benefits which might accrue to them from the management of the transportation business of the corporation during that period. Upon the assumption that the death of the corporation was brought about without their fault, were they thereafter bound? Is the doctrine of implied condition less applicable than it would be if the contract had been between the defendants and the corporation? If, in the one case, the contract, so far as it was unexecuted, would be terminated, did not the happening of the same event terminate the engagement of these parties, based on the assumed continuance of the corporation in life? There is, in the present case, we think, an element which strengthens the conclusion we have reached, that the obligation of the contract terminated *prima facie* with the dissolution of the corporation. There is something more than an implied and wholly unexpressed condition that the corporation should continue in life during the seven years. It is the fair construction of the language of the contract itself. The contract was not unilateral. It contains mutual stipulations. These mutual stipulations, by their terms, look to the continuance of the corporation, and the

cused.¹ The rule just laid down is the more readily applied where such interference of the law is at the suit of the opposing party. Thus where the corporation above referred to was dissolved in an action brought nominally by the people, but really instituted by plaintiff, on the ground of technical breaches of corporate duty, in which plaintiff himself participated, and which would have been corrected if made known to the corporation, and which plaintiff was under no obligation to the state to disclose, the act of plaintiff, as between the parties, must be deemed to have been the cause of the dissolution, and defendant is not estopped to set it up as a defense.²

§ 774. The same subject continued.—Exceptions.—Where the contract with deceased is executory, and the personal representative can sufficiently execute all that the deceased could have done, he may do so and enforce the contract.³ Accordingly, if a purchaser orders goods and dies before the time of delivery, his executors must receive and pay for them, although the particular purpose of the purchase was defeated by the purchaser's death.⁴ A contract for hiring for a year to do ordinary farm work is not terminated by the employer's death before the year expires, and, where the employe continues to do the work without objection by the executors, he may recover of them the full contract price for the year's work when completed.⁵ But, in such a case, the servant's death would operate to end the contract and excuse its performance, as the servant alone could perform it, and his representatives could recover for services performed.⁶

mutual obligations into which the parties entered are qualified by this understanding."

¹ Jones v. Judd, 4 N. Y. 412.

² Lorillard v. Clyde (1894), 142 N. Y. 456.

³ Parsons on Contracts, 131.

⁴ Martin v. Hunt, 1 Allen, 418.

⁵ Lacy v. Getman, 35 Hun, 46.

⁶ Wolfe v. Howes, 20 N. Y. 197; Spalding v. Rosa, 71 N. Y. 40, per Allen, J.: "Contracts for personal serv-

ices are subject to this implied condition, that the person shall be able at the time appointed to perform them; and if he dies, or without fault on the part of the covenantor becomes disabled, the obligation to perform is extinguished. People v. Manning, 8 Cow. 297; Jones v. Judd, 4 N. Y. 412; Clark v. Gilbert, 26 N. Y. 279; Gray v. Murray, 3 Johns. Ch. 167."

§ 775. Revoking agency by death.—The power of an agent to collect and receive rents falling due to his principal ceases upon the death of the latter, unless the agency is coupled with an interest, and payment made thereafter to the agent does not bind the estate of the principal, although made in ignorance of such death. And the fact that the agent is entitled to commissions on rents collected does not give him such an interest as will continue his power after death of his principal; the interest which will have this effect must be an interest in the thing itself, that is, in the property or the rents as such.¹ There would seem to be an incongruity in the law of agency with respect to the effect of a revocation of the agent's powers by the act of the principal himself and a revocation produced by his death, as, in the former case, the revocation does not affect third parties, dealing with the agent in good faith, without notice.²

§ 776. Varying or terminating written by subsequent oral contracts.—In Indiana the rule has been laid down that written contracts may be modified or rescinded by parol at any time after their execution.³ Thus, in an action against a railroad company for breach of a contract to transport cattle, evidence of conversations between plaintiff and defendant is admissible to prove that a written contract for transportation was abandoned and the shipment made under a subsequent parol contract.⁴ Par-

¹ *Farmers' Loan Co. v. Wilson* (1893), 139 N. Y. 284, per O'Brien, J.: "The rule is well settled by authority that the power of an agent to collect and receive payment of rents falling due to his principal, when such power is not coupled with an interest, terminates and ceases upon the death of the principal, and that payment made thereafter to the agent does not bind the estate of the principal, though the payment be made in ignorance of the principal's death. *Weber v. Bridgman*, 113 N. Y. 600. The rule seems to have originated in the presumption that those who deal with an agent knowingly assume the risk that his authority may be terminated by

death without notice to them. The case of an agency coupled with an interest is made an exception to the rule. *Grapel v. Hodges*, 112 N. Y. 419; *Hunt v. Rousmanier*, 8 Wheat. 174, 204."

² *Claffin v. Lenheim*, 66 N. Y. 301; *Williams v. Birbeck*, Hoff. Ch. 359; *Blake v. Garwood*, 42 N. J. Eq. 276; *Wharton on Agency*, §§ 99-104; *Story on Agency*, § 470.

³ *Toledo, etc., R. Co. v. Levy* (1890), 127 Ind. 168; 26 N. E. Rep. 773, per Coffey, J., citing: *Billingsley v. Stratton*, 11 Ind. 396; *Ward v. Walton*, 4 Ind. 75; *Coyner v. Lynde*, 10 Ind. 282.

⁴ *Toledo, etc., R. Co. v. Levy*, 127 Ind. 168.

ties who have made written contracts may vary them afterwards, as much as they please, by parol, if the nature of the agreement is not such that the law requires them to be in writing.¹ Where plaintiff agreed to sell logs to defendant, to be delivered at defendant's mill, and subsequently they agreed that those then in the river should be accepted where they were, with a certain reduction from the price, and defendant took possession under such arrangement, the second contract abrogates the first, and is to be treated as though there had been no other contract.² Where a written building contract was so vague and indefinite that most of the details of the work were left unprovided for, and had to be supplied orally as the work progressed, in order to carry it out satisfactorily to the parties, it was held not improper to instruct the jury that they might regard the written contract as altered and annulled by the conversations between the parties.³ A provision in a building contract that no new work or work of any kind shall be considered as extra, unless a separate written estimate for the same, before it is commenced, shall be submitted by the contractor and the signature of the owner be obtained to it, may be subsequently waived by the parties by parol.⁴

§ 777. As to the consideration of the parol contract.—Where the parties had entered into a written contract for the erection and furnishing of a mill, parol evidence of a subsequent conversation between the parties, tending to show that, in and by such conversation, it was arranged and agreed that the party who built the mill would accept the obligation of a corporation to be subsequently organized, in the place of that of the original promisor, and substitute the one for the other,

¹ *Barton v. Gray*, 57 Mich. 622; 24 N. W. Rep. 638. See also, *Seaman v. O'Hara*, 29 Mich. 66; *Westchester Insurance Co. v. Earle*, 33 Mich. 143; *Roger Williams Insurance Co. v. Carrington*, 43 Mich. 252; 5 N. W. Rep. 303; *Kimmerle v. Hass*, 53 Mich. 341; 19 N. W. Rep. 26. In *Proctor v. Thompson*, 13 Abb. N. C. 340, *Rumsey, J.*, says: "It can not be disputed that a contract in writing not within the statute of frauds may be waived, dissolved or annulled by a subsequent parol agreement. *Goss v. Lord Nugent*, 5 B. & Ad. 58, 75; *Cummings v. Arnold*, 3 Metc. (Mass.) 486."

² *Tingley v. Fairhaven Land Co.*, 9 Wash. 34; 36 Pac. Rep. 1098.

³ *Green v. Paul* (1893), 155 Pa. St. 126; 25 Atl. Rep. 867.

⁴ *McLeod v. Genius*, 31 Neb. 1; 47 N. W. Rep. 473.

is inadmissible, as such agreement was unexecuted and without consideration.¹ A written contract can be modified by a writing signed only by one of the parties thereto, who thereby surrenders a portion of the consideration to be paid to him.² And a substituted parol agreement, followed by actual performance, whether made and executed before or after breach of a covenant in the original contract, is a good accord and satisfaction of the covenant. So also, a new agreement, although without performance, if based on a good consideration, will be a satisfaction if so accepted.³

§ 778. Writing ended by parol although not thus to be varied—Statute of frauds.—The substance of a contract valid only because in writing as required by the statute of frauds can not be varied by parol.⁴ But a contract required by the statute of frauds to be in writing, for example, a contract for the sale of land, may be rescinded or extinguished by a subsequent parol agreement.⁵ A different rule would seem to have obtained in England.⁶ A parol agreement between a husband after his

¹ *Barnard Mfg. Co. v. Galloway* 5 S. D. 205; 58 N. W. Rep. 565.

² *Bray v. Loomer* (1892), 61 Conn. 456; 23 Atl. Rep. 831. In this case plaintiffs entered into a written contract with defendants, giving the latter the right to use a certain patent, upon payment to plaintiffs of twenty-five cents a dozen, as royalty, on the articles manufactured. Subsequently plaintiffs signed a paper allowing defendants "fifteen cents per dozen out of said royalty" towards advertising, and agreed to allow them to retain out of said license fee of twenty-five cents per dozen the sum of fifteen cents per dozen, as payment to them for advertising to be done by them, so that the net license for which defendants shall pay plaintiffs "shall be ten cents per dozen, and no more," and defendants "may retain fifteen cents per dozen out of the sum due by statement, and the balance of ten cents per dozen shall be in full of royalties due"

plaintiffs. It was held that the contract was an unconditional modification of the original contract, and that ten cents per dozen was full payment thereunder.

³ *McCreery v. Day*, 119 N. Y. 1; *Fleming v. Gilbert*, 3 Johns. 528; *Latimore v. Harsen*, 14 Johns. 330; *Dearborn v. Cross*, 7 Cow. 48; *Kromer v. Heim*, 75 N. Y. 574.

⁴ *Hill v. Blake*, 97 N. Y. 216.

⁵ *Proctor v. Thompson*, 13 Abb. N. C. 340, where *Rumsey, J.*, cites *Boyce v. McCulloch*, 3 Watts & S. 429; *Ryno v. Darby*, 20 N. J. Eq. 231; *Bowman v. Cunningham*, 78 Ill. 48; *Arrington v. Porter*, 47 Ala. 714; *Raffensberger v. Cullison*, 28 Pa. St. 426, in support of the text. And see *Stearns v. Hall*, 9 Cush. 31; *Cummings v. Arnold*, 3 Metc. (Mass.) 486.

⁶ *Stead v. Dawber*, 10 Ad. & El. 57; *Harvey v. Grabham*, 5 Ad. & El. 61; *Stowell v. Robinson*, 3 Bing. N. C. 928; *Moore v. Campbell*, 10

wife's death and the guardian of minor heirs that the former might have dower in the premises leased to him by the guardian is void as a modification of the written lease by parol; and the fact that the lease was accepted in reliance upon such parol agreement does not estop the ward from denying its validity where it appears the husband knew that the probate court refused to permit the guardian to give a lease which recognized the right of dower, since the ward can not be estopped by an act of the guardian which the husband knew to be unauthorized.¹

§ 779. Terminating contracts under seal by parol.—In Michigan a contract under seal may be canceled by parol agreement.² And in New York a contract under seal may be canceled by a substituted parol agreement followed by actual performance.³ A sealed executory contract can not be released or rescinded by a parol executory contract, but after breach of a sealed contract a right of action may be waived or released by a new parol contract in relation to the same subject-matter or by any valid parol executed contract.⁴ The Illinois rule is that a contract under seal can not be changed by parol.⁵ Thus, where, by an instrument under seal, a party was given the right to elect to lease freight grounds in perpetuity within a certain definite territory, it was held that the instrument could not be altered by parol so as to extend the right of election to different territory.⁶ And where defendant by a sealed

Exch. 323; *Noble v. Ward*, L. R. 1 Exch. 117; L. R. 2 Exch. 135.

¹ *Heisen v. Heisen* (1893), 145 Ill. 658; 34 N. E. Rep. 597.

² *Blaghorne v. Hunger*, 101 Mich. 375; 59 N. W. Rep. 657. But see, *Roe v. Conneley*, 74 N. Y. 201, where it is questioned if a lease for ten years under seal can be canceled and surrendered by an instrument not under seal.

³ *McCreery v. Day*, 119 N. Y. 1.

⁴ *Delacroix v. Bulkley*, 13 Wend. 71; *Suydam v. Jones*, 10 Wend. 181, 184; *Kaye v. Waghorne*, 1 Taunt. 428.

⁵ *Albrecht v. Kraisinger* (1892), 44

Ill. App. 313; *Kinsley v. Charnley*, 33 Ill. App. 553.

⁶ *Illinois Cent. R. Co. v. Baltimore, etc., R. Co.*, 23 Ill. App. 531, per Moran, J.: "This is the well-settled rule in this state, whatever departures may have been taken in other jurisdictions. In *Loach v. Farnum*, 90 Ill. 367, this rule was applied to exclude from evidence a writing not under seal, but signed by the lessees, purporting to alter the monthly rent fixed by the lease under seal, and upon which the suit was based; and in *Hume v. Taylor*, 63 Ill. 43, it was applied where a contract under seal was

contract appointed plaintiff sole agent to sell his farm, and then having himself found a purchaser, procured from plaintiff a written release from such contract on his agreeing to pay one per cent. of the purchase price, it was held that the sealed contract could not be changed by parol, and that plaintiff was not entitled to commissions on the sale.¹ The doctrine that a contract under seal can not be changed by a parol agreement does not apply to a change in the instrument itself by the direction or consent of the parties to it, for, in such a case, there is no parol agreement existing independent of the written instrument.²

§ 780. Effect of parol modification of written contract.—A material modification of a written contract by a subsequent parol agreement reduces the whole to parol, and the written contract can be used no further than to mark the terms and extent of the new stipulations.³ Where, in an action by a purchaser for breach of a written contract for the sale of goods, it appears that, on the subsequent written proposal of different terms by defendant, and the oral assent thereto by plaintiff, the contract sued on was superseded, and another substituted which is not declared on, plaintiff is not entitled to recover.⁴

made to deliver sixteen hundred hogs of a certain weight and quality, and it was sought to show that the parties made a new parol contract, by which it was agreed that a less number than one thousand hogs would be received in full compliance with the original contract. In such case the parol contract, modifying the sealed one, was denied effect upon the well-settled rule of the common law, that an executory contract under seal can not be modified or varied by a parol agreement.”

¹ *Gilbert v. Coons*, 37 Ill. App. 448.

² *Kneedler v. Anderson* (1892), 43 Ill. App. 317; *Collins v. Collins*, 51 Miss. 311; *Woolley v. Constant*, 4 Johns. 54; *Speake v. United States*, 9 Cranch, 28.

³ *Malone v. Philadelphia R. Co.* (1893), 157 Pa. St. 430; 27 Atl. Rep. 756, following *Vicary v. Moore*, 2 Watts (Pa.), 451.

⁴ *King v. Faist*, 161 Mass. 449; 37 N. E. Rep. 456, per Barker, J.. “The plaintiff contends that it is not clear that the terms of February 27th were declined by the defendants, and that the real situation is that a modification of an original contract had been suggested by the defendants, and effected by his assent to the offer stated in their letter of March 3d, and that he might declare upon the instrument of February 27th as a written contract, and, under his declaration, offer proof of the subsequent modification. The question of pleading here raised has not been discussed in our decisions

§ 781. Parol extension or waiver of time of performance.—

The time for performance of a written contract may be extended or enlarged by parol, but a sufficient consideration of each parol contract must be shown or the courts will not enforce it.¹ And where the time of performance of a written contract is extended by a subsequent parol agreement mutual acts to be performed by the parties may constitute a sufficient consideration of the parol agreement.² After a bond and mortgage under seal have become due a promise to extend the time of payment may be shown by parol.³ And where in such a case the

which have dealt with the doctrine that the terms of a written contract may be varied by a subsequent oral agreement. See *Cummings v. Arnold*, 3 Metc. (Mass.) 486; *Loring v. Alden*, 3 Metc. (Mass.) 576; *Stearns v. Hall*, 9 Cush. 31; *Blasdell v. Souther*, 6 Gray, 149; *Kennebec Co. v. Augusta Ins. Co.*, 6 Gray, 204; *Palmer v. Stockwell*, 9 Gray, 237; *Rockwood v. Walcott*, 3 Allen, 458; *Lerned v. Wannemacher*, 9 Allen, 412; *Whittier v. Dana*, 10 Allen, 326; *Stults v. Newhall*, 118 Mass. 98; *Ballou v. Billings*, 136 Mass. 307; *Emery v. Boston, etc., Insurance Co.*, 138 Mass. 398; *Rogers v. Rogers*, 139 Mass. 440; 1 N.E. Rep. 122; *Hastings v. Lovejoy*, 140 Mass. 261; 2 N. E. Rep. 776. Our statute is that the declaration must state the substantial facts necessary to constitute the cause of action. Pub. St. c. 167, § 2, cl. 3. This is consistent with the old rule of pleading that matters which should come more properly from the other side need not be stated, it being enough for each party to make out his own case. Comyn's Digest, 'Pleader,' c. 81; 1 Chitty on Pleading, 222. If the plaintiff's case could stand solely on the instrument of February 27th as a written contract of the defendants, which they had refused or failed to perform, and he was not compelled in order to show his own right of action to rely upon a

subsequent modification of its terms, and so could treat the new agreement merely as a defense which must fail because it had not been performed by the defendants (see *Whittier v. Dana*, 10 Allen, 326), and was not substituted for the original (see *Stults v. Newhall*, 118 Mass. 98, and *Rogers v. Rogers*, 139 Mass. 440), it would not be necessary for him to state in his declaration either the subsequent agreement or its breach, for neither of those facts are in that case necessary constituents of his cause of action; and, if the defendant should prove the subsequent agreement as a defense, he could rebut that defense by proof that the new agreement was not in substitution, and that it had not been performed, although there was no such averment in his declaration."

¹ *Parker v. Jameson*, 32 N. J. Eq. 222; *French v. Griffin*, 18 N. J. Eq. 279, 281.

² *North v. Kizer*, 72 Ill. 172; *Wadsworth v. Thompson*, 3 Gilm. (Ill.) 423; *Baker v. Whiteside*, 1 Ill. 174.

³ *Van Syckel v. O'Hearn* (1892), 50 N. J. Eq. 173; 24 Atl. Rep. 1024, per Bird, V. C.. "I think all of the authorities in this state hold the time for performance of every such contract may be extended by parol. *Bigelow v. Rommelt*, 24 N. J. Eq. 115; *Tompkins v. Tompkins*, 21 N. J. Eq. 338; *Maryott v. Renton*, 21 N. J. Eq. 381;

action of the party to whom the promise was made was controlled by it, and he took title to the real estate covered by the mortgage relying upon it, a court of equity will apply the doctrine of estoppel and refuse to aid the mortgagee if he attempts to foreclose his mortgage before the expiration of the period named.¹ The time of performance of a written contract may be waived as well as extended by parol. Accordingly a written contract for the sale of land on monthly payments may be changed by parol so as to allow the purchaser to pay the entire consideration at once, and to demand an immediate delivery of the deed.² And where plaintiff contracts to complete a house "ready for occupancy" within sixty days, according to plans which do not require the finishing of the second story and putting on the last coat of paint, the effect of a subsequent contract, made after the sixty days have expired, to do the additional work, for an extra payment, is to waive the original stipulation to complete the work at a certain time, and substitute a stipulation for completion within a reasonable time.³

§ 782. Explaining written receipt by parol evidence.—A receipt is not usually conclusive as between the immediate parties, and is not within the rule which excludes parol evidence to

Stryker v. Vanderbilt, 25 N. J. Law, 482; *Bell v. Romaine*, 30 N. J. Eq. 24; *Sharp v. Wyckoff*, 39 N. J. Eq. 376; *Measurall v. Pearce* (N. J. Eq.), 3 Atl. Rep. 92; *King v. Morford*, 1 N. J. Eq. 274; *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332; *Baldwin v. Salter*, 8 Paige, 473; *Lattimore v. Harsen*, 14 Johns. 330."

¹ *Van Syckel v. O'Hearn*, 50 N. J. Eq. 173, per Bird, V. C.. "In such case, although no consideration or benefit accrues to the person making the promise, he is the author of the very condition of affairs which stands in his way, and it is most equitable that the court should say that they shall so stand. *Martin v. Righter*, 10 N. J. Eq. 510; *Church v. Florence Iron Works*, 45 N. J. Law, 129; *Bank v. Fulmer*, 31 N. J. Law, 55; *Huffman v.*

Hummer, 18 N. J. Eq. 83, 90; *Miller v. Chitwood*, 2 N. J. Eq. 199; *Lee v. Kirkpatrick*, 14 N. J. Eq. 264, 267; *Cox v. Bennet*, 13 N. J. Law, 165; *Continental Bank v. National Bank*, 50 N. Y. 575."

² *Anderson v. Moore* (1893), 145 Ill. 61; 33 N. E. Rep. 848.

³ *Cornish v. Suydam*, 79 Ala. 620; 13 So. Rep. 118, per McClellan, J.: "Of course, the parties had a right to alter and modify the original contract, and to make the second one by mutual consent, and without any new consideration, and by such alteration or new agreement either expressly or impliedly to waive any right either would otherwise have had. *Robinson v. Bullock*, 66 Ala. 548; *Young v. Fuller*, 29 Ala. 464; *Badders v. Davis*, 88 Ala. 367; 6 So. Rep. 834."

vary the terms of a written instrument; and, where the purposes of the receipt are expressed in short and seemingly incomplete terms, parol evidence is admissible to explain the nature of the transaction.¹

§ 783. Where time of the essence—Abandonment—Waiver of condition.—In mercantile contracts time is of the essence. A statement descriptive of the subject-matter or of some material incident, such as the time or place of shipment, is generally to be regarded as a warranty or condition precedent upon the failure or non-performance of which the party aggrieved may repudiate and abandon the whole contract.² Where there is a written contract by which one of the parties agrees to construct a building for a certain price by a certain time, a waiver of the provision as to the time for its completion is not a waiver or abandonment of other features of the contract.³ A supplementary written contract which alters the original in respect to delivery only does not abrogate it and does not prevent an action on it for its breach.⁴ Where a contract for the sale of a lumber plant provided for a reduction in price in case of a shortage in the timber, it was held that a further reduction made where the shortage exceeded expectation did not amount to an abandonment of the contract.⁵

¹ *Osborne v. Stringham*, 4 S. D. 593; 57 N. W. Rep. 776. Per Fuller, J.: "In the case before us we are inclined to believe that the element of uncertainty enters into the receipt, and that the intention of the parties that the note be given and held as collateral to such balance as might be found due on settlement is not repugnant to the recitals of the paper, and that parol evidence is admissible and competent to explain the nature of the transaction. Compiled Laws, § 3562; *Smith v. Holland*, 61 N. Y. 635; *McClelland v. James*, 33 Iowa, 571; *D. M. Osborne & Co. v. Stringham*, 1 S. D. 406; 47 N. W. Rep. 408, and cases there cited."

² *Norrington v. Wright*, 115 U. S. 188, 203; *Davison v. Von Lingen*, 113

U. S. 40; *Lowber v. Bangs*, 2 Wall. 728; *Bowes v. Shand*, L. R. 2 App. Cas. 455; *Behn v. Burness*, 3 Best & S. 751. And see *Hill v. Blake*, 97 N. Y. 216, where Danforth, J., said: "It can not be doubted that the omission to furnish iron shipped in December or January, authorized defendant to rescind the contract." *Welsh v. Gossler*, 89 N. Y. 540.

³ *Jacksonville, etc., R. Co. v. Woodworth* (1890), 26 Fla. 368; *Phillips, etc., Co. v. Seymour*, 91 U. S. 646; *Stewart v. Keteltas*, 36 N. Y. 388; *Cooke v. Murphy*, 70 Ill. 96.

⁴ *Meylert v. Gas, etc., Co.*, 14 N. Y. Supl. 148.

⁵ *Cartier v. Troy Lumber Co.*, 35 Ill. App. 449.

§ 784. **Writing not to be varied by contemporaneous oral agreements.**—A written contract can not be varied by an oral agreement made substantially at the same time.¹ A party can not be relieved from express and definite conditions voluntarily inserted in a written contract, on the mere ground that, at the time of executing the contract, verbal conditions were agreed to, contradicting the writing.² A release by a son of all his interest in the estate of his father, given him by his father's will, is not a bar to an action by the son against the executor on a promissory note given the son by the father in his life-time, and not mentioned in the release; and oral evidence is incompetent to show that the claim in such an action was understood at the time to be embraced in the settlement and release;³ for this would be to engraft upon the written contract an additional oral stipulation founded upon the same consideration and entered into at the same time, and would be contrary to settled rules.⁴ And evidence of a parol agreement and understanding antecedent to or contemporaneous with the execution of an instrument under seal is not admissible to vary its terms.⁵ The rule that the true consideration of a written contract may be shown by parol does not authorize oral stipulations to be added to a written contract under the claim that such oral agreement was part of the consideration.⁶ Where husband and wife enter into clear, unambiguous written agreement for the purpose of perpetuating a parol antenuptial agreement, such written agreement will be deemed to

¹ *McGuinness v. Shannon* (1891), 154 Mass. 86, per Allen, J.. "It must therefore be treated as an oral agreement which was inconsistent with the written one, and was made substantially at the same time, and it can not have the effect to vary it. It was not an alteration of the written contract by a subsequent new oral one between the parties, and in this respect it closely resembles *Clark v. Haughton*, 12 Gray, 38, 41. See also, *Doyle v. Dixon*, 12 Allen, 576; *Fitz v. Comey*, 118 Mass. 100; *Frost v. Brigham*, 139 Mass. 43."

² *St. Vrain Stone Co. v. Denver, etc., R. Co.* (1893), 18 Colo. 211; 32 Pac. Rep. 827.

³ *Frost v. Brigham*, 139 Mass. 43.

⁴ *Doyle v. Dixon*, 12 Allen, 576, 579.

⁵ *Barnett v. Barnes*, 73 Ill. 216; *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516; *Strehl v. D'Evers*, 66 Ill. 77; *Loach v. Farnum*, 90 Ill. 367; *Gable v. Wetherholt*, 116 Ill. 313; *Wilson v. Deen*, 74 N. Y. 531.

⁶ *Brintnall v. Briggs*, 87 Iowa, 538; 54 N. W. Rep. 531; *Mast v. Pearce*, 58 Iowa, 579.

have merged all their parol negotiations made at and before its execution, and, not having been questioned by them during their joint lives, will not be modified afterwards.¹

§ 785. Cases where contracts have been held not terminated or modified by parol.—Where a contract by which plaintiffs agreed to mine iron ore from defendant's mine by the caving system gave defendant the right of terminating the contract whenever it should decide that such system of mining was "prejudicial to the future welfare and development of said mine," it was held that this gave defendant no right arbitrarily to terminate the contract, and, having stopped plaintiffs from continuing the work, without even pretending to have determined that the system would be prejudicial, it was liable in damage for breach of the contract.² Where a contract for the construction of a railroad provides that measurements, classification, and estimates shall be made in determining the price to be paid, but that no alteration of the contract will be allowed unless in writing signed by the parties, a promise of the arbitrator, during the progress of the work, to

¹ *Claypool v. Jaqua* (1893), 135 Ind. 499. And see also, *McAnnulty v. McAnnulty*, 120 Ill. 26.

² *Anvil Mining Co. v. Humble* (1894), 153 U. S. 540; 14 Sup. Ct. Rep. 876, per Brewer, J.: "The first objection to any recovery under this claim is that by the very terms of the contract the defendant was at liberty to terminate it at any time, and hence it is insisted that, even if it did so, plaintiffs were not entitled to recover any profits which they might have made had it not been terminated; that coupled with the right to terminate was a special provision, to wit, an award of referees for estimating the damages which the plaintiffs should sustain in consequence of such termination, and that no attempt to secure such an award was alleged or proved. To this it may be replied that the contract did not give to the defendant a right arbitrarily to terminate the contract, but

only when it determined that the caving system was 'prejudicial to the future welfare and development of the mine,' and that there is no pretense that it ever made such determination. On the contrary, the defendant set up as a defense that the plaintiffs abandoned the work, and thus broke the contract, and that it suffered great damage thereby, and on the trial the whole scope of its testimony in this respect was in denial of the charge that it had stopped the plaintiffs from continuing the mining of ore, or in any manner sought to terminate the contract. For aught that appears to the contrary in this record, the defendant now, as ever, believes that the caving system is not only not prejudicial, but the best method of working the mine, and broke the contract with plaintiffs only for the sake of giving it to another party."

classify a certain part as solid rock, rather than loose rock, does not modify the contract.¹ Where a lease for oil and gas mining contained a covenant that the lessee should commence operations within three months, or thereafter pay lessor a specified sum annually until work was commenced, it was held that the fact that operations in the neighborhood demonstrated that a well on the property would be of no avail did not release lessee from his obligations; and that a provision of the lease that failure of the lessee to make a payment when due should render the lease null and void, and not binding on either party, did not make the lease void, except at the option of the lessor. In an action on such lease by the lessor, defendant alleged a contemporaneous parol agreement that the lessee should have the right to terminate the lease at any time when satisfied that there was no oil or gas in the leased land, and, as well for the protection of the lessee as of the lessor, there was inserted in the lease that failure of the lessee to make a payment when due should render the lease null and void and not binding on either party, and that but for such agreement, and the belief of the lessee that it was substantially expressed in the lease, he would not have signed it. It was held that this was the mere assertion that the lessee thought the language used gave him the right to terminate, and was therefore no ground for relief.² The fact that, at a vendee's request, several deeds were executed to him and his wife by the owners of the land, instead of a joint deed to himself, as called for by contract, does not affect the validity of the contract, nor constitute a parol modification thereof.³ So also,

¹ *O'Donnell v. Henry* (1892), 44 La. Ann. 845; 11 So. Rep. 245.

² *Cochran v. Pew*, 159 Pa. St. 184; 28 Atl. Rep. 219; *Leatherman v. Oliver*, 151 Pa. St. 646; 25 Atl. Rep. 309; *Phillips v. Vandergrift*, 146 Pa. St. 357; 23 Atl. Rep. 347; *Jones v. Western, etc., Gas Co.*, 146 Pa. St. 204; *Ogden v. Hatry*, 145 Pa. St. 640; *Ray v. West, etc., Gas Co.*, 138 Pa. St. 576; *Wells v. Manufacturers', etc., Gas Co.*, 130 Pa. St. 222; *Galey v. Kellerman*, 123 Pa. St. 491.

³ *Tewksbury v. Howard*, 138 Ind. 103; 37 N. E. Rep. 355, per Hackney, J.:

"These acts of the appellees were but an effort to comply with the terms of the contract, and were performed in this manner at the instance of the appellant; and he can no more complain of the waiver of his rights under the contract, and an effort at his request to convey the lands as he desired, than he could deny the payment of the purchase-money under the contract if he had procured the conveyance to be made to another. Browne on the Statute Frauds, §§ 424-426."

where a contract for the construction of a county court-house provided that the county might make any alterations in the specifications, and that such alterations should not make the contract void, it was held that the fact that the county, under agreement with the contractor, changed the window lintels from stone to railroad iron did not affect the obligation of the sureties on his bond, as there was in fact no change of the contract, but rather a careful compliance with it.¹

§ 786. Novation.—Novation according to the civil code of California is made by contract and is subject to the general rules relating to contracts. It is effected by the substitution of a new obligation between the same parties with intent to extinguish the old one; by the substitution of a new debtor in the place of the old one with intent to release the latter; or by the substitution of a new creditor in the place of the old one with intent to transfer the rights of the latter to the former.² A transfer of property by the maker of a note to a third person in order that the note may be paid out of the proceeds of the sale of the property, although made with the payee's consent, will not constitute a novation unless the payee accepted the third person as his debtor in the place of the maker and released the maker from any liability on the note.³ Where one enters into a

¹Howard County v. Baker, 119 Mo. 397; 24 S. W. Rep. 200, per Gantt, P. J.: "But it is a clear misconception of this change to call it a change of the contract. On the contrary, it was a scrupulous compliance with the terms of the contract. The contract stipulated for the change, and, when made, it was as much a part of the agreement as if it had been inserted at first. It in no sense changed the obligation of the contractor or his sureties. Rude v. Mitchell, 97 Mo. 365; 11 S. W. Rep. 225; Ashenbroedel Club v. Finlay, 53 Mo. App. 256; Hayden v. Cook, 34 Neb. 670; 52 N. W. Rep. 165-167."

² §§ 1531, 1532.

³ Pimental v. Marques, 109 Cal. 406; 42 Pac. Rep. 159. In Jackson Iron

Co. v. Negaunee Co. (1895), 65 Fed. Rep. 298, Ricks, J., said: "The new contract did not take the place of or satisfy the old contract. The chief difference between them was that the defendant had no right to mine soft ores while the Union Company had that right and retained it. Both could have occupied land of the Jackson Iron Company and conducted operations under the two contracts. Under the contract between the Union Ore Concentrator Company and the Negaunee Concentrating Company, therefore, the former made a partial assignment of its rights under the first contract between it and the plaintiff. The plaintiff was in no sense a party to the second contract. The second contract was a partial transfer of rights

contract to employ another at a fixed rate for a time certain, and afterwards disposes of the business in which the services are to be rendered to a third person, and such third person retains the servant in his employment and pays him at the contract rate for several months, this is sufficient evidence of novation to charge such third person with the obligations of the contract. In such case the original employer and his vendee are not jointly liable for services performed after the novation; but if they are sued jointly, and a cause of action against the vendee is pleaded and proved, he can not be heard to object because judgment was also rendered against the vendor; nor can the misjoinder in such a case be raised by general demurrer or objection to evidence, on the ground that a cause of action is not stated.¹ Where several persons, who have jointly entered into a building contract, withdraw, and one of them makes a new contract to complete the work, he is thereby released from liability under the former agreement; and, since the release of one joint obligor releases all, the prior contract is terminated.²

§ 787. The same subject continued.—Novation can exist only by the mutual consent and agreement of all the interested parties. When, however, the dissolution of an old firm occurs, and a new firm agrees to assume the liabilities of the old, but slight circumstances are required to justify finding an intention on the part of a creditor of the old firm, who has no-

and a division of the obligations of the Union Company between it and defendant, but without any new and distinct agreement on the part of the plaintiff confirming or permitting a novation. It is true, as contended, that the defendant under the last contract did pay the amount of the monthly installments in pursuance of its contract with the Union Company, and that it did that to prevent default and forfeiture by the Union Company, and to protect itself; but it can not be inferred from that fact that the plaintiff and defendant entered into a contract by which the defendant assumed and

agreed to pay the sum of two thousand five hundred dollars per annum, and for which consideration the plaintiff absolved the Union Company from the obligations of the first contract, and accepted the defendant as the obligee under that contract. We, therefore, fully concur with the trial judge that there was no novation to support the first count of the declaration."

¹ *Culbertson Power Co. v. Wildman*, 45 Neb. 663; 63 N. W. Rep. 947.

² *Brodeck v. Farnum*, 11 Wash. 565; 40 Pac. Rep. 189.

tice of the dissolution and agreement, to accept the liability of the new instead of the old firm.¹ Where the payee of a note accepts it from the maker in satisfaction of the debt of another, and then assigns the debt to him without recourse, there is a complete novation of the debt.² But the fact that a duebill was given by the holder thereof to another, to be transferred to a third person, for the purpose of accomplishing a novation of the debt, is no defense to an action thereon where there is no evidence that it was so transferred.³

§ 788. Breaking contract of sale by sale to another.—Where a party, having contracted to do a thing upon a given day, before the day of performance arrives repudiates his contract, or voluntarily puts it out of his power to perform, the other party to the contract may treat it as rescinded, and bring his action for the breach immediately and without awaiting the

¹ *Tysen v. Somerville*, 35 Fla. 219; 17 So. Rep. 567, Taylor, J.: "In the absence of assent on the part of B. and his release of A., there is no privity of contract as between B. and C. that will support an action by B. against C. upon the latter's promise to A. 1 Parsons on Contracts (7th ed.), p. 244 *et seq.*, and citations; *Murphy v. Hanrahan*, 50 Wis. 485; 7 N. W. Rep. 436; *Trimble v. Strother*, 25 Ohio St. 378; *Kountz v. Holthouse*, 85 Pa. St. 235; *Bilborough v. Holmes*, 5 Ch. Div. 255; *Butterfield v. Hartshorn*, 7 N. H. 345; *Ford v. Adams*, 2 Barb. 349. See as to novation where a new firm agrees to accept the liabilities of an old firm, *Register v. Dodge*, 19 Blatchf. 79; 6 Fed. Rep. 6; 61 How. Pr. (N. Y.) 107."

² *Morse v. Wilcoxson* (Ky. 1895), 30 S. W. Rep. 612, per Paynter, J.: "When appellees executed their note to the appellant for what she claimed Galbraith owed her, there was a complete novation of the debt. No recovery can be had against Galbraith by the appellant. So far as she was con-

cerned, his debt was fully paid, as much so as if it had been paid in money. This is not a case of a debtor who paid it pleading usury, neither does the answer state any facts which show that Galbraith is indebted to the appellee Wilcoxson on account of having paid his debt due the appellant. It appears she bought the land, and was effected with notice (by the mortgage being duly recorded) that the appellant's mortgage was against the land. It is proper to presume, with absence of an allegation to the contrary, that she had actual notice of its existence, and assumed its payment when she purchased the land. Assuming this to be true, notwithstanding appellant assigned without recourse the debt which she held against Galbraith, appellee Mrs. Wilcoxson acquired no right to such debt, as it was extinguished when she executed the note to appellant. It was, in effect, paying part of the purchase-money."

³ *Argyle Co. v. McNeill*, 153 Ill. 669; 39 N. E. Rep. 1102.

stipulated day. It has, however, been held in California that a conveyance of land to a third person by one bound by an executory contract to convey it to another at a future date is not a breach of such contract, and does not entitle such other to treat the contract as abandoned before the time of performance arrives, since, when the time of performance comes, the vendor may be able to furnish a good title.¹

¹*Garberino v. Roberts*, 109 Cal. 125; 41 Pac. Rep. 857, *Van Fleet, J.*: "The question here is whether the mere fact that defendant conveyed the lot under the circumstances alleged had the effect to put it without his power to perform at the future date agreed upon, since it is not alleged that defendant has repudiated his contract, or refused to carry it out, unless the fact of conveying the lot to another is the legal equivalent of such repudiation. In *Joyce v. Shafer*, 97 Cal. 335; 32 Pac. Rep. 320,—a case of precisely the same character as the present,—it was held that the conveyance by the vendor of the land contracted for to a third party before the time for performance of the contract of sale is not a breach of that contract, and does not entitle the purchaser to treat the contract as abandoned or rescinded before the time of performance arrives. 'One may sell land,' says the court in that case, 'which he does not own, and yet be able, when the time of performance arrives, to furnish a good title. In the meantime the purchaser would not be at liberty to disaffirm the contract on the ground that then the vendor was unable to make a good title. It would be incumbent upon him to offer to perform, or to show that at the time of performance

the vendor could not furnish the title.' And in *Shively v. Semi-Tropic, etc., Water Co.*, 99 Cal. 259; 33 Pac. Rep. 848, — another action of like character and purpose, — it is said: 'Rescission or abandonment of the contract by defendant gives plaintiff his cause of action, but a transfer of the land to third parties of itself does not constitute such abandonment or rescission. It does not necessarily follow from such transfer that defendant has placed it out of his power to comply with the terms of the contract. Such transfer creates no breach of the contract. *Non constat* but plaintiff's rights were expressly reserved by its terms. Defendant, as yet, has not defaulted, and might not suffer default when the balance of the purchase price was tendered and a deed demanded; and the plaintiff is not entitled to recover the money paid until he shows the default of the defendant. This question was directly presented in *Joyce v. Shafer*, 97 Cal. 335; 32 Pac. 320, and it was there held that a conveyance by the vendor was not a breach of the contract, and a demurrer was sustained to the complaint for that reason. We are entirely satisfied with the principle laid down in that case.' "

CHAPTER XXIII.

RESCISSION AND CANCELLATION.

- § 789. Equity jurisdiction—Damages as remedy.
790. Rescission to prevent multiplicity of suits.
791. Rescission compared with reformation.
792. Restoring benefits on rescinding contract.
793. Restoring the consideration.
794. Keeping tender good.
795. Requisite joinder.
796. Rescission by vendor with forfeiture against vendee.
797. Rescission for expressions of opinion—Future promise.
798. The same subject continued—If parties in confidence.
799. Concealment—Representations of value—Warranty.
800. The same subject continued—Miscellaneous.
801. Rescission for mistake of law.
802. Where one party only ignorant.
803. Rescinding release of legacy—Mistake of law—Concealment.
804. Fraudulent representations.
805. The same subject continued.
806. Further illustrations.
807. Estate not liable to purchaser for executor's representations—Restoration.
808. Rescinding coal lease for mutual mistake—Lessee's laches.
809. Sale of ground rent—Mistake of law.
810. Rescission for fraud.
- § 811. Fraud of vendee, although he pays consideration.
812. Election by defrauded purchaser—acquiescence.
813. Rescission for purchaser's fraud.
814. The same subject continued.
815. Rescinding sale of goods for buyer's fraud.
816. Fraud must be proved as alleged.
817. Party put on inquiry—Want of diligence.
818. Negligent execution of instrument.
819. Proof of fraud—Diligence.
820. Laches in rescinding by one knowing his rights.
821. Unreasonable delay.
822. Rescission for fraud—For inadequate consideration.
823. Deed of trust by husband or wife.
824. Effect of ratification.
825. Where persons are in confidential relations.
826. Physician and patient.
827. Rescinding deed of trust from wife to husband or son.
828. The same subject continued—Suit by heirs.
829. Rescission by married woman.
830. Parents' deeds to children.
831. Voluntary deed from father to son.
832. Deed of gift by old man—Confidential relation.
833. Conveyances by lunatics and drunkards.

- § 834. Test of grantor's capacity.
 835. Evidence of incapacity—Facts *versus* opinions.
 836. Conveyances by erratic persons.
 837. Where agent sells trust estate to own wife.
 838. Stifling competition at judicial sale.
 839. Canceling mortgage—Want of consideration.
 840. The same subject continued—Security overvalued.
 841. Deed given for illegal purpose—Exception.
- § 842. Where parties were in illicit relation.
 843. Parties in *pari delicto*.
 844. The same subject continued.
 845. Rescission for non-performance.
 846. Deed defrauding cotenants.
 847. Directors' contracts for their own benefit.
 848. Rescinding note procured by fraud—Enjoining transfer.
 849. Rescission of sale where price payable in installments.

§ 789. **Equity jurisdiction — Damages as remedy.** — The breach of promises by a vendor that the vendee shall have the keeping of the cattle connected with a creamery, whereby he would be able to earn money to pay deferred payments, and that large railway improvements will soon be erected near the land, does not entitle the vendee to rescind the contract, he being left to his action at law for damages, fraudulent representations not being ground for the rescission of a sale where it is not shown that the representations, if true, would have inured to the vendee's pecuniary advantage.¹ An equi-

¹ Moore v. Cross, 87 Texas, 557; 29 S. W. Rep. 1051, Brown, J.: "It is not shown that plaintiff could have made profit out of the business, even if that would be considered in this connection. Moore guarantied that a railway, round-house, and machine shops would be built near the block, which has not been done, except that a railroad has been built near there. The proof does not show that the property was worth less without these improvements than it would have been with them, nor that plaintiff would have derived any pecuniary benefit from their construction. If the promises of Moore be considered as representations fraudulently made, they belong to that class of frauds for which there is no redress in court, because there was no pecuniary in-

jury resulting from them, and courts do not undertake to deal with the breach of moral obligations. Bigelow on Frauds, p. 540; Lemmon v. Hanley, 28 Texas, 219; Bremond v. McLean, 45 Texas, 10. It does not appear from the evidence that the alleged promises constituted any part of the consideration for the exchange of the property. If, however, they were the consideration and had been inserted in the deed in the terms stated in the conclusions of fact, their breach would not afford ground for canceling the deed, but the party must resort to his action for damages, if any. Mayer v. Swift, 73 Texas, 367; 11 S. W. Rep. 378; Chicago, etc., Railway Co. v. Titterington, 84 Texas, 218; 19 S. W. Rep. 472."

table action to cancel an executed sale of stock, and to recover it back, on the ground that the buyer, by false representations, obtained it for a nominal price, will not lie where the stock has no special value to the seller apart from its money value, and where the damages can readily be ascertained, and where plaintiffs purchased stock at an executor's sale, and afterwards defendant, one of the executors, represented that the stock was worthless, but that he would like to have it as a relic of the estate, and plaintiffs sold it to him for a nominal sum, it was held that, as plaintiffs had means of information concerning the value of the stock, and made investigation before selling to defendant, the latter could not be regarded as a trustee *ex maleficio* for plaintiffs, although his representations were fraudulent.¹

¹ *Edelman v. Latshaw*, 159 Pa. St. 644; 28 Atl. Rep. 475, *per curiam*: "In *McGowan v. Remington*, 12 Pa. St. 56, Judge Bell, in speaking of cases for the recovery of chattels by a proceeding in equity, said: 'The precise ground of this jurisdiction is said to be the same as that upon which the specific performance of an agreement is enforced, namely, that fruition of the thing, the subject of the agreement, is the object, the failure of which would be but illy supplied by an award of damages; and that chancery always interferes where, from the nature of the subject, or the immediate object of the parties, no convenient measure of damages can be ascertained, or where nothing could answer the justice of the case but the performance of a contract in specie.' There are exceptions to the well-settled principle of law that equity will not enforce specific execution of contracts relating to chattels, as was ruled in *Foll's Appeal*, 91 Pa. St. 434; *Appeal of Goodwin Gas Stove and Meter Co.*, 117 Pa. St. 514; 12 Atl. Rep. 736, and other cases; but we fail to find that plaintiffs have brought themselves within any of the excepted

cases. * * * * Can the bill be sustained upon the ground that the defendant Latshaw was a trustee *ex maleficio*, or upon the ground that he had practiced a fraud in procuring the stocks? He occupied no fiduciary relation to the plaintiffs. What he said at the executors' sale had nothing to do with plaintiffs' purchase, and after that he was acting towards them as an individual, and their relations were simply that of vendor and vendee. He was not bound to disclose his knowledge of the value of the stocks, provided he did not make fraudulent representations, or suppress the truth when it was his duty to speak. It thus appears that plaintiffs had means of information open to them, and that they investigated the matter. How can it be said, therefore, that they relied on Mr. Latshaw's representations as to value rather than on their own knowledge? In *Clapham v. Shillito*, 7 Beav. 146, it was ruled that 'cases have frequently occurred in which, upon entering into contracts, misrepresentations made by one party have not been in any degree relied on by the other party. If the party to whom the representations

§ 790. Rescission to prevent multiplicity of suits.—A bill by a land-owner to cancel numerous tax deeds, held by different persons under a sale made by the commissioner of school

were made himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied on the result of his own investigation and inquiry, and not upon the representations made to him by the other party.' In the case under consideration, plaintiffs held the stocks for four years, had made investigation, and must have been convinced, without any representations from Latshaw, that the stocks were worthless. It is also stated in Adams on Equity, 356, that a mere misstatement by the buyer of his motive in purchasing, or in limiting the amount of his offer, will not bring the case within the class of cases in which equity will grant relief; and for this he cites Vernon v. Keys, 12 East, 632, where the vendee 'falsely and deceitfully represented to the vendor that he was about to enter into partnership in the same trade with other persons whose names he would not disclose, and that these persons would not consent to his giving the plaintiff more for his interest than a certain sum, whereas, in truth, neither A. and B., with whom he was then about to enter into partnership, nor any other intended partners of his, had refused to give more than that sum, but had then agreed with the defendant that he should make the best terms he could with the plaintiff, and would have given him a larger sum; and, in fact, the defendant charged them with a larger price in account for the purchase of plaintiff's interest.' Held, that an action on the case did not lie for this false and deceitful representation by the bidder of the seller's probability of getting a better price for his property,

for it was either a mere false representation, or at most a *gratis dictum*, of the bidder upon a matter which he was not under any legal obligation to the seller to disclose with accuracy, and on which it was the folly of the seller to rely. There is another reason which is fatal to the plaintiffs' contention. It is apparent that plaintiffs are seeking to recover damages for their loss, and not to recover the specific chattels sold. It is not alleged nor shown that the stocks have to them any especial value apart from their money value, and plaintiffs will be placed in *statu quo* when they are paid what they have lost in money. In Mackintosh v. Tracy, 4 Brewst. 59, it was held that 'in cases of fraud, especially where the fraud relates to sales of personal chattels, and where the relief sought is merely compensation in damages, if the remedy at law is adequate, relief is not ordinarily granted in equity.' See also, 2 Parsons on Contracts, p. 782. We are of the opinion that the master did not err in dismissing the bill." In Dakin v. Rumsey (Mich. 1895), 62 N. W. Rep. 990, in an action to set aside a sale for fraud, it appeared that, during the litigation over decedent's estate, defendants purchased complainant's interest in the residue of such estate, after the payment of legacies, for \$2,000; that complainant had heard the will read, knew the amount of the legacies, and had opportunity to know the value of the estate; and that he had offered to sell his share for \$1,500, to save the expense of litigation. It was held that such sale was valid, and it was immaterial that defendants were heavy gainers by the transaction.

lands in one proceeding to forfeit the lands for taxes, may be maintained as a bill to remove cloud from title, and on the ground of avoiding a multiplicity of suits, where all the parties claim under a common source of title.¹ Where a receipt was given by the orator for money left with him in trust by a father for his two children, and the orator became indebted to the father, and gave a note covering the money specified in the receipt and the additional debt, and paid the note in full to the father's administrator, and the receipt was not surrendered, and the children brought separate actions, returnable in different counties, for the money specified therein, it was held that equity jurisdiction to decree cancellation will not be exercised where the orator has a remedy at law in the actions pending, and that such a case presents no such multiplicity of suits as to require equitable interference on that ground.²

¹ *Ulman v. Jaeger* (1895), 67 Fed. Rep. 980.

² *Druon v. Sullivan*, 66 Vt. 609; 30 Atl. Rep. 98, per Munson, J.. "The jurisdiction of equity to grant the remedy of cancellation is exclusive and unquestioned. Its jurisdiction in this behalf will always be exercised when the remedy is sought for the protection or support of an equitable right or interest. But when the remedy is sought in aid of a right which is available in a suit at law the jurisdiction will not be exercised, unless the legal remedy is deemed inadequate. *Pomeroy on Equity Jurisprudence*, §§ 221, 303, 914, 1363, 1377. It is true that a defense available at law, and in its nature adequate, is sometimes deemed an insufficient remedy, because of dangers which may arise from a delay in the prosecution of the claim. But no room is left for an exercise of the jurisdiction on this ground when there is an action at law pending, in which the defense can be made without delay. *Pomeroy on Equity Jurisprudence*, §§ 179, 1363; *Bank of Bellows Falls v. Rutland & B. R. Co.*, 28 Vt. 470. The

facts stated in this bill will afford the orator a complete defense in the suits pending at law, and, if he is entitled to invoke the jurisdiction of equity, it must be upon the ground that judgments at law would not give him adequate protection. The orator insists that the suits brought against him, while proper for the recovery of the demands evidenced by the receipt, are of such a character that their determination will not protect him from further danger if the receipt be suffered to remain uncanceled. In cases where negotiable securities are claimed to have been obtained by fraud or conversion, the remedy of cancellation will not ordinarily be granted, unless applied for before the paper has matured. Some of the circumstances which may induce a court of equity to grant this protection against negotiable paper which has matured were considered in *Town of Glastenbury v. McDonald*, 44 Vt. 450. It is said to be a rule generally adopted that a bill will not be sustained to cancel an executory, non-negotiable, personal contract, where the wrong complained of may be set up as a defense at law, unless

§ 791. Rescission compared with reformation.—The power to open a written contract and let in equities which the complainant may be able to show is well established to exist in all courts of equity. At first the power seems to have been more generally exercised in those cases wherein the complainant alleged that the contract, as executed, did not express the real purpose and agreement of the parties, and he sought to modify what it contained or to insert what was essential to the expression of the true agreement according to his contention. But now, according to the authorities, the power will be exercised with equal readiness where a party seeks either to reform a contract to express the actual intention of the parties, or where he seeks the cancellation of an instrument as an entirety because it is not an agreement which the defendant has the right to enforce.¹

§ 792. Restoring benefits on rescinding contract.—A party seeking to rescind a contract for fraud must tender back to the other party whatever of value he received for the property which he seeks to recover. And, if, upon the discovery of fraud, he fails to offer to return whatever of value he has received under the contract, he affirms the contract.² It is a familiar rule that one who seeks the rescission of a contract on the

there are special circumstances which would prevent the defense from being available, adequate and complete. It is not claimed that the case presented by the bill discloses any circumstances of this character, except such as arise from the fact that the instrument is one that need not be specially declared upon."

¹ *Wilson v. Morris*, 4 Colo. App. 242; 36 Pac. Rep. 248; *Brainard v. Holsapple*, 4 G. Greene, 485; *Bray v. Comer*, 82 Ala. 183; 1 So. Rep. 77; *Gibbons v. Dunn*, 46 Mich. 146; 9 N. W. Rep. 140; *Jackson v. Wood*, 88 Mo. 76; *Roberts v. Derby*, 68 Hun, 299; 23 N. Y. Supl. 34.

² *Balue v. Taylor*, 136 Ind. 368; 36 N. E. Rep. 269, per Dailey, J.: "It is

the law, as contended by counsel, that where a party to a contract seeks to avoid it for fraud, or asks to rescind it on the ground of fraud, he must tender back to the other party whatever of value he received for the property which he seeks to recover by the rescission. *Haase v. Mitchell*, 58 Ind. 213; *Watson, etc., Mining Co. v. Casteel*, 68 Ind. 476; *Hanna v. Shields*, 34 Ind. 84. If a party, upon the discovery of fraud in the procuring of a contract, fails to return, or offer to return, whatever of property or thing of value he has received under the contract, he thereby affirms the contract, and can not afterwards be heard to complain. *Shaw v. Barnhart*, 17 Ind. 183; *Gatling v. Newell*, 9 Ind. 572."

ground of fraud must, as a condition precedent to bringing the action, restore or offer to restore the consideration received by him.¹ Thus, in order that a note may be rescinded for fraud, the maker must account for the benefits he has received in the transaction.² Where the plaintiff in a suit to set aside a mortgage tenders a quitclaim deed of land conveyed to her as a part of the same transaction, the court can compel a conveyance as the price of a decree in her favor.³ In an action by a corporation against a former stockholder to recover money paid him by its president for his stock on an *ultra vires* purchase thereof for plaintiff, the complaint does not state a cause of action,

¹ Bowden v. Achor, 95 Ga. 243; 22 S. E. Rep. 254. In Strodder v. Southern Granite Co. (1894), 19 S. E. Rep. 1022, it was intimated, but not decided, that there might be an exception to the general rule resulting from inability to restore by reason of poverty. In O'Callaghan v. Lowndes (1895), 66 Fed. Rep. 356, Lacombe, J., said: "One who has been induced by fraud or by duress to enter into a contract may rescind it, but when the contract has been executed by a delivery of property in accordance with its terms he can rescind only upon putting or offering to put the opposite party in as good a situation as he was before. 'A party can not rescind a contract, and yet retain any portion of the consideration. * * * (He) can not derive any benefit from it, and yet rescind the contract.' It must be nullified in toto, or not at all. It can not be enforced in part and rescinded in part." Perley v. Balch, 23 Pick. 283. See also, Shepherd v. Temple, 3 N. H. 455; Norton v. Young, 3 Greenl. 30; and 8 Am. and Eng. Encyc. of Law, p. 806."

² Templeton v. Green (Texas C. App. 1894), 25 S. W. Rep. 1073, per Head, J.: "If it be conceded that his right to rescission had not thereby been entirely lost, which we do not decide (Snow v.

Alley, 144 Mass. 546; 11 N. E. Rep. 764), it is clear that this could only be allowed upon an offer upon his part to do equity by accounting for the value of the benefits he had thus received. Life Association v. Goode, 71 Texas 90; 8 S. W. Rep. 639. This appellant failed to do, either in his pleadings or in the evidence introduced. These remarks apply with equal force to the plea of total failure of consideration. As we have seen, there was no total failure, and no basis was furnished from which a partial failure could be estimated."

³ Bell v. Campbell, 123 Mo. 1; 25 S. W. Rep. 359, per Sherwood, J.: "Plaintiff could not procure the cancellation of the first, and still retain the benefits of the second; nor would the trial court allow her to do so, in the event a decree went for her. Moreover, plaintiff, in her petition, recognized this, in which she tendered to Carter a quitclaim deed for the property that he had conveyed to her; and under this tender the circuit court could have compelled a conveyance, and made it the price of the decree it gave her. Whelan v. Reilly, 61 Mo. 565, and cases cited; Dwen v. Blake, 44 Ill. 135, and cases cited."

if it fail to show that plaintiff has returned or offered to return the stock.¹

§ 793. Restoring the consideration.—The rule that he who seeks to rescind a contract of sale must first offer to return the property received, and place the other party in the position he formerly occupied, as far as practicable, prevails equally at the civil and common law; but it presupposes the idea that there are persons to whom the offer or transfer may be successfully made. Where a father conveyed his farm to a son in consideration of his note for about one-tenth of the farm's value, and his promise to maintain the father during his life, and the note was not paid, and the father was supported while the son lived, but when he died his heirs refused to carry out the contract for the father's support, it was held that the father was entitled to judgment canceling the contract, and revesting him with title to the farm; and the mere fact that the father failed to tender the note before suit would not defeat his recovery, since no one to whom he could have tendered it could have restored the land.² A vendor of land need not, before bringing

¹ *Bank of San Luis Obispo v. Wickersham*, 99 Cal. 655; 34 Pac. Rep. 444, per DeHaven, J.: "Counsel for plaintiff do not dispute the general proposition that, to entitle one to rescind a contract, he must restore to the other party everything of value received from him under such contract; but it is claimed by them that the stock was extinguished by the sale, and therefore can not be legally returned, and that all defendant Wickersham can justly claim is to receive in the statement of the account demanded in the complaint a credit for the value of such stock at the time of the sale. We do not agree with counsel upon this point." In *Freeman v. Kieffer*, 101 Cal. 254; 35 Pac. Rep. 767, a land company, as plaintiff's agent, induced defendant by fraud to contract to purchase land, and then assigned the contract to plaintiff, who accepted the benefit thereof. It was held that plaintiff was,

on rescission, liable to refund all money which he had received from defendant under the contract, and that defendant, in rescinding such contract, properly offered to convey all his title in the land under the contract to plaintiff, who was the legal holder of the contract, and for whose benefit it was made.

² *Cree v. Sherfy*, 138 Ind. 354; 37 N. E. Rep. 787, *per curiam*: "A contract to support is a contract for personal services. It can not be performed by another unless the person receiving the support consents to receive it; and, if the person who is to furnish the support die, then his heirs, executors, or administrators must keep it. As appears from the complaint and the finding of the court, the chief consideration for the conveyance was the home comfort of the grantor and his support in declining years. While the decedent lived, the contract was

suit for a rescission of the sale and the cancellation of the deed for fraud, tender to defendant the consideration received by him; but it is sufficient if he offer in his petition to restore to defendant what he received, as the rights of the parties can be fully adjusted by the decree.¹ Where purchasers of a vine-

faithfully kept. After his death the widow and children and aged father remained together for two weeks, when the widow and children, over his advice and objection, abandoned the home, and removed to her mother's residence four miles away, and never returned to look after or care for the appellee, leaving him as the sole occupant of the premises. The appellants having refused to remain and execute the agreement they are in no better situation than the grantee would occupy if he were alive and had deserted the father. It would not be pretended that, if the son had forsaken the father under the circumstances, he would have any standing in a court of equity. It is the province of a court of conscience, when asked for relief—a right of action having arisen to one of the parties—to place the survivors as nearly in the position, relatively, they would have occupied but for the death, as it was possible to do. 'Act of God inures as excuse and relief to both parties to a contract. If it legally releases the one from executing a work he has undertaken, it equally protects the other from paying for more than has been done.' *Doster v. Brown*, 25 Ga. 24; 71 Am. Dec. 153. The case we are now considering presents many features of resemblance to that of *Richter v. Richter*, 111 Ind. 456, 461; 12 N. E. Rep. 698, in which this court says: 'The grantee having abandoned the land without sufficient excuse, and without offering to perform a continuous and fixed duty which rested upon him, no demand for performance was necessary in order to entitle the grantor to

re-enter. Abandoning the land, under the circumstances, must be regarded as equivalent to such a renunciation of the contract as authorized the grantor to enter, and treat the arrangement as at an end.' In the carefully considered case of *Lindsay v. Glass*, 119 Ind. 301; 21 N. E. Rep. 897, it is said: 'One who accepts the property of a sister or a parent, and agrees, in consideration thereof, to furnish a home, with suitable maintenance and support, does not perform his contract fairly, and according to its spirit, by simply furnishing shelter and subsistence. A home is something in addition to a roof over one's head, with food and drink supplied by strangers.'"

¹ *Garza v. Scott*, 5 Texas C. App. 289; 24 S.W. Rep. 89, per Neill, J.: "In such a case it is sufficient for the plaintiff to offer in his petition to restore to the defendant what he has received, and the rights of the parties can be fully adjusted and protected in the decree to be entered. 1 *Bigelow on Fraud*, 76, 82; *Gould v. Gayuga, etc.*, Bank, 86 N. Y. 75; *Allerton v. Allerton*, 50 N. Y. 670. There was an express offer in plaintiff's petition to restore the defendant *Maltzberger* the property deeded to him, and this was sufficient, so far as the tender is concerned, to enable them to maintain their equitable action for a rescission of the alleged fraudulent contract. *Brown v. Insurance Co.*, 117 Mass. 479; *Gould v. Gayuga, etc.*, Bank, 86 N. Y. 75. At law a party can not maintain an action to recover what he has parted with upon a contract into which he was induced to enter by fraud without first restoring

yard, who gave back a mortgage for a balance of the price, have destroyed a considerable portion of the grape vines, and the premises are not in as good condition as when purchased, a rescission will not be decreed in their favor absolutely, but the fraudulent vendor will be given his option to accept the amount due on the mortgage, less the damages assessed to the purchasers, or to rescind, and return the purchase-money, less such sum as will compensate him for the deterioration in the value of the farm.¹

§ 794. Keeping tender good.—The general rule is that where a party seeks to rescind a contract on the ground of mistake or fraud, and thereby seeks to relieve himself of the burdens imposed by the contract, he should not be permitted to retain the benefits of the contract to the detriment of the other party to the transaction. Seeking equity, he must do equity. Accordingly a suit to rescind a release of a claim for personal injuries can not be maintained without tendering back the money paid as a consideration therefor, and keeping the tender good, because in such a case the court can not protect the interests of the other party without requiring from plaintiff repayment or such an effectual tender.²

or offering in good faith to restore to the defendant what he obtained from him by virtue of the contract; and it is evident that the trial court was led into its erroneous ruling by this principle of law, which has no application to equitable actions for rescission."

¹ *Lurch v. Holder* (N. J. Eq. 1893), 27 Atl. Rep. 81.

² *Vandervelden v. Chicago, etc., R. Co.* (1894), 61 Fed. Rep. 54, per Shiras, J.: "The purpose of the general rule is to enable the court to do justice to both parties, so that, if the contract is set aside at the request of one party, the court may be able to restore the other party to the position he occupied before the contract was entered into, or otherwise the court may be made the instrument whereby great wrong may be wrought, in that

the one party is freed from the performance of the contract on his part without being compelled to restore or account for the money or other thing of value which he received by means of the contract which he now repudiates. If the contract is of such a nature that by means thereof one party thereto is induced to pay a given sum of money to the other which he would not have paid except for the inducement of the contract, and after the payment of the money, the party receiving the money seeks to rescind the contract, it is clear that, in justice and equity, he should be required to repay the money as a condition of rescission. There is a class of cases wherein the facts are such that the court, without a repayment or tender on part of the plaintiff,

§ 795. Requisite joinder.—He who would rescind a contract must put the other party in as good a situation as he was before, otherwise he can not do it. And his complaint, framed with this object, must state facts showing that he has performed or offered to perform on his part every act necessary to thus place the defendant. Where a complaint alleged that defendants, by fraudulent practices, induced plaintiff to purchase property from them for twice what it is worth, and that part payment thereof had been made, and notes and mortgages given for the residue, it was held insufficient to maintain an action for the cancellation of the notes and mortgages, where the property received was worth more than the part payment made, without offering to put the vendors *in statu quo*.¹ A part of several joint pur-

has it within its power to protect fully the interests of the other party in case of rescission, and in such cases the court may proceed to a hearing without requiring repayment or a tender. Illustrations of this class of cases may be found in *Thackrah v. Haas*, 119 U. S. 499; 7 Sup. Ct. Rep. 311, and *Billings v. Aspen, etc.*, Smelting Co., 3 C. C. A. 69; 52 Fed. Rep. 250. The difference between that class of cases and the one at bar is marked and radical. This case is not one which involves the sale and transfer of property, wherein the court of equity having control over the property, and the distribution of the proceeds thereof, can adjust and protect the equities and rights of the parties. In this case, when the question of settlement was in treaty between the parties, the one party asserted a right of recovery against the other for personal injuries received, and the other denied all liability whatever. Under these circumstances, the defendant company was willing to compromise, and thereby buy its peace. The money was paid for the purpose of avoiding, not only the risk of damages being recovered by the plaintiff, but also to save the costs and expenses of litigation,

even if the result should be favorable to the company. If the court, without requiring a repayment of the money paid on the settlement, or the equivalent, should hear the issue as to the validity of the settlement, and decree a rescission of the contract, then the plaintiff could prosecute his law action, and therein litigate the question of original liability. If the judgment was adverse to him on that question, he would still have in his possession the money paid him to procure a settlement, and thus, in effect, the company would have been deprived of all the benefits of the settlement without having secured to it the return of the money which it paid to secure the settlement."

¹ *Buena Vista, etc., Co. v. Tuohy*, 107 Cal. 243; 40 Pac. Rep. 386, Searls, C. "A party defrauded may rescind and restore within a reasonable time all of value which he has received under the contract, or he may affirm it and sue for damages. *Gifford v. Carvill*, 29 Cal. 589; *Herrin v. Libbey*, 36 Maine, 357; *Burton v. Stewart*, 3 Wend. 236; *Burbank v. Dennis*, 101 Cal. 90; 35 Pac. Rep. 444. In the case last cited, this court held, in substance, that where a promoter of a

chasers of chattels can not ask for a rescission of the sale without the joinder of the other purchasers in an offer to return the goods.¹

corporation has been guilty of fraud, the company may elect to set aside the contract or to recover the promoter's secret profits. This is not an action to recover the secret profits made by the defendants as promoters of the corporation. No accounting of such profits is sought. No rescission of the conveyance is averred or asked for. The theory of the complaint is: (1) That defendants were promoters of the corporation plaintiff. (2) As such promoters, they were guilty of fraudulent practices, whereby plaintiff was induced to purchase property for \$72,000, which was only worth \$36,000, and to pay therefor \$10,000 in cash, and to give their notes secured by mortgages for the residue of \$62,000. (3) That these notes and mortgages being fraudulent, plaintiff may retain the property conveyed to it so worth \$36,000, and maintain an equitable action for the cancellation of the notes and mortgages without further compensation for the property purchased. Conceding the facts in support of this theory to be well stated, they do not entitle plaintiff to recover." In *Travelers' Ins. Co. v. Redfield* (Colo. 1895), 40 Pac. Rep. 195, Thomson, J., said: "There can be no decree for cancellation or rescission in this action, because the complaint contains no offer to account or pay for the use which the plaintiff has had of the water rights. He who asks equity must do equity. The plaintiff can not repudiate his contract, and still retain the benefits which he has derived from it, and his desire to restore what he has received must appear in his complaint, or he has no standing in a court of equity."

¹ *Robinson v. Siple*, 129 Mo. 208; 31

S. W. Rep. 788, per Burgess, J.. "The rule is that a party desiring to rescind a contract must tender back whatever of value he has received, and place the other contracting party *in statu quo*, otherwise the contract will not be rescinded. This is in accord with the soundest rules of equity and justice, and is of universal application, unless the other party, by some act or omission of his own, has rendered it impossible for the party desiring to rescind to return the property received by him. *Masson v. Bovet*, 1 Denio, 69; *Hammond v. Pennock*, 61 N. Y. 145. In the case in hand, defendants Siple, Siple and Beanblossom were unable to rescind and return the property without the concurrence of their co-defendant, W. H. Robinson, who not only refused to rescind the contract, but had taken and disposed of a number of the horses, so that it was impossible that plaintiff could have been placed *in statu quo*. In *Melton v. Smith*, 65 Mo. 315, Sherwood, J., in speaking for the court, said: 'Smith was in no condition to exercise the right of rescission, even had he elected promptly so to do, and for the obvious reason aforesaid, that, holding only an undivided three-fourths of the property contracted to be conveyed, it was out of his power to have restored Atkinson to his *statu quo*,—an absolute condition precedent to the exercise of the right of rescission, whether exercised with or without the intervention of the courts.' See also, *Estes v. Reynolds*, 75 Mo. 563. But it is argued by counsel for defendants that plaintiff, through the wrongful acts of W. H. Robinson, his agent, placed defendants in such a

§ 796. Rescission by vendor with forfeiture against vendee.—

Where a contract for the sale of land provided that, if the vendee failed to pay the price or the interest thereon within a time specified, the vendor might at his option rescind the contract, and that all improvements and payments made by the vendee should thereupon be forfeited, it was held that the contract was a conditional sale, and, in the absence of fraud, could not be construed as an equitable mortgage, so as to relieve the vendee from forfeiture on rescission by the vendor for default in payment of interest.¹ Where lands were forfeited

position that they could not rescind, or restore all of the property, and that under such circumstances the law did not require them to do that which plaintiff himself had rendered impossible. This position, if borne out by the evidence, is perhaps true, but is untenable in this case, for the reason, as we have before said, that W. H. Robinson was not the agent of the plaintiff, and even if, in any possible way, he could be considered as acting as the agent of plaintiff in the sale of the horses,—which we do not admit,—there was not one scintilla of evidence tending to show that any such agency existed after they were purchased. On the discovery of the fraud, defendants had the right to stand by the contract, and sue the party from whom the horses were purchased for damages for the fraud practiced upon them, or to rescind the contract. They chose the latter course, and, in order to avail themselves of this right, it was a prerequisite that they place the other party *in statu quo*. Moreover, they should have acted promptly upon the discovery of the fraud. *Taylor v. Short*, 107 Mo. 384; 17 S. W. Rep. 970; *Key v. Jennings*, 66 Mo. 356; *Hart v. Handlin*, 43 Mo. 171; *Dougherty v. Stamps*, 43 Mo. 243; *Estes v. Reynolds and Melton v. Smith*, 65 Mo. 315. This they did not do. The judg-

ment was clearly for the proper party, and should be affirmed."

¹ *Pease v. Baxter*, 12 Wash. 567; 41 Pac. Rep. 899, *Denbar, J.*: "This case was substantially before the court in *Reddish v. Smith*, 10 Wash. 178; and it was there decided that under the provision of a contract for sale of land, that, in case the purchaser fails to pay promptly the monthly installments provided for after a demand of thirty days, the vendor could declare the contract forfeited, was entitled to enter upon and repossess himself of the premises, and thereupon the contract should be at an end, there was a forfeiture of the payments made; and it was further decided that under such contract, if any of the monthly payments were not made by the purchaser when due, it was not a waiver of the vendor's right of forfeiture that he did not declare it until three payments had become due. The contract in the case cited is not nearly so explicit as that in the one at bar. While it is true that the courts will not supply language to create a forfeiture where the forfeiture is not specially provided for by the parties themselves, yet it seems to us that it was the clear, unequivocal intention of the parties to this contract that the payments made by the appellants should be forfeited, in case the respondents elected so to do, upon the

through failure to enter the same for taxation as provided by the constitution of West Virginia, it was held that a deed from the state would not be set aside upon the ground that the complainant had been deprived of his property without due process of law, because the forfeiture is in that event a nullity, and

non-performance of the contract by the appellants. * * * To prevent any misconception of the right of the vendor to elect to rescind this contract, the draftsman of the contract went beyond the ordinary form of words employed in such cases, and provided that they might, at their mere option, rescind this contract; and it was not left for the courts to determine the rights of the parties when once the vendor had elected to rescind, but it is especially provided that in such cases all payments and all improvements on said premises theretofore made should be forfeited to said party of the first part. It is claimed that the question of the equitable right of the vendee was not raised before this court in the case of *Reddish v. Smith*, *supra*; but while it is true that the subject was not discussed under the head of 'equitable mortgages,' as it is by the learned counsel in this case, the equitable interests of the vendee were contended for in that case, and the principle discussed was the same, viz., the right of the vendor to rescind the contract and enforce the forfeiture provided for. A great number of cases have been cited by the respondents to sustain their contention, all of which we have carefully examined, but none of them, we think, are in point. Most of them refer to the proposition which we have just spoken of in relation to the construction of deeds, and in none of them is there construed a contract which bears any relation whatever to the contract in question. It is true, in *Fisk v. Stewart*, 24 Minn. 97, the

court held that 'when the real nature of a transaction between parties is confessedly that of a loan of money advanced upon the security of real estate granted to the party making the loan, whatever the form of the instrument taken as the security, it is always treated in equity as a mortgage,' to which is annexed as an inseparable incident the right to an equity of redemption. But it is not confessedly a loan in this case, but, according to the terms of the contract, it was a sale of real estate, and the case cited does not bear upon the questions involved in the case at bar. In *Gale v. Morris*, 29 N. J. Eq. 222, which was an action to reform a mortgage, the court held that an equitable mortgage could arise from an unsuccessful attempt to make a valid mortgage deed; and this is simply in accordance with the law which we noticed above, that, where it was shown conclusively that it was the intention of the parties that the instrument in question should be a mortgage instead of a deed, the courts would construe it to be a mortgage; and none of the cases cited go further than this. No case is cited by either side which is directly in point, and we must conclude that the presumption has always obtained in all courts that where a contract was plain and specific in its terms, and no fraud is alleged, the contract must be enforced. As was said by the court in *Gray v. Blanchard*, 8 Pick. 284: 'It is a harsh proceeding on his (appellant's) part, but it is according to his contract, which must be enforced if he insists upon it.' "

complainant has an adequate remedy at law. Even if the school commissioner of the state sells forfeited lands as waste lands, when he has no right to do so, the former owner has no rights therein which he can enforce in a court of equity; because the sale is either void, in which case there is an adequate legal remedy, or it is merely irregular, in which case relief must be had in the state court in which the proceedings for sale were had; and a court of equity will not be disposed to exercise any merely discretionary powers in order to relieve from statutory forfeiture lands which for thirty years have paid no taxes, and have not been reported for taxation as required by law, especially when the owner does not now offer to pay the same, or aver an intention to do so, but merely seeks to set aside certain conveyances, which he alleges will embarrass him in the exercise of his right to redeem, in case he should elect to do so.¹ Where the consideration of a deed conveying a right of way to a railroad company was, as expressed in the deed itself, the benefits which were expected to accrue to the land-owner from the construction of the contemplated railroad, and there was an express promise on the part of the company to construct the road, by virtue of which promise the conveyance was procured, and also a parol license to cut cross-ties induced, a breach of the contract by failing to construct the road, abandoning work upon it, and selling out to a rival company, with intent that the whole enterprise should be suppressed and forever abandoned, constitutes a cause of action in behalf of the land-owner to the extent, at least, of having decreed a cancellation of the conveyance, and of having awarded to him compensation for any damage done to the land by severing timber and cross-ties therefrom, and digging up the soil, or by other means, while the work of construction was in progress.²

§ 797. Rescission for expressions of opinion—Future promise.—Fraudulent expressions of opinion are generally insufficient to justify the rescission of a contract executed and acted

¹ *Read v. Dingess* (1894), 60 Fed. Rep. 21. And see also, *McClure v. Maitland*, 21 W. Va. 561, 578. ² *Savannah, etc., R. Co. v. Atkinson*, 94 Ga. 780; 21 S. E. Rep. 1010.

on by the parties.¹ An action for rescission for fraud can not be predicated upon a promise to do something in the future, although the party promising had no intention of fulfilling the promise at the time it was made.² And the purchaser of a lot of land from a company is not entitled to rescind the sale, or to damages because of the expression by the grantor's agent, at the time of the sale, of his belief that certain improvements would be made on land controlled by the company, which were in fact not made, where such agent believed his statements to be true, and made no engagement to carry out the purposes expressed.³ But where a railroad company, desiring to run its road through a certain farm, represented to the owner of the farm that it would change the location of its road from that indicated by the preliminary survey so as to run it along a certain slough, and upon the strength of that representation the owner agreed to give a deed of the right of way, and the company built its line according to said survey, and it did not appear that it ever intended to build it along the slough, it was held that the false representations as to the location of the road avoided the contract, and that where a written contract is attacked on the ground of fraud, parol evidence is admissible to show the fraud.⁴

¹ *Johansson v. Stephanson*, 154 U. S. 625; 14 Sup. Ct. Rep. 1180.

² *Balue v. Taylor*, 136 Ind. 368; 36 N. E. Rep. 269, per Dailey, J.: "Counsel also reminds us that representations upon which an action of fraud can be predicated must be of alleged existing facts, and not upon a promise to do something in the future, although the party promising had no intention of fulfilling the promise at the time it was made. *Bennett v. McIntire*, 121 Ind. 231; 23 N. E. Rep. 78; *Caylor v. Roe*, 99 Ind. 1; *Fry v. Day*, 97 Ind. 348. The foregoing principles enunciated by counsel are elementary. Applying these tests to the complaint under consideration, it is manifest that it would not be sufficient to constitute a cause of action for a rescission of the contract between the parties."

³ *Joseph v. Decatur Land Imp. Co.*, 102 Ala. 346; 14 So. Rep. 739.

⁴ *Grand Tower R. Co. v. Walton*, 150 Ill. 428; 37 N. E. Rep. 920, *per curiam*: "It is, however, claimed that the representation made to appellee establishes only a future intention on the part of the railway company to make the change of route; and, it is said, a representation, although it may be false, as to a matter of intention, does not constitute fraud; and in support of this position we are referred to Kerr on Fraud and Mistake (page 88), where the author says: 'As distinguished from a false representation of a fact, the false representation as to a matter of intention, not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud at law, nor does it

§ 798. The same subject continued— If parties in confidence.

—A statement by a vendee of land, for the purpose of inducing another to indorse his note, and take the contract in his name as security therefor, that the vendee expected to resell the land at an advanced price, is a mere opinion and can not be made a basis of a charge of fraud in defense to an action by the vendee against the indorser for interest due. The indorser is not entitled to a rescission thereof because there existed an agreement, undisclosed to the indorser, between the vendor and vendee, that he should have a certain discount from the agreed price in case of his procuring a purchaser, where such indorser was informed of all the facts as to the value of the land, and how much it would cost him if he should be compelled to take it because of the vendee's default.¹ Where plaintiff listed his land with defendant, a real estate agent, for exchange, and, relying on defendant's representation that certain land of his was worth as much as plaintiff's, exchanged his land therefor, his deed to defendant will be canceled where defendant grossly misrepresented the value of his land; since plaintiff has a right to rely on defendant's representations because of the fiduciary relations existing between them.² But where there is no relation of trust or confidence

afford grounds for relief in equity.' It is, however, plain that the representations here involved do not fall within the rule indicated by the author. Here was an agreement to locate the road at a definite, specified place, on the part of the railroad company. It was not a mere statement of an intention to do an act in the future, but a contract to change the location, in consideration of which the appellee agreed to give the right of way. It is also claimed that parol evidence was not admissible to vary or change the terms of the written contract executed by appellee. Where parties have reduced their contract to writing, the rule is well established that parol evidence is not admissible to vary or change the terms of the contract. But

this rule of evidence has no application here. Where it is sought to impeach a written contract for fraud, in a court of equity, parol evidence is admissible for that purpose. *Van Buskirk v. Day*, 32 Ill. 260; *Race v. Weston*, 86 Ill. 92; *Wilson v. Haecker*, 85 Ill. 349."

¹*Spence v. Geilfuss*, 89 Wis. 499; 62 N. W. Rep. 529.

²*Shute v. Johnson*, 25 Ore. 59; 34 Pac. Rep. 965, per Moore, J.: "The defendant contends that, admitting he made representations as to the value of his property as alleged by plaintiffs, they were mere expressions of opinion, not amounting to a warranty, upon which the plaintiff had no right to rely, and for any damages arising therefrom, equity will not afford re-

existing between the parties, a mere false representation of value by a vendor, where no warranty is intended, is no ground of relief to the purchaser;¹ if, however, the representations were intended to be the statement of a fact, to be understood and relied upon as such, relief will be granted to the purchaser who has been injured thereby, and the question should be left to the jury to say whether the representations were mere expressions of opinion as to value or the statement of a material fact.²

§ 799. Concealment—Representations of value—Warranty.—False representations, to be fraudulent, must be a false statement of acts, positively made, not mere matters of erroneous opinions. A concealment to afford ground of rescission for fraud must be a willful suppression of such facts in regard to the subject-matter of the contract as the party making it is bound to disclose.³ If the value of property can be ascertained by ordinary inspection, the maxim "*caveat emptor*" applies; but such maxim does not apply when any particular skill is required to ascertain it, and affirmations of value in such cases may be relied upon. Where a person makes an affirmation of value which is the inducement to a purchase, within the principle of the decisions it is a warranty; or, where statements of value are attended with statements as to the elements

lied. * * * * The plaintiff had listed his property with the defendant for exchange, and by thus creating him his agent for that purpose established a relation of trust and confidence between them; and it became the duty of the defendant, so long as this relation continued, to correctly inform the plaintiff as to the character and value of the property offered; and this relation did not cease when the defendant offered his own property in exchange for that of the plaintiff. To hold that this relation between them had terminated when the defendant offered to trade his own property would be to hold that any person acting in a fiduciary capacity, when he, on his own ac-

count, and for his own benefit, treated with his principal or *cestui que trust*, might rob him with impunity. Such is not the law, and this fiduciary relation furnishes an exception to the general rule that the affirmation of value of property made by a vendor to secure a sale is but the mere expression of an opinion, and upon which the vendee can not rely, because it is customary in selling property to make such statements of overvaluation."

¹ 2 Kent's Commentaries, 485; 1 Bigelow on Frauds, 4191; Medbury v. Watson, 6 Metc. (Mass.) 246; Rockafellow v. Baker, 41 Pa. St. 319.

² Homer v. Perkins, 124 Mass. 431.

³ Rison v. Newberry (Va. 1894), 18 S. E. Rep. 916.

that go to make up the value, which are false, they are not to be treated as statements of opinion, but of material facts.¹ But, as a general rule, a statement by a vendor or his agent in regard to the value of land is merely an expression of opinion, and not a representation of a fact upon the falsity of which an action to rescind may be based.² Representations as to the effectiveness of a mechanical equivalent, made to a person experienced in the sale of the article, who has every chance to make tests, and the opinion of an expert to guide him, although in fact false, are no ground for equitable rescission of a sale of the patent right.³

§ 800. The same subject continued—Miscellaneous.—A bill for the rescission of the purchase of a silver mine on the ground of fraud alleged that defendant represented that the ore therein contained a certain average of pure silver, making it very valuable, whereas in fact the average was so low that it was worthless; and that defendant had “salted” the samples which complainant took from the mine, and upon the faith of whose analysis the purchase was made, by fraudulently mixing native silver therewith. It was held that, where the latter allegation is sustained, defendant can not shelter himself behind the plea that his representations were mere expressions of opinion as to the value of the mine.⁴ Where the defendant

¹ *Van Epps v. Harrison*, 5 Hill (N. Y.), 63; *Hubbell v. Meigs*, 50 N. Y. 480.

² *Nostrum v. Halliday*, 39 Neb. 828; 58 N. W. Rep. 429.

³ *Wade v. Ringo*, 122 Mo. 322; 25 S. W. Rep. 901.

⁴ *Mudsill Min. Co. v. Watrous* (C. C. A. 1894), 61 Fed. Rep. 163, per Lurton, J.: “It is, perhaps, too well settled to admit of controversy that a misrepresentation, in order to constitute fraud, must be an affirmative statement of some material fact, and not a mere expression of opinion. *Gordon v. Butler*, 105 U. S. 553; *Southern Development Co. v. Silva*, 125 U. S. 247; 8 Sup. Ct. Rep. 881. This distinction between

the misrepresentation of a fact and the expression of an opinion is peculiarly applicable in the sale of a property so speculative and uncertain as a silver mine. In *Jennings v. Broughton*, 17 Beav. 234, which was a case brought to set aside the sale of shares in a mining venture on account of fraud in the sale, Knight Bruce, L. J., said: ‘First, in the statements or representations concerning the mine, was there any untrue assertion material in its nature; that is to say, which, taken as true, added substantially to the value or promise of the mine, and was not evidently conjectural merely?’ The representations made verbally, and which it is alleged were

bought a patented machine from plaintiff, on the false representation that the right to use the patent was not disputed, and, on being sued by a patentee, who claimed that the machine infringed his patent, defendant demanded and plaintiff promised to give an indemnifying bond, it was held that such promise was upon a sufficient consideration, and its breach justified defendant in rescinding the contract of sale.¹ Under the California code, providing that "a written instrument, which if left outstanding may cause serious injury to a person against whom it is void or voidable, may upon his application be so adjudged, and ordered to be delivered up and canceled," plaintiff, who granted to defendant the sole and exclusive right to sell a patented machine in certain states, with a provision for the termination of the agreement, in case the latter failed to faithfully prosecute the introduction or sale of the article, could sue to cancel the agreement when defendant, having made an agreement with the proprietor of a rival machine, with the intention that the introduction and sale of plaintiff's machine within a portion of the territory covered by plaintiff's agreement should be thereby prevented, repudiated plaintiff's right

false, related alone to the average richness of the exposed body of ore. Though in form the affirmation of a fact, yet, when applied to the subject-matter of the negotiation, it was in its very nature conjectural, and amounted to an expression of opinion. But this rule that a mere expression of an opinion will not constitute fraud must not be pushed beyond the reason for the rule. If a false statement is to be given immunity because it is mere 'puffing' or 'trade talk,' and only the expression of an opinion, it is because the party to whom the opinion is addressed has no right to rely upon the mere expression of an opinion, and is assumed to have the ability and opportunity of forming his own opinion and coming to an independent judgment. In speaking of the difference

between the legal effect of a representation as to a fact and the expression of an opinion, Mr. Pomeroy says: 'The reason is very simple. While the person addressed has a right to rely on any assertion of a fact, he has no right to rely upon the mere expression of an opinion held by the party addressing him, in whatever language such expression be made. He is assumed to be equally able to form his own opinion, and to come to a correct judgment in respect to the matter, as the party with whom he is dealing, and can not justly claim, therefore, to have been misled by the opinion, however erroneous it may have been.' Pomeroy on Equity Jurisprudence, § 878."

¹ Pratt v. Paris Gaslight Co., 155 Ill. 531; 40 N. E. Rep. 1032.

to then terminate the agreement, threatening to obtain an injunction to restrain sales by plaintiff in such territory.¹

§ 801. Rescission for mistake of law.—As a general rule, a mistake of law, pure and simple, is not adequate ground for relief. While this general doctrine prevails in equity as well as at law, equity sometimes exercises its jurisdiction on account of a mistake of law. If the mistake of law is not pure and simple, but is induced or accompanied by other special facts giving rise to an independent equity on behalf of the mistaken person, such as inequitable conduct of the other party, equity will interpose its aid.²

¹ *Bradley v. Anglo-Amer. Gas Co.*, 102 Cal. 627; 36 Pac. Rep. 1011.

² *West v. West* (Texas App. 1895), 29 S. W. Rep. 242. In this case W. died insolvent, leaving plaintiff, his second wife, one child by her, and several children by a first wife, including defendant. Defendant, in order to procure from plaintiff a deed of the homestead interest of herself and child, fraudulently represented to her that if she should marry again she would lose all interest in the premises, and promised to care for her child, and also stated that her interest was not worth \$50, but that he would pay \$100 (a grossly inadequate sum), which he never in fact paid. It was held that, as the mistake of law under which plaintiff executed the deed was due in part to the inequitable conduct of defendant, the deed was void. Neill, J., said: "Upon cases of this character, Mr. Pomeroy says that 'whatever may be the effect of a mistake, pure and simple, there is no doubt that equitable relief, affirmative or defensive, will be granted when the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights, which are to be affected, is induced, procured,

aided, or accompanied by inequitable conduct of other parties. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud; it is enough that the misconception of law was the result of, or even aided or accompanied by, incorrect or misleading statements or acts of the other party.' *Id.*, § 847; Kerr on Fraud and Mistake, 90, 400, 401. Independent of the misrepresentations and false promises of the appellee, the parties stood in unequal positions. The appellant, Mary, had been recently left a widow; had born a child by her husband during her widowhood. After its birth she sought for herself and infant shelter in the late home of her husband, which was withheld from her and occupied by the appellee, who took advantage of her condition and solicitude for her babe, and, by fraudulent representations and false promises, obtained, without consideration, a deed to her interest in her home. The appellee was a man, and half-brother of the infant, and knew his father's estate was insolvent, and that the deed he obtained was to all his father's wife could acquire from her husband's estate, save a year's allowance, and what might be allowed her

§ 802. Where one party only ignorant.—Where ignorance of the law exists on one side, and that ignorance is known and

in lieu of exempt property. By canceling the deed, the appellee's situation will not be changed from what it was before its execution. Even where parties have acted under a mistake of law, though there be no actual fraud, if one is unduly influenced and misled by the other to do that which he would not have done but for such influence, and he has, in consequence, conveyed property to another without consideration, equity will, if possible, restore both parties to the same condition they were before. *Jordan v. Stevens*, 51 Maine, 78. It seems to us that the facts alleged by appellant in this case present stronger grounds for the interposition of a court of equity. In the case of *Ramey v. Allison*, 64 Texas, 697, the defendant sought in her answer to be relieved against her mistake as to the law when she signed a deed of trust by virtue of which her property was sold. Her mistake resulted from the fraudulent and misleading representations made to her as to the state of the law in respect to the vital consideration on which alone she could have been induced to sign the instrument. The question of law was a doubtful one. So in this case the question as to the appellant's and her child's interest in the homestead was one upon which lawyers and judges differed. See dissenting opinions of Chief Justice Stayton in *Zwer-nemann v. Von Rosenberg*, 76 Texas, 522, and *Childers v. Henderson*, 76 Texas, 664. And the court held that 'a contract obtained in such a manner is fraudulently obtained if the representations were fraudulently made, and intended to deceive. If not thus fraudulently conceived and intended, they were not the less misleading, and induced a fatal mistake on the

party relying on their correctness. In either case the contract is not that of a person giving consent to it under circumstances that will render it binding in equity.' See also, authorities quoted and cited in the opinion. We have concluded that appellant's petition states a cause of action entitling her to equitable relief, and that the judgment of the district court should be reversed, and the cause remanded." In *Salinas v. Stillman* (1894), 66 Fed. Rep. 677, Congress made an appropriation to acquire title to the Ft. B. reservation. After the act was passed, seven persons, heirs of one S., brought an action of trespass to try title to the reservation, against K., the commanding officer of the troops stationed thereon, in which several other persons intervened, claiming title. When the case was about to come on for trial, two of the plaintiffs and nearly all the interveners entered into an agreement, for the purpose of securing promptly a judgment which would make it possible to give a title acceptable to the United States, and to secure the appropriation, by which they undertook to co-operate on the trial in securing a verdict which would vest the title in two of the interveners, and, after such verdict had been secured, and the title passed and money paid, to submit their respective claims to certain arbitrators, who should divide the money between them. This agreement was not communicated to the court. The trial resulted in a verdict for the two chosen interveners, the land was conveyed to the government, and the money paid. Seven years later two of the plaintiffs in the action of trespass, one of whom was a party to the agreement, and an in-

taken advantage of by the other party, the former will be relieved. More particularly will this be so if the mistake was encouraged or induced by misrepresentations of the other party.¹ Thus a settlement of a claim for half the amount a party was entitled to, made in ignorance of the law, and upon the fraudulent representations of the other party, who knew of such ignorance, and who knew the rights of the parties, will be set aside.²

tervener in that action, who was also a party to the agreement, brought this suit to set aside the agreement for mistake, and the judgment in the action of trespass for mistake, and as a fraud upon the court. The only allegation as to mistake was that, for want of counsel and well-considered legal advice, W. (one of the complainants) was led into error in signing the agreement. It was held that, in view of the length of time elapsing before any attack was made on the proceedings, and the indefiniteness of the allegation of mistake, no case was made for setting aside the agreement or judgment on the ground of mistake.

¹ Bispham on Equity, § 188.

² Titus v. Rochester German Ins. Co. (Ky. 1895), 31 S. W. Rep. 127, Eastin, J.: "Under the authorities quoted, it is manifest that the compromise contract sought to be rescinded here is within the control of a court of equity and may be set aside. And now, referring to the decision of this court, and to the doctrine established in this state, it seems to us still clearer that the contract complained of, and which was made under the circumstances set forth in the petition and admitted by appellee, can not be sustained. In an exhaustive opinion, in which the authorities were ably reviewed, by Judge Robertson, after referring to the difficulty of determining in every case when a contract was, in fact, made under a

mistake of law, it is said: 'When it can be made perfectly evident that the only consideration of a contract was a mistake as to the legal rights or obligations of the parties, and when there has been no fair compromise of *bona fide* and doubtful claims we do not doubt that the agreement might be avoided on the ground of a clear mistake of law, and a total want, therefore, of consideration or mutuality.' Underwood v. Brockman, 4 Dana, 309. In the case of Ray v. Bank, 3 B. Mon. 510, this court referred to and approved the above case, and said: 'Upon the whole, we would remark that whenever, by a clear and palpable mistake of law or fact, essentially bearing upon and affecting the contract, money has been paid without cause or consideration, which in law, honor, or conscience, was not due and payable, and which in honor or good conscience ought not to be retained, it was and ought to be recovered back.' Both of these cases are cited with approval in the case of Louisville & N. R. Co. v. Hopkins Co., 87 Ky. 605; 9 S. W. Rep. 497, and the doctrine laid down therein has not been departed from by this court. It will be seen that the question of fraud did not enter into the decision of either of those cases, but that they are almost entirely based upon the fact that there was no good consideration to uphold the contracts; that it was not a fair compromise of *bona fide* and doubtful claims; and

§ 803. **Rescinding release of legacy—Mistake of law—Concealment.**—It is well settled that, where there is a mistake of law on one side, and either positive fraud on the other, or inequitable, unfair, and deceptive conduct, which tends to confirm the mistake and conceal the truth, it is the right and duty of equity to award relief. All the cases which deny a remedy for mere mistake of law on one side are careful to add the qualification that there must be no improper conduct on the other.¹ Thus where plaintiff, who was an old man, through a mistake of law supposed that, on the lapse of a legacy caused by the death of a legatee, it went to the deceased legatee's children, although in fact the plaintiff was entitled to it as the testator's brother and heir, executed to the executor a release of all claims against the estate, it was held that the release was voidable because of the executor's concealment from plaintiff of his legal rights as heir.² But where, on the ex-

that the money was not in law, honor, or conscience payable, and ought not in honor or good conscience to be retained. If, for these reasons, a contract made under a clear mistake of law may be set aside, then how much stronger reason is there for annulling the contract under consideration? Not only was this contract, according to this record, as it comes before us, wholly without consideration, and not only was the money surrendered by appellant on his claim not due in law, honor, or conscience, and surrendered only under a clear mistake of law, but it is further admitted by the demurrer that this contract was obtained, and that appellant was induced to surrender one-half of his claim, by the actual false and fraudulent misrepresentations of appellee, knowingly made for the purpose of deceiving and defrauding appellant."

¹Silliman v. Wing, 7 Hill, 159; Flynn v. Hurd, 118 N. Y. 19; 22 N. E. Rep. 1109; Vanderbeck v. City of Rochester, 122 N. Y. 285; 25 N. E. Rep. 408.

²Haviland v. Willets, 141 N. Y. 35; 35 N. E. Rep. 958, per Finch, J.: "There was in this case evidence of a studious concealment of the precise point essential to the free and intelligent action of the plaintiff by the executor, in whose position and ability some confidence was reposed. No effort or suggestion was made by Stephen to rectify the mistake under which Barclay was acting; and even the statement of his counsel, made at the last minute, occurred after Barclay was already bound, was directed to Stephen, and not to the plaintiff, and was couched in legal terms, which the latter might not have apprehended even if he had heard them. And that he remained mistaken to the end is indicated by the fact that just before the release was read Barclay asked Stephen to intercede with Martha and Phebe to procure him a larger share, to which Stephen answered merely, 'We will see about that.' So that upon the facts there is evidence to support the finding of Barclay's mistake, and the

ecutor's death, soon after, plaintiff learned his rights from his own counsel, but for more than three years kept silence, allowing the administration to proceed, and large payments to be made to the children of the deceased legatee, it was held that he was estopped to recover payments so made after he knew his rights.¹

§ 804. Fraudulent representations.—In order to establish a fraudulent representation by a party to a contract which will entitle the other party to a rescission, the latter must show by clear and decisive proof—first, that the defendant has made a representation in regard to a material fact; second, that such representation is false; third, that such representation was not actually believed by the defendant, on reasonable grounds, to be true; fourth, that it was made with intent that it should be acted on; fifth, that it was acted on by the complainant to his damage; and, sixth, that in so acting

legal conclusion founded thereon. Much more should the rule we have asserted apply in a case where the release is utterly without consideration, and where its true legal effect is simply an authority by Barclay to Stephen to give away the former's property through ignorance on his part of his ownership."

¹*Haviland v. Willets*, 141 N. Y. 35; 35 N. E. Rep. 958, per Finch, J.: "If he intended not to be bound it was his duty to speak, and he had full opportunity to do so. Silence misled to their harm both the administrators and the supposed legatees. The former paid and the latter accepted the money as rightfully payable and due, and the one incurred risk and the other may have spent the money or changed modes of life in consequence, and certainly thereby incurred an unknown and unsuspected obligation, if required to return the fund. Under such circumstances the plaintiff is estopped from a recovery. The moment he learned his real rights it was his duty to speak. He had full opportunity to

speak and he knew that his silence would necessarily mislead the other parties to their harm. *Erie County Bank v. Roop*, 48 N. Y. 292; *Blair v. Wait*, 69 N. Y. 113; *Viele v. Judson*, 82 N. Y. 32; *Queen v. Lords of the Treasury*, 16 Q. B. 357; *Brisbane v. Dacres*, 5 Taunt. 143. Indeed, if the case should be reduced down to its simplest elements, and treated from the moment in which Barclay knew his rights on the basis of a mere gift which he had authorized the representatives of the estate to make out of his own share, he could not recover back from the donees the gift so far as executed. It can not be that a gift voluntarily made, without mistake or fraud, can be at will recovered back; and, from the day when Barclay knew that the lapsed share was his, every payment made to Samuel's daughters was his payment, because made by his direction and authority, with full knowledge of both law and facts, and by the assent of his silence during more than three years."

thereupon the complainant was ignorant of its falsity, and reasonably believed it to be true. The first of the foregoing requisites excludes such statements as consist merely in an expression of an opinion or judgment honestly entertained; and, again, excepting in peculiar cases, it excludes statements by the owner and vendor of property in respect to its value.¹

¹ *Southern Development Co. v. Silva*, 125 U. S. 247. In *Clark v. Reeder* (1895), 158 U. S. 505; 15 Sup. Ct. Rep. 849, it appeared that by a contract of sale, defendant agreed to convey, with special warranty only, all the land within the exterior boundaries of a certain survey containing 50,096 acres, more or less, except such of the lands as were found, by subsequent surveys, to be held by third persons by adverse title and possession, constituting a better title than that of the vendor; the sale to be by the acre, and not in gross; part payment to be made when the vendee's attorney should certify the title to be good and valid, which certificate was to be made within thirty days. The certificate was accordingly made, the attorney stating therein that a small part of the survey was covered by an older survey, but that such survey had long been forfeited, and therefore did not interfere with the vendor's title. It was subsequently discovered that this older survey in fact covered most of the land included in the contract, but the full extent of the interference was not known by either party at the time, and the evidence was insufficient to show any fraudulent misrepresentation or concealment on the part of the vendor's agent. It was held that the interference between the surveys constituted no ground for rescission. *Clark v. Reeder*, 40 Fed. Rep. 513, affirmed. In *Bement v. LaDow* (1895), 66 Fed. Rep. 185, Coxe, J., said: "It is thought that the third of these propositions should be qualified by the further statement that if the defendant conveys the impression that he has actual knowledge of the existence of the facts when he is conscious that he has no such knowledge, he is as responsible for the injury caused by such representations, to one who believes and acts upon them, as if he had actual knowledge of their falsity. *Lehigh, etc., Iron Co. v. Bamford*, 150 U. S. 665, 673; 14 Sup. Ct. Rep. 219; *Marsh v. Falker*, 40 N. Y. 562. In *Slaughters' Admr. v. Gerson*, 13 Wall. 379, the supreme court said: 'Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another.' *Farnsworth v. Duffner*, 142 U. S. 43; 12 Sup. Ct. Rep. 164; *Farrar v. Churchill*, 135 U. S. 609; 10 Sup. Ct. Rep. 771. Mere expressions of opinion as to the value of property are not actionable; they are regarded as 'trade talk' which every man of intelligence receives *cum grano salis*. *Gordon v. Butler*, 105 U. S. 553; *Mooney v. Miller*, 102 Mass. 217. In *Dillman v. Nadlehofer*, 119 Ill. 567; 7 N. E. Rep. 88, 'the defendant

Where the evidence in an action to set aside a deed showed that the conveyance was made in consideration of the transfer to plaintiff of the exclusive right to sell a patent washing machine and wringer; that defendants represented to plaintiff that a certain firm had agreed to furnish the machines to any one defendants might direct, and that, after the execution of the deed, such firm failed to furnish the machines, and defendants failed to convey the exclusive rights named, it was held that the evidence sustained a verdict for the plaintiff.¹

§ 805. The same subject continued.—It has been held that material representations which are untrue, although innocently made, or the concealment of material facts by mistake or inadvertence, when relied on and which have become the foundation of the existing relations between the parties, operate as a “surprise and imposition,” and constitute such fraud as will move a court of equity to decree a rescission of an executory contract.² As a rule, all representations which are untrue, and which materially affect the value of the property which forms the subject of the contract, will furnish grounds for a rescission, even though they may have been made without fraudulent intent.³ Accordingly where one, without fraudulent inten-

represented to plaintiffs that said improvements were his own invention, and that the patents issued thereon were genuine and valid, and that they did not conflict with or infringe upon the patents or inventions of any one, and particularly those controlled by the Washburn and Moen Manufacturing Company and J. L. Ellwood or their licensees.’ The court held that these were expressions of opinion merely, and not actionable in a court of equity in a suit for rescission. *Reeves v. Corning*, 51 Fed. Rep. 774.”

¹ *Brady v. Harper* (Ky. 1895), 30 S. W. Rep. 664.

² 1 Beach on Equity Jurisprudence, §§ 69, 93; 1 Story on Equity, § 193; Bishop on Contracts, § 662; Clark on Contracts, p. 339; 2 Pomeroy on Equity Jurisprudence, §§ 883, 887, 889;

Derry v. Peek, L. R. 14 App. Cas. 337; *Arkwright v. Newbold*, L. R. 17 Ch. Div. 320; *Traill v. Baring*, 4 De Gex, J. & S. 318; *Ship v. Crosskill*, L. R. 10 Eq. 73; *Cooley on Torts* (2d ed.), p. 582; *Hexter v. Bast*, 125 Pa. St. 52; 17 Atl. Rep. 252; *Chatham Furnace Co. v. Mofatt*, 147 Mass. 403; 18 N. E. Rep. 103; *Wells v. McGeoch*, 71 Wis. 196; 35 N. W. Rep. 769; *De Frees v. Carr*, 8 Utah, 488; 33 Pac. 217; *Cotzhausen v. Simon*, 47 Wis. 103; 1 N. W. Rep. 473; *Grant v. Law*, 29 Wis. 99; *Knowlton v. Amy*, 47 Mich. 204; 10 N. W. Rep. 201; *Bullitt v. Farrar*, 42 Minn. 8; 43 N. W. Rep. 566; *Litchfield v. Hutchinson*, 117 Mass. 195; *Smith v. Richards*, 13 Pet. 26; 2 Warvelle on Vendors, § 18.

³ 2 Warvelle on Vendors, § 18; *Allen v. Hart*, 72 Ill. 104; *Bennett v. Judson*, 21 N. Y. 238; *Mulvey v. King*,

tion, represents that he holds a fee-simple to land, when in fact he does not, and executes a warranty deed of the same, equity will treat the deed as an executory contract to convey, the rescission of which may be decreed. And where a grantor executes a warranty deed for land of which he does not hold a fee-simple, upon a suit for cancellation of the notes and mortgage given as the purchase price of the same, the grantee need not offer to reconvey.¹

§ 806. Further illustrations.—Although defendant believed that his representations as to land, by which he induced plaintiff to make a purchase, were true, and although he told plaintiff that he had never seen the land, and part of the representations consisted of the report of an employe, still, they having been materially false, plaintiff is entitled to a rescission.² Where the fraudulent representations alleged

39 Ohio St. 491; *Wilcox v. Iowa, etc., University*, 32 Iowa, 367; *Alvarez v. Brannan*, 7 Cal. 503.

¹ *Adams v. Reed*, 11 Utah, 480; 40 Pac. Rep. 720, King, J.: "The facts in this case show that the representations of plaintiffs as to the character of their title to the land were more than mere expressions of opinion. They were affirmations of a material fact, and inducements to the contract. Being untrue and material, they are fraudulent. *Cressler v. Rees*, 27 Neb. 515; 43 N. W. Rep. 363; *Conlan v. Roemer*, 52 N. J. Law, 53; 18 Atl. Rep. 858. There is no controversy in regard to the materiality of the representations made respecting the title, nor is it contended that defendants did not act in due season, in giving notice of the rescission after the discovery of the defect in the title; but plaintiffs urge that the defendants not having tendered back a deed of the property conveyed, there was no rescission. The rule is, no doubt, that the parties must be placed *in statu quo* before a rescission can be effectuated. Having decided that the warranty

deed executed by the plaintiffs was merely an executory contract, it follows that defendants had nothing to return to plaintiffs in order to place them *in statu quo*. The referee found that the land described in the warranty deed was not owned by plaintiffs, and the conveyance executed by them certainly created no cloud upon the owner's title, if there was an owner. Plaintiffs conveyed nothing to defendants. Their deed was worthless, except that it might be the basis of an action in equity for specific performance, or the foundation of a suit at law, after reformation, for a breach of the vendor's covenants. Plaintiffs having parted with nothing of value, defendants had nothing to return, and in such case the failure to tender that which was valueless can not be interposed to prevent a rescission of the contract. *Bishop on Contracts*, § 679."

² *Groppengiesser v. Lake*, 103 Cal. 37; 36 Pac. Rep. 1036, per Temple, C.: "It does not matter that defendant did not know that what he stated was untrue, or that he believed it to be true.

were of material facts conducive to the transaction, such a bill is not defective on the ground that the representations were not such as complainants had a right to rely on, because, by the exercise of diligence, they could have ascertained their falsity.¹ A bill to rescind a contract whereby plaintiffs conveyed to defendant certain land in consideration of the transfer

According to the testimony, his statements constituted all the knowledge possessed by plaintiff as to the subject-matter of the sale. As they were untrue in material respects, the plaintiff, acting promptly, may rescind. Civil Code, § 1572; *Alvarez v. Brannan*, 7 Cal. 503; *Bank v. Hiatt*, 58 Cal. 234. See also, 2 Pomeroy on Equity Jurisprudence, § 887."

¹ *Baker v. Maxwell*, 99 Ala. 558; 14 So. Rep. 468, per McClellan, J.: "This is manifestly true in regard to the alleged representations as to the personalty, since it does not appear by the bill that complainants had any means of knowing or ascertaining whether they were false or not; and, moreover, these representations were such that complainants had a right to rely upon them, unless they knew—not merely had an opportunity of informing themselves—that they were untrue. *Henry v. Allen*, 93 Ala. 197; 9 So. Rep. 579. With respect to the alleged false representations as to the title to the land embraced in the mortgage, the same doctrine obtains. The representations alleged, being material and conducing to the transaction, are vitiating, notwithstanding the complainants might, by the exercise of diligence, have ascertained their falsity. They were representations of fact, and not mere expressions of opinion. The defendant assured the complainants, as a fact, that the mortgagor, at the time of executing the instrument, had title to the land, and he even went so far as to give them the means and sources of his information—

not opinion—to that effect, stating that he (the defendant) had examined the records of land titles, and therefrom ascertained the fact to be as he represented it. On this state of case, complainants were under no duty to inquire further. They had the right to rely and act on defendant's statements as true, notwithstanding the opportunity was afforded them, by an examination of public records, to ascertain to the contrary. *Woodbury v. State*, 69 Ala. 242; *Griel v. Lomax*, 94 Ala. 641; 10 So. Rep. 232. In an action to foreclose a mortgage, defendants, who are husband and wife, pleaded fraud in the sale to them of the mortgaged premises, consisting of a farm devoted to grape culture, and they asked damages and for a rescission of the sale. The farm was near a town of about one thousand five hundred population, and where such industry had been extensive for many years, but was nearly ruined by 'black rot,' which affects the fruit only. Defendants resided in a distant city, and were familiar with grape culture, and were induced by plaintiff to visit his farm with a view of purchasing it when the fruit was in bloom. Defendants testified that plaintiff represented that the town had about five thousand population, and that grapes were not affected with black rot. Plaintiff denied making such representations. It was held that the defense pleaded was established. *Lurch v. Holder* (N. J. Eq. 1893), 27 Atl. Rep. 81."

to them of certain chattel and real estate mortgages, on the ground of fraudulent representations of defendant as to the title of the mortgagors to the mortgaged land, and the existence at the time of the mortgaged chattels, is not bad because it shows that the contract is wholly executed.¹

§ 807. Estate not liable to purchaser for executor's representations—Restoration.—A decedent's estate is not liable to one purchasing assets thereof, on the ground that the executor induced the purchase by false representations; nor is it liable on a warranty given by the executor in making the sale.² But

¹ *Baker v. Maxwell*, 99 Ala. 558; 14 So. Rep. 468, per McClellan, J.: "But other demurrers are in the nature of confession and avoidance. Conceding the fraud charged, and that it conduced to the result complained of, one position advanced by the demurrers is that no relief can be had on this bill because the contract became and was a wholly executed one, in that complainants had made an absolute conveyance of the land to the defendant, and the latter had fully paid the agreed consideration by transferring and delivering the mortgages to the vendors, reciting in the indorsement of transfer that it was without any recourse whatever on him. The fullest concession of the executed character of the contract will not help the appellant. No contract can ever stand against an assault seasonably made on the ground that the fraud of one of the parties induced the other to enter into it, merely because everything contemplated by it has been fully done. No transaction can be closed against the vitiating consequence of actual fraud leading to its consummation, if the aggrieved party is diligent in his attack upon it. It was long ago decided by this court in line with the universally prevailing doctrine, that 'a misrepresentation by a vendor of land in regard to a material fact, which

operated as an inducement to the purchase, upon which the vendee had a right to rely, and by which he was actually deceived and injured, is a fraud, and confers upon him the right to avoid the contract, whether executory or executed.' *Foster v. Gressett*, 29 Ala. 393. And there are many cases in our reports where this doctrine has since been acted on without question."

² *Huffman v. Hendry*, 9 Ind. App. 324; 36 N. E. Rep. 727, per Davis, C. J.: In *Rodman v. Rodman*, 54 Ind. 444, the supreme court said: "When property or money which does not belong to the estate of a decedent may come into possession of a party who happens to be administrator of such estate, such party can not, by charging himself, as such administrator, with such property or money, make such property or money a part of the assets of his decedent's estate, nor can he, by so doing, render the estate of his decedent, or himself as administrator, liable for such property or money to the lawful owner thereof." In *Riley v. Kepler*, 94 Ind. 308, this language is used: "If he made false representations in the sale, that was his individual tort, for which he alone could be held individually liable." See also, *Rose v. Cash*, 58 Ind. 278; *Holderbaugh v. Turpin*, 75 Ind. 84;

if parties acting in good faith make a mutual mistake, either of fact or law, as the result of which an estate under control of the court is benefited, the court, having jurisdiction of the trust, may, in a proper case and in the exercise of a sound discretion, grant the injured party equitable relief; but, as a condition precedent to such equitable relief, it would certainly be necessary for him to restore or to offer to return to the estate what he had received, or to show a good reason for his failure to do so.¹

§ 808. Rescinding coal lease for mutual mistake—Lessee's laches.—Where it is made apparent that a lease of land was entered into under a mutual mistake as to the existence of a workable vein of coal thereupon, and that an incidental timber contract was induced by the belief that such coal did so exist, which would aid the lessee in his mining operations, the contract should be rescinded not only as to the coal, but as to the timber.² But if nothing has been done under the contract for the

Mills v. Kuykendall, 2 Blackf. 47; *Cornthwaite v. First Nat. Bank*, 57 Ind. 268. Whether the claim of appellee sounds in tort, or is founded in contract, the result is the same. In any view that may be taken of the case, it is clear, under the authorities cited, that the estate is not liable for any damages sustained by appellee, growing out of the alleged representations, warranties or statements of said administratrix.

¹ *Huffman v. Hendry*, 9 Ind. App. 324; 36 N. E. Rep. 727.

² *Bluestone Coal Co. v. Bell* (W. Va. 1893), 18 S. E. Rep. 493, per English, J.: "The general principles governing cases of this character are laid down in 15 Am. and Eng. Encyc. of Law, p. 628, as follows: 'In order that a mistake may come within the cognizance of a court of equity, it must be shown to be—First, material, or the moving cause of the complaining party's action; second, mutual, or shared in by both parties to the trans-

action; third, unintentional; and, fourth, free from negligence.' It would be difficult to use language which would more accurately describe the mutual mistake which was made by the contracting parties with reference to the coal supposed to underlie this land, which acted as the moving cause and inducement to the contract for the timber. In the absence of the coal, the evidence shows there would have been no contract for the timber. This was the foundation on which the timber contract rested, and, the foundation having no real existence, the superstructure must fall. Kerr on Fraud and Mistake, at page 405, says: 'The jurisdiction of equity over mistake is exercised much more liberally where the mistake is in matter of fact than where it is in matter of law. The admission of ignorance of fact as a ground of relief is not attended with those inconveniences which seem to be the reason for rejecting ignorance

period of seventeen years from the date of the contract, the lessor has a right to presume that the contract has been abandoned, and the lessee or his assigns can not, after having been guilty of such laches, restrain the lessor from cutting and using the timber on the land by enjoining him from cutting and removing the same.¹

§ 809. **Sale of ground rent—Mistake of law.**—Where the defendant owned a ground rent, which she believed irredeemable, and her son, an attorney, confirmed such belief, and the plaintiff purchased it as irredeemable, on the strength of the defendant's representation to that effect, and took the papers to a title insurance company, which confirmed the belief, and insured the ground rent as irredeemable, and the defendant invested the proceeds, and a few years after the sale the ground rent proved redeemable, it was held that the defendant's honest misrepresentation did not harm plaintiff, as he did not rely thereon, and that it would be inequitable to cancel the sale, and compel defendant to suffer a loss in realizing on her investment so as to return the money. So too, equity would not grant relief in such a case, as plaintiff's mistake was one of law.² It is not ground for canceling a contract of sale, at the suit of the vendee, that the vendor wrongfully attempted to declare the contract forfeited, where it is not shown that

of law as a valid excuse,' etc. And again, in a note on page 416, we find it is said that 'nothing is more clear than the doctrine that a contract founded in a mutual mistake of the facts constituting the very basis or essence of it will avoid it.' See *Irick v. Fulton's Exrs.*, 3 Gratt. 193."

¹ *Bluestone Coal Co. v. Bell* (W. Va. 1893), 18 S. E. Rep. 493. And see also, *Rorer Iron Co. v. Trout*, 83 Va. 397; *Cowan v. Radford Iron Co.*, 83 Va. 547.

² *Clapp v. Hoffman* (Pa. 1894), 28 Atl. Rep. 362, *per curiam*: "The master is of opinion that the mistake in this case is a mistake of law. Whether a ground rent is redeemable or not is

certainly a question of law. The mistake, then, being one of law, equity will not grant any relief. The master does not deem it necessary to cite many cases in support of this proposition, as he understood the learned counsel for the plaintiffs to admit that, if the mistake was one of law, they were not entitled to the relief prayed for. If any authorities are necessary to support the master, they can be found in *Rankin v. Mortimore*, 7 Watts, 372; *McAninch v. Laughlin*, 13 Pa. St. 371; and the later cases. The master is therefore of opinion that the plaintiff's bill should be dismissed, with costs, and he recommends a decree to that effect."

the vendee was injured thereby, and it appears that both parties afterwards treated the contract as still subsisting.¹

§ 810. Rescission for fraud.—A party to a contract may rescind the same if the consent of the party rescinding was obtained through fraud exercised by or with the connivance of the party as to whom he rescinds.² But it is the duty of a party discovering a fraud to take immediate steps for a rescission of his contract. By his ratification of the acts of which he complains, and to which he was a willing party, he is forever estopped from setting up such a defense.³ Accordingly the lessee of a mill, after remaining in possession for a year, can not rescind the lease for fraudulent representations as to the

¹ *Lundahl v. Hansen*, 147 Ill. 504; 35 N. E. Rep. 741, per Wilkin, J. . . "The weakness of appellant's case lies in the fact that he seeks to rescind and cancel a contract fairly entered into, because of an attempt by the other contracting party to do a thing which he had no right to do, but which was wholly harmless to him. If he had elected to treat the declaration of forfeiture as an abandonment of the contract on the part of appellee, and proceeded to recover back what he had paid under it, he might have insisted, with some plausibility, that there was a rescission, but even that he did not see proper to do. We are clearly of the opinion that no sufficient cause was shown in the court below for asking the interposition of a court of equity to cancel the agreement between these parties. Appellant's proper remedy was a bill for specific performance, or an action at law on the contract, for its breach. He may still have one of these remedies, but the decree of the superior court will be affirmed."

² *Taylor v. National Bank* (S. D. 1895), 62 N. W. Rep. 99. See also, § 822, *infra*.

³ *Saunders v. Richard*, 35 Fla. 28; 16 So. Rep. 679, *per curiam*: "One is not

always relieved from his contract because it is illegal or made upon a void consideration. There are often circumstances which estop him from setting up such a defense. In *Southern, etc., Trust Co. v. Lanier*, 5 Fla. 110, this court held: 'It is the duty of a party, upon discovering a fraud, to take immediate steps for the rescission of his contract. By his ratification of the acts of which he complains, and to which he was a willing party, he is forever estopped from setting up such a defense.' That one is estopped to assert title by reason of ratification and acquiescence in a sale is also established in this state in the cases of *Chesser v. DePrater*, 20 Fla. 691 (text 696); *Terrell v. Weymouth*, 32 Fla. 255; 13 So. Rep. 429. In the case of *Daniels v. Tearney*, 102 U. S. 415 (text 419), the Supreme Court of the United States held that a bond sued upon was void because given 'in aid and furtherance of the objects and policy of the ordinance of secession' of the state of Virginia. But it held that the obligor in the bond could not urge its invalidity in defense of the action, because he had obtained the benefit of a stay of execution provided for by the statute under which the bond was given." And see also, *Thompson v. Cohen*, 127 Mo. 215; 29 S. W. Rep. 885.

condition and capacity of the mill.¹ But mere delay by one party in the execution of an executory contract, whose terms would be satisfied by performance within a reasonable time, does not of itself entitle the other party to rescind. To have this effect, in the absence of an express repudiation, the implication arising from the non-performance of the contract must be inconsistent with its being still in force.² In an action for rescission of a contract for fraudulent representations the defendant, if he relies on failure of plaintiff to tender within a reasonable time the return of the property received by him, should raise the issue by demurrer or answer, and can not, after judgment on the issues made upon the merits of the case, for the first time raise such issue on appeal.³

§ 811. Fraud of vendee although he pays consideration.—Where one sells land for half what he considers it worth, upon the false representations of an agent that it was to be used for a certain purpose, which would greatly enhance in value the residue of his property, whereas it was used for another purpose, for which he would not have sold, the sale will be set aside; and this, even though the grantees may have paid all the land was in fact worth.⁴

¹ *Richardson v. Horn*, 8 Houst. (Del.) 26; 31 Atl. Rep. 896.

² *Sea Isle City, etc., Association v. McTague* (N. J. Err. 1895), 31 Atl. Rep. 727.

³ *Taylor v. Fulks* (Ky. 1895), 29 S. W. Rep. 349.

⁴ *Williams v. Kerr*, 152 Pa. St. 560; 25 Atl. Rep. 618, per Heydrick, J. "It is quite true that fraud without the concurrence of injury affords no ground for relief in equity. But it is such injury as will be redressed, to obtain from an owner, by a false representation of a fact which he deems material, property which he would not otherwise have parted with upon the terms which he is thus induced to accept. If this were not so, a conveyance obtained by any other fraud than such as was practiced in this case could be

upheld by proof that the grantor was in no worse condition than if he had not made it. Something of this kind was set up in *Levick v. Brotherline*, 74 Pa. St. 149, in supposed justification of the procurement of a conveyance by husband and wife of the wife's land, by falsely representing that the name of a person to whom the wife alone had previously attempted to convey was inserted as the grantee, and that the deed was intended merely to perfect his title. It was said in that case that, although a substantial money consideration was paid as an inducement to the execution of the deed, if the grantor relied upon the false representations, and would not have executed it if they had known that the name of the actual grantee was inserted therein, it was as fraud-

§ 812. Election by defrauded purchaser—Acquiescence.—

When a purchaser acquires knowledge that he has been defrauded, he has an election of legal remedies. He may keep the property and sue for damages, or repudiate the contract and demand rescission. These remedies are not concurrent, but inconsistent, and the adoption of one of necessity excludes the other. The rule is well settled in equity that after knowledge of the fraud the party must, within a reasonable time, make an election as to whether he will affirm the trade notwithstanding the fraud, or offer to restore the property and demand the return of his purchase-money. If, after the knowledge of the facts which entitle him to rescind, he deal with the property as owner, it is evidence of his acquiescence and affirmance of the contract.¹ Where the complainant

ulently procured as if it had been obtained for a nominal consideration; and it was brushed aside as so much waste paper. It was upon the same principle that the sale of a horse procured to be made by a fraudulent contrivance was avoided in *Harner v. Fisher*, 58 Pa. St. 453, although the seller was tendered, after delivery of the horse, and upon the day payment of the contract price was agreed to be made, what would have been adjudged the legal equivalent of that price if the transaction had been honest upon the part of the purchaser."

¹ *Mudsill Mining Co. v. Watrous* (C. C. A. 1894), 61 Fed. Rep. 163, per *Lurton, J.* "The authorities to this point are numerous, and the principle well settled. The more important cases are: *Pence v. Langdon*, 99 U. S. 578; *Johnston v. Standard Mining Co.*, 148 U. S. 360; 13 Sup. Ct. Rep. 585; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Upton v. Tribilcock*, 91 U. S. 45; *Cobb v. Hatfield*, 46 N. Y. 533; *Schiffer v. Dietz*, 83 N. Y. 300; *Lawrence v. Dale*, 3 Johns. Ch. 23; *Tanner v. Smith*, 10 Sim. 410; *Gilbert v. Hunnewell*, 12 Heisk. 289; *Oakes v. Turquand*, L. R. 2 H. L. 325. But before a purchaser

is compelled to elect whether he will affirm or disaffirm, he must be aware of the facts which raise such an election. Delay will not defeat his right to relief, unless the fraud was known to him, or ought to have been known by due diligence. In *Pence v. Langdon*, 99 U. S. 578, Mr. Justice Swayne, in discussing a question of alleged acquiescence in a fraud, laid down what we deem the true rule upon this question. He said: 'Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One can not waive or acquiesce in a wrong while ignorant it has been committed. Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do. But he may not willfully shut his eyes to what he might readily and ought to have known. When fully advised, he must decide and act with reasonable dispatch. He can not rest until the rights of third persons are changed. Under such circumstances, he loses the right to rescind, and must seek

purchased a silver mine from defendant, and afterwards discovered that the samples by which he had been induced to purchase had been "salted," and he at once attempted to persuade defendant to take the property back, who refused to do so, and complainant then erected a small mill in order to make more complete tests of the quality of the ore, and also sought to discover evidence to convict defendant of the "salting," but did not reach a conviction upon this point until a year after the sale was consummated, and he then filed a bill for rescission, it was held that there was not such a dealing with the property as amounted to a waiver of his right to rescind, and that he was not guilty of laches.¹ A chattel mortgage given to secure the price of a stock of goods sold by the mortgagee to the mortgagor can not be set aside on the ground that the sale was procured by the fraud of the mortgagee, where no attempt is made to rescind the sale itself.²

§ 813. Rescinding for purchaser's fraud.—Where a purchaser makes no false statements as to existing facts, to induce an owner to sell the land at a very low price, the sale will not be set aside for fraud after the land has become valuable by the construction of a railroad to it. And the purchaser of the land, who lives near it, is under no obligation to disclose to the owner, who resides a long distance from it, the fact that there is a prospect of a railroad being built to the place where the land is situated, even if he have knowledge of such a fact.³

compensation in damages. But the wrong-doer can not make extreme vigilance and promptitude conditions of rescission. It does not lie in his mouth to complain of delay, unaccompanied by acts of ownership, and by which he has not been affected. The election to rescind or not to rescind, once made, is final and conclusive. The burden of proving knowledge of the fraud and the time of its discovery rests upon the defendant.'"

¹ *Mudsill Mining Co. v. Watrous*, 61 Fed. Rep. 163.

² *Brill v. Rack* (Ky. 1893), 23 S. W. Rep. 511.

³ *Burt v. Mason*, 97 Mich. 127; 56 N. W. Rep. 365. In *Wagner v. Lewis*, 38 Neb. 320; 56 N. W. Rep. 991, it appeared that plaintiff charged that the purchaser of the farm had made representations that the notes of third persons given by purchaser were good, and that he relied upon the same, which representations were untrue. The notes proving to be nearly worthless, the vendor of the farm tendered them back, and asked for a rescission, and that the title of the farm be

Where the plaintiffs agreed with a third person to exchange certain land for what purported to be Texas land scrip, and it was understood that they would convey the land to whomever he might designate, and he then sold the land to defendant, to whom plaintiffs accordingly made the deed, and the scrip proved worthless, and plaintiffs sought to cancel their deed, it was held that, as neither defendant nor her agent had knowledge of the agreement between plaintiffs and the third person who had acted solely for himself, plaintiffs had no cause of action.¹

§ 814. **The same subject continued.**—Where the plaintiffs lived a thousand miles away from their land, and relied almost entirely on their warranty deed, and an attorney living near their land told them that the deed to their grantor was forged, their title valueless, and the land of little worth, and, relying on his representations, they quitclaimed for a mere trifle to avoid needless litigation, through which fraud he obtained a deed running to a third person, and not to their grantor's predecessor, as they intended, and his statements were false, it was held that the deed would be set aside.²

reconveyed and quieted in him. The court below having found in his favor, it was held that the judgment was right, and is affirmed.

¹ *Belau v. Bryan*, 89 Iowa, 348; 56 N. W. Rep. 512.

² *Robinson v. Reinhart*, 137 Ind. 674; 36 N. E. Rep. 519, per Howard, C. J.. "In *Peter v. Wright*, 6 Ind. 183, it was said by Judge Stuart: 'In what light the law views such transactions, remains to be seen. In *Smith v. Richards*, 13 Pet. 26, it is, says Judge Barbour, an ancient and well-established principle that, whenever a *suppression veri* occurs, it is sufficient to set aside a conveyance. Judge Story expresses the same thing thus: 'Where a party designedly produces a false impression, in order to mislead, entrap, or obtain an undue advantage over another, in every such case there

is fraud,—an evil act with an evil intent.' 1 Story on Equitable Jurisprudence, 201.' And again: 'In cases like this, of numerous and complicated facts, the fraud which should vitiate is generally sought in vain in any one phase of the case. It lurks almost intangibly in the whole transaction. It may be deduced, says Kent, not only from deceptive or false representations, but from facts, incidents, and circumstances which may be trivial in themselves, but decisive evidence, in the given case, of a fraudulent design. 2 Kent's Commentaries, 484.' The land is within a short distance of Chicago, and Stirren went to Baltimore armed with full knowledge of all that related to the title. Appellees had little knowledge of the land, or of the title; yet it is contended by appellants that appellees were at fault for

§ 815. **Rescinding sale of goods for buyer's fraud.**—A sale of goods induced by fraud is voidable at the vendor's option. On discovering the fraud, he may rescind the contract and reclaim the goods from the fraudulent vendee; and, inasmuch as an assignee for the benefit of creditors is not a *bona fide* purchaser, but takes only the defeasible title of his assignor, the vendor in such case may also compel a return of the goods from him.¹ But, when a vendor waits until his vendee, having the title, possession and absolute right of disposition, as his own property, of the merchandise sold to him, has disposed of the same, and then, to obtain an advantage over the creditors of the vendee, who is insolvent, and has in the meantime made a general assignment for the benefit of creditors, rescinds the sale induced by fraud, a constructive trust as to the proceeds of the sale of the portion of such merchandise,

not better informing themselves before executing the deed, notwithstanding Stirren's solicitations and representations. The law does not allow the shrewd and designing to thus hide their evil-mindedness behind the ignorance of their victims. 'Where a man professes to possess full knowledge of a fact, and, for the fraudulent purpose of inducing another to act, makes a statement of fact which is untrue, and thus misleads the person whom he has induced to act, he is guilty of fraud, although he did not know the statement to be false.' *Bethell v. Bethell*, 92 Ind. 318. It is also contended that because one of the inducements held out to appellees was that Stirren would bring suit against Cline on his warranty, and thus recover for appellees what they had paid for the land, therefore the false representations of fact did not induce the making of the deed from appellees, and were consequently not material representations. 'It is true,' as said in *Bethell v. Bethell*, 92 Ind. 318, 'that a promise to do a thing in the future is not fraud, although there may be no

intention of fulfilling the promise, for fraud consists in the misrepresentation of an existing fact. But in the present case there is more than a failure to make good a promise. There is deceit, misrepresentation, abuse of confidence, and a wrongful preparation of a written instrument different from that agreed upon. There are facts pleaded showing fraud, and the absence of epithets does the pleading no harm.' This applies to the case at bar. Because Stirren's promise was not kept, it does not follow that his other misrepresentations were harmless."

¹ *American Sugar Ref. Co. v. Fancher* (1894), 81 Hun, 56, per Parker, J.: "Burkhalter & Co., upon the delivery of the sugar to them in pursuance of their contract with the plaintiff, became vested with the title and possession notwithstanding the fraud, subject, however, to the right of the vendor to rescind the contract if it should so elect. *Powers v. Benedict*, 88 N. Y. 605; *Goodwin v. Wertheimer*, 99 N. Y. 149; *Wise v. Grant*, 140 N. Y. 593."

sold by the vendee prior to the rescission by the vendor of the original sale, will not be held by courts of equity to have been created for the benefit of the vendor.¹

¹*American Sugar Ref. Co. v. Fan-cher* (1894), 81 Hun, 56, per Parker, J.. "Before the plaintiff concluded to rescind the contract, and reclaim the property, that portion of it which is now the subject of controversy was, in the usual course of business, sold and delivered to various customers of the firm, who were purchasers for value and without notice. It was then too late for the plaintiff to reclaim the property. The title and possession had become vested in persons protected as a rule of necessity from the original vendor. 'A contrary principle would endanger the security of commercial transactions and destroy that confidence upon which what is called the usual course of trade materially rests.' (*Root v. French*, 13 Wend. 570.) Then came the hour of the general assignment, which found the plaintiff apparently content with the then existing relation of debtor and creditor. By the instrument then executed, all of the debtor's property passed to the assignee for administration and distribution. The proceeds of the sugar, necessarily, passed with the other assets of Burkhalter & Co. It was their sugar when sold. True, it might have been otherwise had the plaintiff elected to rescind the contract and reclaim the property, but as it did not do this, the vendees in selling it sold their own property, and the proceeds of it belonged to them when the assignment was made. Then the plaintiff's relation to Burkhalter & Co., as to the sugar sold, was that of a contract creditor, the only difference being that fraud entered into the making of the contract between it and the com-

mon debtors. But this fraud did not entitle it to preference over the other creditors in the distribution of assets. *Matter of Cavin v. Gleason*, 105 N. Y. 256. While the cases cited by the text-writers, as we have said, in the main involve questions relating to real estate, there are two classes of cases where the equitable doctrine of constructive trusts has been applied to personality and the proceeds followed, neither one of which, however, includes a case like the one under consideration. 1. Where a person, having possession of the property of another towards whom he sustains a fiduciary relation, wrongfully disposes of it. 2. Where there is an absence of title in the wrong-doer *ab initio*. The first class extends to trustees, executors and administrators, directors of corporations, guardians, committee of lunatics, agents using money of their principals, partners using partnership funds, husbands purchasing property with money belonging to their wives, parents buying property of their children, guardians of their wards, trustees of their *cestui que trusts*, attorneys of their clients, and all persons who stand in fiduciary relations towards others. The following cases, cited on this appeal, are within this class: *Holmes v. Gilman*, 138 N. Y. 369; *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696. Respondent strongly urges that the case of *Importers' and Traders' Nat. Bank v. Peters*, 123 N. Y. 272, supports this judgment. The court of appeals said in *Bosley v. National, etc., Co.*, 123 N. Y. 550-555: 'It is not in every case of fraud that relief is to be administered in a court of equity, and it is a well-settled rule that wherever

§ 816. Fraud to be proved as alleged.—It is a familiar principle, that fraud is a conclusion of law from facts stated and proved. When it is pleaded at law or in equity, the facts out of which it is supposed to arise must be stated. A mere general averment of fraud, without such facts, is not sufficient.¹ He who alleges fraud must clearly and distinctly prove the fraud he alleges; the burden is upon him to prove his case as it is alleged in the bill. If the fraud is not strictly and clearly proved, as it is alleged, relief can not be had, although the party against whom relief is sought may not have been perfectly clear in his dealings. Fraud will not be carried by way of relief one tittle beyond the manner in which it is proved to the satisfaction of the court. If a case of actual fraud is alleged by the bill, relief can not be had on the bill by proving only a case of constructive fraud.² And if a case of misrepresentation is alleged, the rescission of the contract or instrument can not be had on the bill by proving only a case of mistake.³

a matter respects only a sale of personal chattels, and lies merely in damages, the remedy is at law only. If this had been a sale of a horse to the plaintiff procured by fraud, it would not have been proper for her to resort to an equitable action for relief, because an action at law would furnish her an ample remedy and give her all the relief to which she could, under any circumstances, be entitled.' ”

¹ *Loucheim v. First Nat. Bank*, 98 Ala. 521; 13 So. Rep. 374; 3 *Brickell's Digest*, p. 510, § 31.

² *Reynolds v. Excelsior Coal Co.* (Ala. 1893), 14 So. Rep. 573, per Haralson, J.: “If the bill alleges a case of constructive fraud, and the title to relief rests upon that fraud only, the bill will be dismissed, if the fraud, as alleged, is not proved. It can not be allowed to be used for any secondary purpose. *Kerr on Fraud and Mistake*, 382; *Adams v. Thornton*, 78 Ala. 489. ‘Though the proof may show that complainants are entitled to re-

lief, it can not be granted, unless it is shown that they are entitled to it on the grounds stated in the bill.’ *Simms v. Greer*, 83 Ala. 263, 266; 3 So. Rep. 423; *Winter v. Merrick*, 69 Ala. 86; *Munchus v. Harris*, 69 Ala. 506; 3 *Brickell's Digest*, p. 402, § 571.”

³ In *Porter v. Collins*, 90 Ala. 510; 8 So. Rep. 80, where the bill sought a rescission of a contract for the sale of land, on the ground of material misrepresentation by the vendor pending the negotiations, alleging that they were made either fraudulently or through honest mistake on his part, and the evidence showed only a mutual mistake of both parties, the variance was held to be fatal. The court said: “The bill, as we have seen, claims rescission solely on the ground of misrepresentations. Its only reference to any supposed mistake was in connection with and qualification of the allegations of misrepresentations. It avers that the transaction was induced by misrepresentations on the part of Collins, and

An action by a vendor to rescind a sale of land for the vendee's fraud is properly dismissed as against a purchaser from the vendee where there is no allegation in the petition charging him with notice of the fraud.¹

§ 817. Party put on inquiry—Want of diligence.—Where the two parties to a contract are both intelligent and of business ability and have the same facilities for knowing the facts upon which the validity of the title in question depends, and the party assailing the contract could have learned those facts by the exercise of ordinary diligence, he can not have the contract rescinded for fraud on the ground that he was misinformed as to those facts by the other party. Thus equity will not relieve defendant, as maker of a note, on the ground of fraud, where it appears that plaintiff was a banker, and defendant a lawyer, and both from the east, in San Diego together; that plaintiff offered to sell his stock in a California corporation organized to purchase Mexican lands, and his undivided interest in a Mexican land contract; that defendant asked if the corporation or an alien could hold the land; that plaintiff replied truthfully that a San Diego law firm versed in Mexican law, whom he had paid for an opinion, had informed him that the corporation could hold the land; that defendant purchased of plaintiff, and gave the note in question; and that defendant could have learned, by exercising a little diligence, that the contract conveyed Mexican lands which could not be held by aliens.² Where the defendant, in an action to fore-

that these were made either fraudulently or mistakenly. But, it nowhere avers that the sale was the result of the mistake of the parties. Misrepresentation, either intentional or inadvertent, and not mistake, is made the gravamen of the bill; and, upon misrepresentation and not upon mistake, the case must turn. Relief can not be granted on facts developed in evidence, but not alleged, any more than upon facts alleged and not proved." *Park v. Lide*, 90 Ala. 246; 7 So. Rep. 805.

¹ *Garza v. Scott*, 5 Texas App. 289; 24 S. W. Rep. 89.

² *Daly v. Brennan*, 87 Wis. 36; 57 N. W. Rep. 963, per Winslow, J.: "Defendant was a lawyer, and knew that, if aliens could not hold land in Mexico, the entire scheme was worthless. He was in San Diego, where are lawyers versed in Mexican law. Presumably, had he taken counsel, he would have ascertained the fact that aliens could not hold the lands in question. The means of ascertaining the truth were within his reach equal-

close a purchase-money mortgage, sought to rescind the purchase on the ground of fraudulent representations, and it was found that he had purchased the land from a real estate agent, without the knowledge of the owner, who afterwards ratified the sale; that no representations were made by the owner; that the defendant had resided within a short distance of the land for several years, and had ample opportunity to judge of its value; that he had placed the land on the market after purchasing it, and had made no complaint for two years, nor until after suit was begun to foreclose the mortgage, it was held that judgment for plaintiff was sustained by the findings.¹ But where, in the course of negotiations for the exchange of property between parties interested therein, material representations of fact are made by one of them, who knows the facts, to the other, who is ignorant thereof, under circumstances calculated to mislead, instead of putting him upon inquiry, and such representations are false, and relied on by the latter to his prejudice, an action will lie.²

§ 818. Negligent execution of instrument.—Where one joins her husband in the execution of a paper which she knows is to secure his debt, and which she has advised him to secure,

ly with the plaintiff, but he chose to make no investigation, trusting to the advice given to Daly. He can not now be heard to say that he was defrauded. He was put upon inquiry. By the use of even a little diligence he could have obtained knowledge as to the fact, and he chose not to exercise it. Equity even will not relieve under such circumstances. *Mamlock v. Fairbanks*, 46 Wis. 415; 1 N. W. Rep. 167; *Conner v. Welch*, 51 Wis. 431; 8 N. W. Rep. 260." In *Patterson v. Galusha*, 53 Kan. 367; 36 Pac. Rep. 737, it appeared that G., who owned a quarter section of land, conveyed one hundred and forty acres of the same to P., in consideration that P. would assume and pay a mortgage indebtedness which existed against the land. Afterwards G. brought an ac-

tion to recover from P. ten acres of the land, or the value of the same, alleging that P. had misrepresented the nature and the amount of the indebtedness, and that one hundred and thirty acres was sufficient consideration for the debt assumed. Upon the testimony in the record it is held that the parties stood upon an equal footing; that the nature and amount of the debt assumed and the material facts in the transaction were equally within the knowledge of both; and that there was no such deception and fraud on the part of P. as will defeat the conveyance of the land, or justify a recovery in favor of G.

¹ *Lion v. McGlory*, 106 Cal. 623; 40 Pac. Rep. 12.

² *Lofgren v. Peterson*, 54 Minn. 343; 56 N. W. Rep. 44.

and makes no inquiry as to its form or contents, she can not afterwards have it set aside on the ground that she did not know its purport.¹ The party seeking the relief must be reasonably free from negligence; and it has been held that, when a party signs a deed without reading it, or, if he can not read, without having it read to him, he can not obtain rescission. The presumption that the minds of the parties did meet can only be rebutted by proof of facts indicating fraud.² When one has executed a contract, the bare fact that he did not read it or know its contents will not relieve him from it, and, if he brings an action to cancel it on the sole ground that the other party has refused to perform it, he must stand on the contract as he executed it.³

§ 819. Proof of fraud—Diligence.—An instrument will not be rescinded on the ground of fraud in its inception unless such fraud is established by satisfactory proof, and is shown to have caused actual injury to the party defrauded.⁴ An

¹ *Sanborn v. Sarnborn* (Mich. 1895), 62 N. W. Rep. 371.

² *Wharton on Negligence*, §§ 932, 1243; *Greenfield's Estate*, 14 Pa. St. 489; *Hallenbeck v. Dewitt*, 2 John. 404; *Link v. Page*, 72 Texas, 592; 10 S. W. Rep. 699; *De Perez v. Everett*, 73 Texas, 434; 11 S. W. Rep. 388. As quoted from *Touchstone*, in *Greenfield's Estate*, *supra*, it is said: "If the party that is to seal the deed can read himself, and doth not, or, being illiterate or blind, doth not inquire to hear the deed read, or the contents thereof declared, in these cases, albeit the deed is contrary to his mind, yet it is good and unavoidable."

³ *Quimby v. Shearer*, 56 Minn. 534; 38 N. W. Rep. 155. In *Gibson v. Brown* (Texas C. App. 1893), 24 S. W. Rep. 574, in an action to recover land, in which defendant sought to rescind a deed he had given to plaintiff on the ground of fraud, it appeared that plaintiff, his stepson, with whom he was on good

terms, came to him when he was at work, and said that he had bought his brother's and sister's interest, and that he wanted defendant and his wife to sign the deed also; that defendant replied that he did not have his spectacles, but reckoned it was all right, and, on plaintiff's statement that it should never interfere with defendant or his wife, signed the deed, believing it conveyed only the future interest of plaintiff's brother and sister in the land, and that he was not to be interfered with in the use of the premises. It was held that, even if the defendant did not understand the purport of the deed, he was not free from negligence in signing it without reading, and was not entitled to a rescission; and the fact that defendant received no consideration would not invalidate the deed.

⁴ *McCann v. Preston*, 79 Md. 223; 28 Atl. Rep. 1102, per *Roberts, J.*: "Fraud will never be presumed, for it is a maxim well recognized in the law

application for relief from a purchase on the ground of fraud must be made in a reasonable time.¹ To avoid an instrument for fraud in its execution the evidence of fraud must be clear and the party assailing it must himself be reasonably free from fault or negligence.²

§ 820. Laches in rescinding by one knowing his rights.—

A suit by the heir of a married woman to set aside a deed of trust of her separate property by reason of a mistake therein, which gave the husband power after her death to have the fee vested in him and diverted from her heirs, is not barred by acquiescence and laches, except as to such part of the property as he sold, where the husband was entitled to the possession of the property for life by the curtesy, and the heir lived with

that '*odiosa et inhonesta non sunt in lege præsumenda.*' It is not only necessary to prove fraud, but the fraud practiced must have worked an actual injury to the defrauded party. *McAleer v. Horsey*, 35 Md. 439."

¹ *McCann v. Preston*, 79 Md. 223; 28 Atl. Rep. 1102, per Roberts, J.: "If the defendants desired to rescind the contract because of its fraudulent character, they should have done so within a reasonable time. In this case there is no evidence even of dissatisfaction until after the expiration of more than a year. It may be that the defendants have not profited by the exchange which they made, but it by no means follows, as a legal result, that they can now ask the law to relieve them from the consequences of a bad bargain."

² *Minneapolis, etc., R. Co. v. Chisholm* (1893), 55 Minn. 374; 57 N. W. Rep. 63, *per curiam*: "Under the allegations in the answer, the defendants undertook to show that there was fraud in the execution of the contract in this: That it was agreed and understood between the parties that the deed to be given should be a quitclaim only, and the contract was not so written. The trial court held that the evidence

was not sufficiently clear and satisfactory to establish fraud in the execution of the contract. In this we think the court did not err, since the rule in such cases is that the party seeking to avoid the contract should himself be reasonably free from negligence, and the evidence should be clear and persuasive. 2 Wharton on Evidence, § 932; *McCall v. Bushnell*, 41 Minn. 37; 42 N. W. Rep. 545, and cases. Here nearly six years had passed before the trial. The recollection of the defendants was evidently not very distinct, except they felt sure that it was a quitclaim they were to give, and that the agent who procured it so read the contract. They did not read it themselves, nor require it to be read in full, nor ask for a copy, though they had ample opportunity to read it if they chose. The contract calls for a conveyance, but not for a quitclaim or a deed with covenants; and the defendants allege that they had perfected the title within the previous five years. A careful examination of the evidence of the defendants, including the cross-examination, satisfies us that the court was right, and that the evidence was insufficient to avoid the instrument."

and trusted the husband, and he told her that his wife had given him the property, and promised her that, if she outlived him, she would see that he had done her no wrong, and she brought the suit three months after his death.¹ A person can

¹ *Hall v. Otterson*, 52 N. J. Eq. 522; 28 Atl. Rep. 907, per Green, C.: "Mrs. Hall says that she first heard that her sister, Mrs. Otterson, had executed this deed of conveyance, after her death; that Mr. Otterson then told her that her sister had given him the farm; and that he immediately went on and said: 'Whoever shall outlive me will see that I have never done you or your children any injustice.' She was at the time a member of the Otterson family, making her home with them when her sister died, and continuing to live there for some time thereafter. The same diligence is not required between members of the same family as between strangers. *Laver v. Fielder*, 9 Jur. (N. S.) 190. After Mrs. Hall's husband's death, Otterson became her legal adviser, attended to her business, and continued not only on terms of friendship, but of confidence, during his life. She had every reason to, and did, put entire trust and reliance in him and his representations, and there is no reason to think, from the facts as they appear, that her confidence was misplaced. The unwitnessed will, dated May 20, 1887—24 years after his wife's death—demonstrated, I think, that he really intended to carry out Mrs. Otterson's purpose that this property should go to the children of the complainant. But it is urged that she had constructive, if not actual, notice from the record of the transfer of the Ottersons to Gowen, and from Gowen to Mr. Otterson. The deed of trust, however, was not put upon record until January, 1864—6 years after its date, and nearly one year after Mrs. Otterson's death, and contempora-

neous with the conveyance from Gowen, trustee, to Otterson. It does not appear definitely when the statement that his wife had given him the property was made by Otterson to Mrs. Hall, but the fair construction of the evidence is that it was soon after her sister's death. But I do not think she was negligent in failing to make an examination of the record. Not only is it probable that, at the time it was put on record, she was acting under the promises of Otterson, but, if she had any knowledge whatever of legal rights, she knew that, independent of the deed, Otterson was entitled, as tenant by the curtesy, to continue in possession of the property. These defendants stand in Otterson's shoes. They can not urge, as a bar to the complainant's right of action, a delay in commencing suit, if it has been occasioned by the acts or representations of him under whom they claim. They come into court and insist that it is inequitable that the complainant should, after a delay of many years, prosecute her claim; but, if he whom they represent has been the cause of this procrastination, this appeal to the equitable denial of this court does not lie in their mouths. With his announcement to Mrs. Hall that her sister had given him the farm, he makes her the promise that puts her vigilance to sleep, and it is in consequence of his representations that she has remained inactive; and herein this case differs from *Wilkinson v. Sherman*, 45 N. J. Eq. 413; 18 Atl. Rep. 228. It is said that it would be inequitable to permit this suit to be maintained, because, during the complainant's delay in bringing it, wit-

not be deprived of his remedy in equity on the ground of laches, unless it appears that he had knowledge of his rights. As one can not acquiesce in the performance of an act of which he is ignorant, so one can not be said to neglect the prosecution of a remedy when he has no knowledge that his rights have been invaded, excepting, always, that his want of knowledge is not the result of his own culpable negligence.¹

§ 821. Unreasonable delay.—When a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. A court of equity is always reluctant to rescind, unless the parties can be put back *in statu quo*. If this can not be done, it will give such relief only where the clearest and strongest equity imperatively demands it.² A

nesses have died and testimony has been lost. But it appears to me that Mr. Otterson has been himself guilty of laches in this regard. He, being a lawyer of distinction, must be assumed to have known that the law cast upon him the burden of proof hereinbefore indicated. It was within his power, by suit, to have perpetuated the testimony necessary to establish the deed as a valid gift, as well as within hers either to have perpetuated the testimony necessary, or to have brought suit, to annul it; and he can not invoke her delay in that regard as a bar to her action, because, during the interval, he has been deprived of testimony lost to him by his own neglect. I am of opinion that these conveyances, so far as they relate to property not conveyed by James Otterson, Jr., in his lifetime, should be set aside."

¹ Hall v. Otterson, 52 N. J. Eq. 522; 28 Atl. Rep. 907, per Green, V. C.: "It

is not a little difficult to determine what knowledge is necessary to place the party in the position of negligently delaying his action. The chancellor, in *Van Houten v. Van Winkle*, 1 Dick. Ch. 380, says: 'After he has been informed of facts and circumstances which apprise him of the wrong.' The court, in *O'Neill v. Hamill*, Beat. 618, says: 'Of her being fully apprised of her rights.' In *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, it is described as 'sufficient knowledge of the fact constituting the title to relief.' That it must be something more than knowledge of the mere facts which have transpired, or papers which may have been executed, is shown by *In re Garnett*, L. R. 31 Ch. Div. 1." And see *Savery v. King*, 5 H. L. 627.

² *Grymes v. Sanders*, 93 U. S. 55, 62. In *Schiffer v. Dietz*, 83 N. Y. 300, 307, Andrews, J., said: "The plaintiff-

wife who, after she has been abandoned by her husband, conveys land without his joining in the conveyance, in payment of necessary supplies furnished her by the grantee, although without obtaining permission from the chancellor, as authorized by the Kentucky statutes, is not entitled, years afterwards, and after the grantee's death, to have the deed canceled, on the ground that, because of her coverture, no title passed by her conveyance without paying the grantee's estate the value of the supplies.¹ There has, however, never been any fixed, certain period of time within which a defrauded purchaser may not move for rescission. There are many cases in which the lapse of several years after sale and before suit for rescission was held no bar to the prosecution of an action for relief. The true inquiry is, in all cases of

iff was entitled, on the discovery of the fraud, to demand a rescission of the sale and conveyance, and the restoration of the money and securities received by the defendant. But a party entitled to rescind a contract for fraud may deprive himself of this remedy by acquiescence; or where the transaction is a sale of property, by his dealing with the property as owner after the discovery of the fraud. A party claiming to rescind a contract for fraud must act promptly on discovery of the fraud, and restore, or offer to restore, to the other party what he has received under it. He can not thereafter deal with the other party on the footing of an existing contract, or with the property acquired under it as his own." See also, *Bach v. Tuch*, 126 N. Y. 53. In *Bement v. La Dow* (1895), 66 Fed. Rep. 185, Coxe, J., said: "In a case quite similar to the case at bar, involving the question of fraudulent representations upon the sale of patents, the supreme court of Illinois held that 'it is not sufficient to allege that the patents are infringements upon others, and worthless, without showing that the complainants have ceased to use the

patents or their right to use them has been questioned.' *Dillman v. Nadle-hoffer*, 119 Ill. 567. Delay will defeat the right to relief if the fraud was known to the party alleged to be defrauded or ought to have been known by the exercise of ordinary diligence. After knowledge of the facts which will enable him to take effectual action he must disaffirm the contract with reasonable promptness. He can not willfully shut his eyes and ears to what he might have known and ought to have known. If, after knowledge which would enable him to disaffirm, he deals with the property as his own, accepts advantages for himself and deprives the other party of the advantages of ownership, he can not afterwards rescind. The election to rescind or not to rescind, once made, is final and conclusive." *Mudsill Mining Co. v. Watrous*, 61 Fed. Rep. 163, 186; *Scheffel v. Hays*, 58 Fed. Rep. 457; *Pence v. Langdon*, 99 U. S. 578; *Rugan v. Sabin*, 53 Fed. Rep. 415; *Johnston v. Standard Mining Co.*, 148 U. S. 360, 370; 13 Sup. Ct. Rep. 585.

¹ *Gray v. Shaw* (Ky. 1895), 30 S. W. Rep. 402.

this character, has there been unreasonable delay on the part of one seeking rescission after having information of the fraudulent misrepresentation practiced upon him, and on which he relied.¹

§ 822. Rescinding for fraud — For inadequate consideration.—Equity will rescind a contract for the purchase of land for representations by the seller's agents that there was a demand for lots on the land, that a railroad company was about to move its shops to that point, and that a syndicate of prominent men had been formed to secure the land, and had offered more than the contract price for the land, where it appeared that the representations were false, and were known to be false by the makers; that the representations were made to plaintiff's copurchaser, who repeated them to plaintiff and induced him to purchase; that the purchasers believed the representations were true, and that the purchase price was twice the value of the land.² The purchaser should have inquired and tested the truth of the representation, but his contributory negligence in not so doing can not be invoked by the seller to save him from liability for the false representations. Equity will not, however, decree costs to the purchaser in such case, because of his carelessness.³ A deed by a married woman, of land devised to her by her first husband, to a third person, and by him to her husband, on the faith of her husband's false representations that the land would otherwise be taken from her, and that, on his death, he would devise the same to her chil-

¹ *Bonner v. Bynum*, 72 Miss. 442; 18 So. Rep. 82. In this case in an action to rescind a sale of land it appeared that in February, 1891, plaintiff bought the land without inspecting it, relying on defendant's representations as to its quality. In June, 1892, plaintiff was informed that defendant's representations were false, and at once wrote to persons living near the land to ascertain its quality, and in September, as soon as he received replies from such persons, wrote defendant for a rescission of the sale, and, receiving no answer, wrote de-

fendant the next month to the same effect. In November plaintiff inspected the land, and on December 1st again wrote defendant, demanding a rescission, and on December 20th filed his bill, the land being then in the same condition as when the sale was made. *Held*, that plaintiff did not unreasonably delay bringing the action.

² *Sutton v. Morgan*, 158 Pa. St. 204; 27 Atl. Rep. 894.

³ *Sutton v. Morgan*, 158 Pa. St. 204; 27 Atl. Rep. 894.

dren by her first husband, will be set aside, where the will of the husband was insufficient to make such dispositions of the land.¹

§ 823. **Deed of trust by husband or wife.**—Where a husband gives a deed of trust on homestead property to secure a debt of his own, he can not sue to cancel it, as not joined in by his wife, without offering to do equity by paying the debt, and the wife's joinder as a party complainant, she having no estate or interest in the land, is not necessary or proper.² In an action by a married woman to cancel a deed of trust of her separate

¹ *Menne v. Menne* (Ky. 1894), 25 S. W. Rep. 592. Where, in a suit to rescind, for inadequacy of consideration, a sale of a half interest in an oil lease of two hundred acres, the consideration being five hundred and fifty dollars in cash, and an additional one hundred dollars in case a well producing daily six or more barrels of oil should be found, it appeared that at the time of the sale there was only one well on the premises, the output of which was variously stated by the witnesses to be from one to eight barrels per day, and there were several wells on an adjoining tract, the yield of one of which was very large, and there was evidence that, in the neighboring oil lands, good wells and dry holes were found together, and that the value of undeveloped oil lands was always speculative, it was held that the consideration was not inadequate. *Neill v. Shamburg*, 158 Pa. St. 263; 27 Atl. Rep. 992. In *Owen v. Smith*, 91 Ga. 564; 18 S. E. Rep. 527, it was held that where, according to the face of the conveyance, it is founded upon a mixed consideration, consisting in part of love and affection, and in part of money or services, mere inadequacy of the latter part is no cause for setting the conveyance aside, and raises no presumption against the capacity of the maker, or against the good faith and fair dealing of the beneficiary. A

widow, who, during the life-time of her husband, voluntarily put herself *in loco parentis* to his bastard son, and has so continued since her husband's death, may extend her bounty to such son, by a deed of gift, as if he were her own offspring.

² *Pounds v. Clarke*, 70 Miss. 263; 14 So. Rep. 22, per Woods, J.: "If the husband elects to invoke the aid of a court of equity, rather than resort to a law court, the shadow of the wife's name, as an unnecessary party to the proceeding, will not absolve him from the operation of the rule which requires him to do equity before asking relief in equity. Though the conveyance is invalid, the appellant must be required to do equity, by paying what the conveyance was designed to secure, before he can have a court of conscience cancel the invalid instrument. The case is readily distinguishable from that of *Massey v. Womble*, 69 Miss. 347; 11 So. Rep. 188. In that case the husband, who had conveyed without the wife's joinder, was dead, and the wife had succeeded to the headship of the family, and had an estate in common with her children in the premises. She was a necessary and proper party, and she was under no obligation to pay any debt secured by the invalid conveyance."

estate, given to secure the payment of a note which she executed with her husband, since deceased, on the ground that her liability on the note was barred by limitations, where it appeared that her personal liability was barred, but that a right of action still survived against the husband's estate, it was held that the bill should be dismissed, as this right of action against the estate of the husband kept alive the security on the land.¹

§ 824. Effect of ratification.—Where, after the execution of a deed to his wife, and her subsequent death, the grantor, as guardian of her children, treated the land as theirs and asked lawyers if the deed was sufficient to give them title, stating that, if it was not, he wanted to make it so, it was held that, even if the deed was obtained by undue influence, there was a ratification of it.² Whether a contract alleged to have been

¹ *Bell v. Clark*, 70 Miss. 603; 14 So. Rep. 318, per Cooper, J.: "Mrs. Dozier is not entitled to any relief against the defendant. She bound her lands for the payment of the debt named in the deed of trust by the deed. She bound herself by the note. Her personal liability has been discharged by lapse of time, but the death of Mr. Dozier, who was also personally bound on the note, has preserved the liability of his estate. The note, as to his estate, is yet alive; and, because it is, the deed of trust upon Mrs. Dozier's land for its security also lives. The specific relief prayed can not be granted; and unless, under the prayer for general relief, a decree can be made in favor of the complainants, or some of them, the bill should have been dismissed. It was formerly the rule in equity that no relief could be granted under the general prayer which was inconsistent with that specially prayed. *Weymouth v. Boyer*, 1 Ves. Jr. 416; *Palk v. Lord Clinton*, 12 Ves. 48; *Walpole v. Lord Orford*, 3 Ves. 402; *Grimes v. French*, 2 Atk. 141; *Kor-*

negay v. Carroway, 2 Dev. Eq. 403. In modern practice the rule is more liberal, and under the general prayer any relief consistent with the bill, and within its scope, may be afforded, though it be inconsistent with the specific relief prayed. *Dodge v. Evans*, 43 Miss. 570; *Mhoon v. Wilkerson*, 47 Miss. 634. But relief must yet be such as can be afforded on the facts stated, and it must appear that the defendant is fairly apprised by the bill that the relief is sought by the complainant. *Weeks v. Thrasher*, 52 Miss. 142. Mrs. Dozier is entitled to no relief, and the only relief which could be afforded to Clark, Hood & Co. against the defendant would be incidental to that afforded them as against Mrs. Dozier, the mortgagor. But she is a complainant with them, and not a defendant against whom any relief is prayed. If the bill, as stated, should be taken as confessed against the defendant, it is evident that no proper decree granting relief could be entered."

² *Ellis v. Ellis*, 5 Texas C. App. 46; 23 S.W. Rep. 996. And see, *Balue v. Tay-*

obtained by defendant through fraud was ratified by plaintiff after discovery of the fraud is a question for the jury, and in an action to rescind such contract an instruction as to what acts of plaintiff would constitute a ratification is erroneous.¹

§ 825. Where persons are in confidential relations.—Where the grantor and grantee sustain relations of trust and confidence—which includes not only cases where there exists a formal and technical fiduciary relation, such as guardian and ward, parent and child, attorney and client, principal and agent, but all cases in which confidence is reposed by one party in the other—and the trust is accepted under circumstances which show that the confidence was founded on the intimate personal and business relations existing between the parties, which gave the other party an advantage or superiority, any transaction between them will be closely scrutinized by a court of equity, and relief will be granted against contracts entered into between them, unless the party claiming the benefit of the contract shows, by clear and convincing proof, that he acted with perfect good faith, and did not abuse or betray the confidence reposed in him; and, where the donee is of superior mental capacity, or the donor of weak or feeble intellect, the presumption of fraud will require strong evidence to remove it.²

lor, 136 Ind. 368; 36 N. E. Rep. 269; Shaw v. Barnhart, 17 Ind. 183.

¹ Evans v. Goggan, 5 Texas App. 129; 23 S. W. Rep. 854.

² Waddell v. Lanier, 62 Ala. 347. In Boney v. Hollingsworth, 23 Ala. 690, it was said: "There may be no fraud, everything may be honest and fair; but until the act is satisfactorily accounted for, the inference of fraud, artifice, or abuse of confidence, is so strong, that we think equity should relieve against it." Of such transactions Judge Story said: "And, indeed, considering the abuses which may attend any dealings of this sort between principals and agents, a doubt has been expressed whether it

would not have been wiser for the law in all cases to have prohibited them; since there must always be a conflict between duty and interest on such occasions." See also, Kyle v. Perdue, 95 Ala. 579; 10 So. Rep. 103; Burke v. Taylor, 94 Ala. 530; 10 So. Rep. 129; 1 Story on Equity Jurisprudence, §§ 307, 315; 1 Perry on Trusts, §§ 168, 194. As illustrative of the rigor of the application of this doctrine in England, the case of Anderson v. Elsworth, 3 Giff. 154, is frequently referred to, where a voluntary deed made by a woman "of about seventy years of age, and not incompetent, was set aside upon her death for the reason that the deed was im-

§ 826. **Physician and patient.**—A physician who also acts as agent and confidential adviser of his patient, a woman of advanced age, has the burden of proving that a deed conveying all her real estate to him, in trust for herself for life, and thereafter to himself, was fairly and honestly obtained, and that the transaction is above suspicion. The fairness of such a transaction is not established by evidence that the physician rendered professional services for a number of years without compensation, where he does not attempt to fix their value, and he will be compelled to reconvey the property discharged of the trust.¹

provident, and because it did not appear affirmatively that she understood the whole nature and effect of the deed. This decree was made after the death of the grantor, and in favor of volunteers, although the court found that Elizabeth Marston, the grantor, certainly had a distinct intention to give her property to Mary Elsworth, who took it by this deed to the exclusion of all other persons." The question, as Lord Eldon said in *Huguenin v. Baseley*, 14 Ves. 273, 300, in a similar case, "is not whether she knew what she was doing, had done or proposed to, but how the intention was produced." In *Ryan v. Price* (Ala. 1895), 17 So. Rep. 734, in an action to set aside a deed of gift, it appeared that plaintiff executed the deed when she was seventy-two years of age, and in feeble health, and that the property conveyed was all she possessed. Defendant was six years of age, and his father had for many years had control of plaintiff's property, collecting her rents, paying her taxes and insurance and other bills, and keeping for her what other money she had. Plaintiff was threatened with a lawsuit for slander, and feared that she would be deprived of her property thereby, and asked defendant's father for advice, and, as a result of their conference, plaintiff and

defendant's father went to her attorney, who drew plaintiff's will in favor of defendant, and a few days later they asked the attorney to draw the deed in controversy, which he did, and plaintiff signed it with her mark, and defendant's father procured the judge of probate and a friend of his to take the deed to plaintiff for acknowledgment. The attorney testified that, after the death of defendant's father, plaintiff came to his office, and inquired if she had made a deed to defendant, stating that she had been so informed, and, when told that she had done so, she expressed great surprise. It was held that the deed should be set aside.

¹ *Unruh v. Lukens*, 166 Pa. 324; 31 Atl. Rep. 110, *per curiam*: "In Greenfield's Estate, 14 Pa. St. 489, the court says: 'While these connections exist, the adviser shall take no benefit to himself, from contracts or other negotiations, without establishing this perfect fairness and adequacy, and that the deed was the deliberate act of the confiding party, after being fully informed of his rights, interest, and duties, and put on his guard against even the suggestion of his own inclination.' It was argued by the counsel for the defendant, that the services of Dr. Lukens and the promise of Miss Unruh to compensate him liber-

§ 827. Rescinding deed of trust from wife to husband or son.—Where a wife and her husband, who was a lawyer, execute a deed of trust of her separate property by which he acquires an advantage, the burden is on him to show that she thoroughly understood its effect, and where it does not appear that she had independent advice, and the deed was complicated, and a cursory reading of it would disclose that during their lives they might jointly do anything with the property, that she might during her life appoint to whom the property should go after the death of herself and husband, and that, in case she failed to appoint, he, surviving her, might by will dispose of it, and that, if neither disposed of it by will, the trustee

ally, together, formed such valid consideration, and that this conveyance in trust to Dr. Lukens was coupled with an interest which vested in him under the said deed, and which could not be divested by any subsequent action of Miss Unruh. It is suggested, however, that, while the reasoning of the counsel may be ordinarily true, the confidential relations existing between Miss Unruh and Dr. Lukens were such as to withdraw this particular conveyance from the operation of ordinary rules, and throw upon the beneficiary the duty of showing expressly that the arrangement was fair and conscientious, beyond the reach of suspicion. This was not done. The value of the services rendered was not attempted to be proven, nor were the items of such services submitted. It is true, the doctor testified that upwards of one thousand visits were made necessary by his duties; but he rested his consideration upon the promise which he alleged was made to him to compensate him by a will, and made no attempt to affix a value to them. It is not necessary to run through the various judgment notes, mortgages, and other conveyances, which were alleged to be frauds, in the law as well as in morals, because

the question at issue is, in the master's view, only that of the existence of the relationship suggested, and the necessity, in consequence of such relationship, of proof, beyond the possibility of doubt or suspicion, of the fairness of the dealing, and the full knowledge of Miss Unruh as to the result of her act. From the time of Greenfield's Estate this has been the recognized law of the commonwealth, and in Darlington's Estate, 147 Pa. St. 624; 23 Atl. Rep. 1046, the court, in citing Greenfield's Estate, says further, and only in the development of the same principle: 'The confidential relation is not confined to any specific association of the parties to it. It embraces agent and principal, physician and patient.' So that, in the present case, the defendant, Lukens, occupied a relation which was doubly a confidential one. In view of the facts as found, and the law bearing upon those facts, the master has therefore concluded, and respectfully submits to the court, that the prayers of the bill should be granted, and that the defendant, Benjamin F. Lukens, be directed to reconvey the title to the property in question to the plaintiff, Emeline Unruh, freed and discharged of any and all trusts."

should hold for her heirs; and such reading would not give the unprofessional mind an idea that, by the words "or the survivor of them" in the power of revocation, it gave the husband power on her death to have the fee vested in him and diverted from her heirs, the deed will not stand against her heirs, both she and her husband having died without disposing of it by will, and he having after her death revoked the trusts and had the fee vested in him.¹ Where a woman of advanced

¹ Hall v. Otterson, 52 N. J. Eq. 522; 28 Atl. Rep. 907, per Green, V. C.: "The rule of equity that 'he who bargains, in a matter of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence' (Gibson v. Jeyes, 6 Ves. 266), applies with particular force to a transaction by which a husband secures from his wife a portion of her estate. The most dominant of all relations is that of the husband over the wife. There are, of course, exceptional cases when the will of the woman may control. The relation is so close, the trust of the wife so absolute, her dependence so entire, it may be, her fear so abject, while the dominion of the husband is so complete, his influence so insidious yet so controlling, that equity regards all such transactions with a jealous care, and subjects them to the severest scrutiny. The greater the affection, the more submissive the dependence; the stronger the trust, the more liable is the wife to be subject to the control of the husband, and the more vigilant should the court be in protecting the weak. Farmer v. Farmer, 39 N. J. Eq. 211, 216; May on Fraudulent Conveyances (Text-Book Series), 483; Black v. Black, 30 N. J. Eq. 215, 219; Boyd v. De La Montagnie, 73 N. Y. 498; Weeks v. Haas, 3 Watts & S. 520; Campbell's Appeal, 80 Pa. St. 298; Darlington's Appeal, 86 Pa. St. 512; McRae v. Battle, 69 N. C. 98; Witbeck v. Witbeck, 25

Mich. 439; Smyley v. Reese, 53 Ala. 89; Shaffer v. Kugler, 107 Mo. 58; 17 S. W. Rep. 698. Chief Justice Gibson says, in Watson v. Mercer, 6 Serg. & R. 49, with reference to transfers obtained from the wife for the purpose of vesting the estate in the husband: 'What honest mind would feel regret that, in the hurry of accomplishment, some circumstance, merely formal, was omitted by which the wife and her family were rescued from his rapacity?' This deed was executed at a critical period of Mrs. Otterson's life. She was in extremely delicate health; it was doubtful if she could survive the peril of her approaching confinement. She was a refined lady, unacquainted with business, relying for its care first on her agents and then on her husband, who, after their marriage, became her agent, and was intrusted by her with the entire management of her estate, and exclusively of the property in question; in short, she was most dependent on and devoted to him and his interests, her affection for and attention to him were marked, as was her anxiety to please him. He was a prominent lawyer; so was the selected trustee, who was the husband's intimate friend; and so was also the officer who took the acknowledgment. So far as the evidence shows, this inexperienced lady was surrounded by these gentlemen, of whose legal ability she must have been aware, in one of whom she reposed the most im-

years executes to her son-in-law, who had for many years been her confidential adviser, and to her son, a trust deed, by which they were to be benefited, the burden is on them to show that she voluntarily made it, understanding that it gave her no power of revocation.¹ Where, pending an action by the maker of a trust deed to reform it by inserting a power of revocation, and to require the trustees to deliver to plaintiff the trust property, plaintiff died, and the action was revived and continued in the administrator's name on a supplementary complaint containing an allegation that, prior to the action, plaintiff had revoked the trust deed, which allegation was afterwards, by amendment, inserted in the original complaint, no objection being made thereto in either complaint, it was held that under the pleadings, as so changed, the action would be regarded, not as one to reform the deed to permit revocation,—a power which could be exercised only by the maker,—but as one to

placit confidence, she being without any competent independent adviser. It is a case in which the court should be alert to require the observance of all technical rules applicable. In all transactions between persons occupying relations, whether legal, natural, or conventional in their origin, in which confidence is naturally inspired, is presumed, or, in fact, reasonably exists, the burden of proof is thrown upon the person in whom confidence is reposed, and who has acquired an advantage, to show affirmatively, not only that no deception was practiced therein, no undue influence used, and that all was fair, open, and voluntary, but that it was well understood. *Mott v. Mott*, 49 N. J. Eq. 192; 22 Atl. Rep. 997; *Gibson v. Jeyes*, 6 Ves. 266; *Hoghton v. Hoghton*, 15 Beav. 278; *Siemon v. Wilson*, 3 Edw. Ch. 36; *Coutts v. Acworth*, L. R. 8 Eq. 558; *Boyd v. De La Montagnie*, 73 N. Y. 498; *Darlington's Appeal*, 86 Pa. St. 512; *Huguenin v. Baseley*, 2 White & T. Lead. Cas. Eq. (Text Cook Series), 597, notes. It is

essential to the maintenance of a deed of gift that the donor comprehends the full force and effect of his acts; as Sir George Jessel puts it, 'thoroughly understands what he is about' (*Dutton v. Thompson*, 23 Ch. Div. 278, 281), or, in the words of Lord Eldon in *Huguenin v. Baseley*, 14 Ves. 273, 'with that knowledge of all their effect, nature, and consequences which the defendants and the attorney were bound by their duty to communicate to her before she was suffered to execute them.' See also, *Mulock v. Mulock*, 31 N. J. Eq. 594, 602. It is to establish this thorough understanding that the burden of proof is thrown on the donee in cases of gifts between persons standing in fiduciary relations."

¹ *Barnard v. Gantz*, 140 N. Y. 249; 35 N. E. Rep. 430; *Cowee v. Cornell*, 75 N. Y. 91; *In re Smith*, 95 N. Y. 522. See *Allen v. Snyder*, 100 Mich. 290; 58 N. W. Rep. 997; 59 N. W. Rep. 653, where a bill to set aside deeds for mental weakness and undue influence was held to be properly dismissed on the evidence.

make an actual revocation effective, and to recover the property, in which case, if the power of revocation should have been in the deed, it will be treated as being there.¹

§ 828. The same subject continued—Suit by heirs.—A suit by the heirs to set aside, by reason of mistake, a deed of trust from a wife to her husband, being purely of equitable cognizance, is not affected by the statute of limitations.² The Texas

¹ *Barnard v. Gantz*, 140 N. Y. 249; 35 N. E. Rep. 430.

² *Hall v. Otterson*, 52 N. J. Eq. 522; 28 Atl. Rep. 907, per Green, V. C. "The present is a suit purely of equitable cognizance. It is founded on that branch of equity jurisdiction which relieves against mistake. As to its subject-matter she would be remediless at law. The case does not fall within the principle that equity applies the bar of the statute to cases where there is both a legal and equitable remedy for the same cause of action. *Kane v. Bloodgood*, 7 Johns. Ch. 90, 118; *Smith v. Wood*, 42 N. J. Eq. 563; 7 Atl. Rep. 881; *Kirkpatrick v. McElroy*, 41 N. J. Eq. 555; 7 Atl. Rep. 647; 13 Am. and Eng. Encyc. of Law, tit. 'Limitation of Actions,' p. 675, and notes. This defense must rest, therefore, solely on the application of those rules relating to acquiescence and laches, which the court has always recognized, altogether outside of and independent of the statute of limitations. They are the fruit of the maxim that 'equity aids the vigilant, not those who slumber on their rights.' The chancellor has forcibly stated the rule, its reason, and the consequences attendant on its disregard, in *Van Houten v. Van Winkle*, 1 Dick. Ch. 380. The defenses of laches and acquiescence are cognate, but not correlative. They both spring from the cardinal rule that 'he who seeks equity must do equity.' 'Acquiescence,' however, properly speaking,

relates to inaction during the performance of an act. 'Laches' relates to delay after the act is done. Lord Cottingham, in *Duke of Leeds v. Earl of Amherst*, 2 Phil. Ch. 117, says of the use of the term 'acquiescence:' 'If a party having a right stands by and sees another dealing with property in a manner inconsistent with that right, and makes no objection while the act is in progress, he can not afterwards complain. That is the proper sense of the word "acquiescence."' And thus it is that in such a case an equitable estoppel is raised. Acquiescence here might properly be applied, in favor of purchasers, to the inaction of the complainant while *James Otterson, Jr.*, was selling portions of the property, and those purchasers were spending money in its improvement. 'But,' says *Thesiger, L. J.*, in *De Bussche v. Alt*, L. R. 8 Ch. Div. 286-314, 'when once the act is completed, without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which at all events, as a general rule, can not be divested without accord and satisfaction or release under seal. Mere submission to the injuries for any time short of the period limited by statute for the enforcement of the right of action can not take away such right, although, under the name of "laches," it may afford a ground for refusing relief under some peculiar

statute, providing that every personal action "for which no limitation is otherwise prescribed shall be brought within four years," applies to an action for the rescission of a contract on the ground of fraud.¹ And in South Carolina an action by heirs to set aside their ancestor's deed, as procured from him by fraud, can not be maintained unless brought within six years after he had sufficient information to put him on inquiry as to the manner in which the deed was procured.²

§ 829. Rescission by married woman.—A conveyance procured from a wife by her husband through threats to take her children away from her, and to prevent her seeing them again may be rescinded as obtained by undue influence.³ Where a

circumstances.' 'Now, the doctrine of laches in courts of equity,' says Sir Barnes Peacock, in *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, at 293, 'is not an arbitrary or technical doctrine.'

¹ *Evans v. Goggan*, 5 Texas C. App. 129; 23 S. W. Rep. 854, per Collard, J. "The question was, when would the right to a rescission be barred? The statute does not specifically provide for it, but provides that every other personal action 'for which no limitation is otherwise prescribed shall be brought within four years next after the right to bring the same shall have accrued, and not afterward.' Revised Statutes, art. 3207. It has been decided that the statute of four years applies to an action for rescission of a contract consummated in fraud. *Cooper v. Lee*, 75 Texas, 114; 12 S. W. Rep. 483. If, then, the plaintiff is entitled to a rescission, and is not barred by limitation in that action, he would be entitled to complete restoration of his rights upon rescission. The amount paid on the contract should be restored to him, and its recovery would not be governed by a different period of limitation from that which would govern the action

itself. The two-year statute, as for debt or open account or money had and received, would not apply."

² *Brown v. Brown* (S. C. 1895), 22 S. E. Rep. 412. And see *Beck v. Searson*, 8 Rich. Eq. 130; *Kirksey v. Keith*, 11 Rich. Eq. 33.

³ *Kellogg v. Kellogg*, 21 Colo. 11; 40 Pac. Rep. 358, Hoyt, C. J.: "He, a strong, vigorous man; she, a weak woman, with two small children clinging to her for support. The custody of those children was more precious to her than wealth, and it should not be a matter of surprise that she yielded to his threats, and deeded to him the only property she possessed, outside of her wearing apparel. The evidence shows that the value of this property at the time was not less than \$1,500, while the only consideration paid or promised was the sum of \$10, which he gave her to meet her present necessities. A more unconscionable transaction can not well be imagined. Courts of equity always interfere to protect the weak against the strong, and relieve from a conveyance for an inadequate consideration, extorted by threats sufficient to overcome the will of the grantor. *Turner v. Turner*, 44 Mo. 535; *Anthony v.*

deed of voluntary assignment was executed by the members of a firm, the husband and sons of plaintiff, and the latter joined in the deed, so as to convey her separate estate, and she first knew of the insolvency of the firm on the day she executed the paper, which she did only after repeated urging by her husband, and representations by him that by so doing she would save the business, and these representations and his statements then made to her as to the amount of the firm indebtedness turned out to be untrue, and she had no legal advice at the time, and there was no consideration moving from the creditors for such conveyance by her, it was held that it was proper to declare void the conveyance by her, and to enjoin the assignee from selling her property so conveyed.¹

§ 830. Parents' deeds to children.—Parents of sound mind, in the absence of undue influence, may deed their property to some of their children to the exclusion of others, although there was no money consideration for the conveyance, and the grantors reserved the right of possession during their lives, and a court of equity will not rescind such a deed.² But where a man, shortly before his death, undertakes to distribute his property among his wife and children, and executes deeds in favor of some of them, which they obtain possession of without the grantor's consent, and he fails, through feebleness, to complete the contemplated distribution, the deeds already executed should be set aside.³ In an action against a vendee to set aside a sale on the ground of fraud and undue influence, where no fiduciary relations existed between the parties, the burden of proof is on plaintiff; and, where no fiduciary relations existed between the parties to the sale, and there was no pecuniary distress, or any lack of mental capacity on the part of the vendor, who had an equal opportunity with the vendee to know the value of the property, mere inadequacy of consideration is not ground for rescission.⁴

Hutchins, 10 R. I. 165; *Yard v. Yard*, 27 N. J. Eq. 114; *Taylor v. Taylor*, 8 How. 183."

² *Hester v. Sample* (Iowa, 1895), 63 N. W. Rep. 463.

³ *McGee v. McGee* (Mich. 1895), 63 N. W. Rep. 763.

¹ *Fleming v. Ogden*, 152 Pa. 418; 25 Atl. Rep. 639.

⁴ *Cooper v. Reilly*, 90 Wis. 427; 63

§ 831. **Voluntary deed from father to son.**—Where the natural position of parent and child is so changed that the former becomes subject to the dominion of the latter, and where their situation is such that the child has a controlling influence over the will and conduct and interests of the parent, equity will interpose its jurisdiction to set aside instruments executed between them, and, under such circumstances, gifts from parents to children will be set aside, unless most satisfactory evidence is produced that they were not obtained by undue influence.¹ But the fact that an old man acts under the advice of his son in his ordinary business affairs, and is influenced by his affection for him, does not tend to prove the exercise of undue influence in his execution of a deed to his son.² And in such a case his declarations made in the absence of the son to the effect that he had been unduly persuaded to make the conveyance, and that it had been made to defraud his creditors, are inadmissible for the purpose of invalidating the deed; because it is no ground for setting aside the deed at the suit

N.W. Rep. 885, Newman, J.: "Many, perhaps most, of the circumstances from which fraud is sought to be inferred are as fairly susceptible of explanation upon a theory of honesty as on a theory of deceit. The strongest circumstance in the case—very nearly the only one—upon which the theory of fraud is urged is what is claimed to be the inadequacy of consideration. But even a great disparity between the value and the price paid is no evidence of fraud where both parties have an equal opportunity to know the value. *Wood v. Boynton*, 64 Wis. 265-272; 25 N. W. Rep. 42, and cases cited; *Prince v. Overholser*, 75 Wis. 646; 44 N. W. Rep. 775; *Mosher v. Post*, 89 Wis. 602; 62 N. W. Rep. 516. Unless inadequacy of consideration is coupled with some other circumstances, such as weakness of mind, a fiduciary relation, pecuniary distress, or the like, it is no ground for setting

aside a sale. *Wood v. Boynton*, 64 Wis. 265."

¹ *Burt v. Quisenberry*, 132 Ill. 385; *Harvey v. Sullens*, 46 Mo. 147; *Brice v. Brice*, 5 Barb. 533.

² *Francis v. Wilkinson*, 147 Ill. 370; 35 N. E. Rep. 150, per Magruder, J.: "The fraud or undue influence which will render a will or deed invalid must be connected with the execution of the instrument, and operating when it is made. *Pooler v. Cristman*, 145 Ill. 405; 34 N. E. Rep. 57; *Guild v. Hull*, 127 Ill. 523; 20 N. E. Rep. 665; and, although a father may act under the advice of his son in his ordinary affairs, and may be influenced by that advice, yet such relation and influence do not tend to prove the exercise of undue influence in the execution of a conveyance by the former to the latter. *Brownfield v. Brownfield*, 43 Ill. 148; *Rutherford v. Morris*, 77 Ill. 397."

of the grantor's heirs that it was given to defraud creditors, since such a conveyance is good as between the parties.¹

§ 832. Deed of gift by old man—Confidential relation.—

Where an old, illiterate man makes a deed of gift of a valuable farm, which was practically all of his property, to the husband of a niece, with whom he had lived for several years, and who during that time had been his general agent, to the exclusion of a sister, with whom he was on the best of relations, and other nieces and nephews, the burden is on the donee to prove that the gift was the voluntary and deliberate act of the donor, and that he knew at the time he signed it that he was divesting himself of all interest, and transferring it to the donee; and it can not be sustained where, in a suit by the donor's heirs to set it aside for undue influence of the donee and his wife, neither they nor the draughtsman testify, and the notary who took the acknowledgment states that the deed was not, in his presence, read to the donor.²

¹ Francis v. Wilkinson, 147 Ill. 370, per Magruder, J.: "It is well settled that the declaration of a grantor when the grantee is not present can not be admitted for the purpose of invalidating the deed. Parties making deeds or wills can not invalidate them by their own parol declarations, made previously or subsequently. Dickie v. Carter, 42 Ill. 376; Bennett v. Stout, 98 Ill. 47; Bentley v. O'Bryan, 111 Ill. 53; Guild v. Hull, 127 Ill. 523; 20 N. E. Rep. 665; Burt v. Quisenberry, 132 Ill. 385. * * * * If such declarations made by the father and sons were properly admissible, the fraud upon creditors which they tended to show could in no way operate to the benefit of these complainants, who sue as heirs of the fraudulent grantor. The general rule is that voluntary conveyances, although void as to creditors, are valid as to the parties, and can not be set aside by the grantor or his heirs. 1 Story on Equity Juris-

prudence, § 371; Miller v. Marckle, 21 Ill. 152; Harmon v. Harmon, 63 Ill. 512; Rawson v. Fox, 65 Ill. 200; Campbell v. Whitson, 68 Ill. 240; McElroy v. Hiner, 133 Ill. 156; 24 N. E. Rep. 435."

² Zimmerman v. Bitner, 79 Md. 115; 28 Atl. Rep. 820, per Robison, C. J.: "A good deal has been said as to what constitutes a confidential relation, within the operation of the principle, but courts have always been careful not to fetter the operation of the principle by undertaking to define its precise limits. The cases of parent and child, guardian and ward, trustee and *cestui que trust*, principal and agent, are familiar instances in which the principle applies in its strictest sense. But its operation is not confined to the dealings and transactions between parties standing in these relations, but extends to all relations in which confidence is reposed, and in which dominion and influence resulting from such confidence may be ex-

§ 833. Conveyances by lunatics and drunkards.—Conveyances are not now set aside upon the sole ground that the grantor is a lunatic, idiot, or *non compos mentis*. But persons dealing

exercised by one person over another. No part of the jurisdiction of the court is more useful, it has been said, than that which it exercises in watching and controlling transactions between parties standing in a relation of confidence to each other; and, being founded on the principle of correcting abuses of confidence, it ought to be applied to every case in which a confidential relation exists as a fact, where confidence is reposed on the one side, and the resulting superiority and influence on the other. *Billage v. Southee*, 9 Hare, 534; *Tate v. Williamson*, L. R. 1 Eq. 528; *Tate v. Williamson*, L. R. 2 Ch. App. 55. The broad principle, says Vice Chancellor Wood, on which the court acts in cases of this description, is that wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert influence over the person trusting, the court will not allow any transaction between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him. *Tate v. Williamson*, L. R. 1 Eq. 528. Tested by these well-established principles, the relations existing between the donor and donee in this case were, beyond question, of such a character as to cast the onus upon Zimmerman, the donee, of proving that the deed of gift was the voluntary and deliberate act of the donor; that he knew at the time he signed it that he was thereby divesting himself of all interest in the property, and was in fact transferring his entire in-

terest to the donee. In the recent case of *Bishop Ames' will* (*Hiss v. Weik*, 78 Md. 439; 28 Atl. Rep. 400), against the probate of which a caveat was filed on the ground of fraud and undue influence practiced by Mr. and Mrs. Hiss, the beneficiaries under the will, and in the trial of which neither Mr. nor Mrs. Hiss offered to testify, we said: 'It is a generally accepted rule of law that the suppression or non-production of pertinent and cogent evidence necessarily raises a strong presumption against the party who withholds such evidence, where he has it in his power to produce it.' And this we said in a case where there was a caveat to a will, and the burden of proof was upon the caveators. Here we are dealing with a gift to one standing in a confidential relation to the donor, and upon whom the burden of proof is to show to the satisfaction of the court that it was the voluntary act of the donor, and was not procured by any influence exercised over him by the donee. To sustain a voluntary deed, upon the proof before us, would be to break down the safeguards which courts of equity have thrown around the dealings and transactions of parties standing in a confidential relation to each other; and, instead of shutting the door to temptation, it would invite persons to secure benefits to themselves, to the detriment of those, the confidence of whom they had betrayed. The case of *Eakle v. Reynolds*, 54 Md. 305, relied on by the appellant, differs widely from the one now before us. In that case the uncle conveyed to a favorite nephew a farm valued at between twelve and fifteen

with this class of persons, knowing them to be so, are deemed to have perpetrated a fraud, and in such cases courts of equity can interfere, and set aside contracts made by them.¹ Where a mortgage conveyance of real estate, and a title acquired by foreclosure proceedings thereunder, are sought to be impeached and declared void, by a subsequent purchaser from the mortgagor, upon the ground of the mental incapacity of the mortgagor at the time of the execution of the mortgage, caused by the habitual use of intoxicating liquor to such an extent as to destroy his reasoning faculties, the burden of proving such unsoundness of mind is upon the plaintiff, which he must also show affirmatively existed at the time of the execution of the mortgage; and, in such a case, it must also appear affirmatively that the transaction was fraudulent, or that undue advantage was taken of the intoxicated vendor, or that such intoxication was produced or procured by the other party, or that he had notice of the vendor's intoxicated condition at the time of the execution of the mortgage.²

thousand dollars, but he was careful enough to reserve a life estate to himself. Prior to the deed of gift he had made three wills, in each of which he gave legacies to other relatives, making his nephew the residuary devisee. He had lived with his uncle from early childhood, and for some time prior to the execution of the deed he had occasionally transacted business for him, and during his uncle's sickness had the general management of the farm. Whatever suspicion attached to the execution of the voluntary deed in that case, the donee proved that it was the free and voluntary act of the donor, and that the latter signed with full knowledge of its import and meaning."

¹ Story on Equity Jurisprudence, § 227.

² *Youn v. Lamont*, 56 Minn. 216; 57 N. W. Rep. 478, per Buck, J.: "Mr. Story lays down the rule further: 'That if a purchase is made in good

faith, without any knowledge of the incapacity, and no advantage has been taken of the party, courts of equity will not interfere to set aside the contract if injustice will thereby be done to the other side, and the parties can not be placed *in statu quo*.' Section 228. See *Schaps v. Lebner*, 54 Minn. 208; 55 N. W. Rep. 911. In *Briswell on Insanity*, § 413, the rule is laid down that 'a completed contract for the sale of lands made by an insane vendor without fraud, or notice to the vendee of the grantor's insanity, and for a fair consideration, will not be set aside, either at law or equity, in favor of the vendor or his representatives, except the purchase-money be restored to, and the parties fully reinstated in, the condition in which they were prior to the purchase.' In *Lancaster, etc., Bank v. Moore*, 78 Pa. St. 407, the bank discounted a note for a lunatic, and he was held liable, and *Paxson, J.*, said: 'It would be an

§ 834. **Test of grantor's capacity.**—The law upon the subject of capacity and undue influence is that, where the maker of a voluntary conveyance is capable of doing the act, and there is no fraud, no concealment, and no advantage taken, the court will not interpose.¹ The law does not require that persons shall be able to dispose of their property with judgment and discretion in order to the validity of a conveyance. It is sufficient if they understand what they are about.² And the fact that grantees advised and encouraged the execution of the voluntary deeds does not impair the validity of the instruments, unless the free agency of the grantor was destroyed.³ Where, in an action to cancel a deed made by plaintiff to defendant, it appeared that defendant was the half-brother of plaintiff's husband, who died a few days before the deed was made, and defendant claimed that the deed was made in pursuance of an understanding between deceased and the parties, and plaintiff claimed that she was so confused, owing to the recent death of her husband, that she did not understand the effect of the deed, and there was evidence of an understanding with deceased that defendant should have the property, and that, after consulting with plaintiff, the defendant, at her suggestion, retained her husband's lawyer to draw the deed, which he did, after consulting her as to the details, among which was a provision for an annuity to her secured on the land, and after the execution of the deed, defendant spoke to plaintiff, a very intelligent woman, about a rumor that he had treated her unfairly, and offered to cancel the deed if she was dissatisfied, and plaintiff expressed no dissatisfaction, and defendant first learned that she was dissatisfied from the bringing of the suit, it was held that the evidence did not show that plaintiff, when she executed the deed, did not comprehend its nature.⁴ Differ-

unreasonable and unjust rule that such persons should be allowed to obtain the property of innocent parties, and retain both the property and its price.' "

¹ *Hadley v. Latimer*, 3 Yerg. (Tenn.) 537; *Coffee v. Ruffin*, 4 Cold. (Tenn.) 487.

² *Paine v. Roberts*, 82 N. C. 451.

³ *Stone v. Wilbern*, 83 Ill. 105; *Roe v. Taylor*, 45 Ill. 485.

⁴ *Seat v. McWhirter*, 93 Tenn. 542; 29 S. W. Rep. 220, per McAlister, J.: "The chancellor, however, found that Mrs. Seat was incapable of understanding and comprehending transactions of the magnitude of the one in

ence in the mental capacity of the parties to a contract is not ground for rescission, unless one overreached the other through his superior capacity. And the fact that the vendor is aware that the vendee is without means to make deferred payments is not ground for rescission of the conveyance.¹

§ 835. Evidence of incapacity—Facts versus opinions.—A deed by an ignorant woman, of ordinary mental powers, to one of her sons, to the exclusion of the others, on the ground of his kindness and services to her, but without evidence of undue influence practiced upon her, will not be set aside at the instance of the other sons, on the ground of her mental incapacity.² Where, in a suit to set aside a deed of a farm, made in consideration of an agreement for support, it appeared that the deceased grantor, an aged widow, although palsied and physically helpless, took care of her money and attended to her business affairs rationally; and that, while her mental condition was generally good, and she appeared to understand the contents of the deed in suit, she was childish and easily influenced, and plaintiff's witnesses, who were acquaintances

question, and that she executed the two deeds ignorantly and without understanding the real contents and tenor of the same, and without consideration, and with the belief that she was doing an entirely different act by the execution of the papers. We are of opinion that the great preponderance of the evidence is against the finding of the chancellor on the proposition last announced. We are of opinion Mrs. Seat was fully capable of understanding and appreciating what she was doing when she made the deeds, and did comprehend the nature of the transaction."

¹ Moore v. Cross, 87 Texas, 557; 29 S. W. Rep. 1051, Brown, J.: "Courts can not measure the relative intelligence and business qualifications of parties to a transaction, unless it reaches the point where it appear, that one has overreached the other by rea-

son of his incapacity. Neither is the fact that plaintiff was a laboring man, and defendant a trader and speculator, of any importance, or that defendant knew that plaintiff had no means except his labor out of which to pay the debt he was about to contract. It was the business of plaintiff to determine for himself whether or not he could pay the debt before he contracted it. No one was better qualified to judge of that matter than plaintiff, and it did not devolve upon Moore to guard him against his own judgment on that point."

² Soberanes v. Soberanes, 106 Cal. 1; 39 Pac. Rep. 39; 39 Pac. Rep. 527, McFarland, J.: "Whether or not it was a proper and commendable thing for her to give all her property to one of her children is not a question for courts; that question was with her alone."

and relatives of the grantor, thought her mentally incapable of executing the deed in question, and thirteen witnesses for defendant testified that they had known the grantor for years in a business and social way, and that, notwithstanding her physical infirmities, her mind was sound, it was held that the preponderance of evidence was in defendant's favor, and that a finding that the grantor was incapable of making the deed was erroneous.¹ And, where one went with his muniments of title to his attorney, sought his creditor and proposed a deed of trust, explained and discussed with his attorney the purpose of said deed, and, after the attorney had drawn up the deed as instructed, signed it and went before a notary and

¹ *Pennington v. Stanton*, 125 Mo. 658; 28 S. W. Rep. 1067. In *Henrizi v. Kehr*, 90 Wis. 344; 63 N. W. Rep. 285, a man seventy-nine years old, infirm in mind and body, nearly blind, and very hard of hearing, who had had a stroke of paralysis, and did not recognize any one until informed who the person was, executed to his son, with whom he lived, a satisfaction of a mortgage, which was nearly all his property. The satisfaction was filed immediately, but his other children, who were frequently at the house, knew nothing of it till after his death, eight months later. The notary, who was the only disinterested witness of the transaction, told the son at the time that he doubted if his father was not too weak in mind for transaction of such business, but the son wanted it done. His opinion at the time of the transaction, as well as at the time of testifying, was that the father's mind was "a little short of doing that kind of business." The testimony of the other witnesses against the son was that the father "was not right in his sense any more." The witnesses for the son testified that the father's mental condition was very fair, and, in their opinion, he could understand common business transactions. It was held that the evidence showed want

of mental capacity. So also, where, in an action by heirs to set aside a deed from a father, eighty-six years old, to his son, it appeared that, when the deed was made, the son agreed that he should pay to the father a sum of money, which should be a lien on the land, and should support the father during his life, and there was evidence that the father was feeble, that his hearing and sight were poor, that he was extremely nervous, that his wife and son attended to some of his business, and that he seemed incompetent to do business, and a daughter testified that, shortly before the deed was made, her father talked about disposing of his property among his children, and told her what he would give each, and that he was going to make the deed in suit, and, when the deed was made, he disposed of other property among his children, and the lawyer who drew the papers testified that he discussed the different dispositions, and was competent to make a will, and the doctor called in to attend him a few weeks later testified that he did not see anything about him that was not rational, it was held that a finding that there was no evidence of undue influence or mental incapacity was proper. *Davis v. Latta* (Iowa, 1895), 62 N. W. Rep. 17.

acknowledged it, and the attorney, the creditor and notary all testified that he was apparently sober during the whole transaction, but several other credible witnesses who had seen him that day, but not during the time of the transaction, testified that, in their opinion, he could not have been sober enough to make a valid conveyance, it was held that the deed was valid.¹

§ 836. Conveyance by erratic persons.—In an interesting and instructive case, where on a bill to set aside a deed it appeared that the parties, both elderly people, were sister and brother, and that the deed was made after the return of complainant's husband, who had separated from her, to the town where she lived, and the complainant testified that defendant told her that her husband had come to get possession of her property, and that she had better execute a paper giving up the control thereof to him; and that she afterwards, at his request, and to protect her from her husband, executed the deed, which gave defendant her property, reserving merely a life estate for herself, and the defendant testified that the deed was made by complainant in execution of her long-expressed purpose to give him the property on her death, and the person who drew the deed testified that complainant appeared to know what was the purport of the deed, but that defendant did most of the talking in regard to the matter, and the complainant, who was erratic and excitable, had always had the utmost confidence in her brother, and had practically left the management of her affairs to him, and it appeared that he had induced her to agree to an amicable separation from her husband, it was held that the deed should be set aside.²

¹ McGowan v. Brooks (Miss. 1895), 16 So. Rep. 436, Cooper, C. J.: "What weight should be given to the testimony of witnesses that, in their opinions, certain facts could not exist, in the face of uncontroverted, positive, and satisfactory evidence that the precise facts did exist? If a thousand witnesses testify that, in their opinion, a particular person had not sufficient intelligence to learn the multiplica-

tion table, must it not all go for naught if a sufficient number of credible witnesses testify that, in fact, such person did correctly repeat the table to them?"

² Smith v. Cuddy, 96 Mich. 562; 56 N. W. Rep. 89, per McGrath, J.. "Under the circumstances of this case, the burden was upon the defendant to show not only that complainant fully understood the terms, im-

§ 837. Where agent sells trust estate to own wife.—The general rule is that when a trustee of any description, or person acting as agent for others, sells a trust estate, and becomes

port, and effect of the instrument executed, but, if her intent was as expressed by that instrument, to show that such intention was not produced by undue influence exerted by himself. *Gibson v. Jeyes*, 6 Ves. 266; *Hoghton v. Hoghton*, 11 Eng. Law and Eq. 134; *Huguenin v. Baseley*, 14 Ves. 273. Defendant's testimony fails to satisfy us upon either point. Transactions of this nature are regarded by courts of equity with suspicion, and scrutinized with vigilance. The presumption is against the propriety of the transaction, and, as has been frequently said in our own cases, the duty of courts is to refuse judicial sanction to such an instrument until fully satisfied of the fairness of the transaction, and that the instrument is the intelligent act of the person executing it. *Seeley v. Price*, 14 Mich. 541; *Witbeck v. Witbeck*, 25 Mich. 439; *Wartemberg v. Spiegel*, 31 Mich. 400; *Barnes v. Brown*, 32 Mich. 146; *Duncombe v. Richards*, 46 Mich. 166; 9 N. W. Rep. 149; *Jacox v. Jacox*, 40 Mich. 473; *Finegan v. Theisen*, 92 Mich. 173; 52 N. W. Rep. 619. In *Jacox v. Jacox*, Mr. Justice Graves says: 'The actual conduct of relatives and others at the time in question towards the individual is generally of much greater value as proof of their conception of his mind or capacity than any term they may employ on the stand to express it.' In the present case, the best of evidence of the incapacity of the complainant in matters of business was the almost absolute control which defendant assumed and exercised over her business affairs. Continuing, Mr. Justice Graves says: 'In case it appears from the facts that there was mental

disorder, but not of a high degree, or far advanced, it then becomes material to inquire into the nature of the transaction, and the influences leading to it; and if the circumstances disclose that the person under the infirmity, whether through choice, accident, or otherwise, was as matter of fact for the time being in the place of ward of the other party, or was by his own consent, however brought about, in a state of submission to the judgment or opinion of the other, a presumption will arise adverse to the justice and equity of the bargain, and the bargainee will be required to show that no advantage was taken, and that in itself the arrangement was not only suitable, fair, and conscientious, but one expedient under the circumstances, and conducive to the interests of the other.' The decree below must therefore be reversed, and a decree entered here for complainant, ordering a reconveyance, the decree to stand in lieu of such reconveyance, until the same is made, with costs of both courts to complainant." In *Field v. Shorb*, 99 Cal. 661; 34 Pac. Rep. 504, in an action for an accounting and to set aside a gift as made when the donor was insane, it appeared that he was very close in money matters, and uncleanly in habits and dress; that he shrank from the use of water, and objected to changing his soiled clothes; that he talked of women in an obscene way, and when angry swore badly; that he played on the piano without extracting any music, and then walked around the room in a quaint, unnatural manner. These were his characteristics for months before his death, in August, 1890. It was held that a finding that deceased

himself interested, either directly or indirectly, in the purchase, the *cestui que trust* is entitled as a matter of course, at his election, either to have the sale affirmed or set aside, if he acts

was sane until July 1st—two days before he made the gift—and insane from that time until the date of his death, was against the evidence. In *Leggatt v. Leggatt*, 14 Mont. 104; 35 Pac. Rep. 724, a conveyance by plaintiff to her brother-in-law, J., through her brother-in-law, R., who was appointed her attorney in fact at the suggestion of J., will be set aside for fraud and collusion, they having, with full knowledge, grossly misrepresented to her the value of the land and the state of its title, she being ignorant of the facts and trusting them, and the sale being for a small fraction only of the value of the land. In *Buckey v. Buckey*, 38 W. Va. 168; 18 S. E. Rep. 383, it was held that a grantor in a deed may be extremely old, his understanding, memory and mind enfeebled and weakened by age, and his action occasionally strange and eccentric, and he may not be able to transact many affairs of life, yet, if age has not rendered him imbecile, so that he does not know the nature and effect of the deed, this does not invalidate the deed. If he be capable, at the time, to know the nature, character, and effect of the particular act, that is sufficient to sustain it, and the court said: "If we look anywhere, we shall find it laid down as law, particularly in *Jarrett v. Jarrett*, 11 W. Va. 584, and *Kerr v. Lunsford*, 31 W. Va. 661; 8 S. E. Rep. 493, that 'old age is not in itself sufficient evidence of incapacity to make a deed,' and that the presumption of law is always in favor of the sanity, at the time the deed was executed, of a person whose deed is brought in question; the burden of proof is on him who asserts insanity, unless a previous condition of insani-

ty has been established. *Jarrett v. Jarrett*, *supra*; *Anderson v. Cranmer*, 11 W. Va. 562, 584; *Hiatt v. Shull*, 36 W. Va. 563; 15 S. E. Rep. 146. "This presumption is universal, and is not defeated by common report or reputation, or the imputation of friends or relatives, or the old age or feebleness of the subject, or, in short, by any cause except controlling evidence produced." *Buswell on Insanity*, § 159. The principle is sound in itself, and settled as a rule that, in the absence of fraud, imposition, or undue influence, mere weakness or feebleness of understanding is not sufficient to overthrow the party's deed. *Aiman v. Stout*, 42 Pa. St. 114; *Cain v. Warford*, 33 Md. 23; *Miller v. Craig*, 36 Ill. 109; *Maddox v. Simmons*, 31 Ga. 512, 528; 2 *Lomax's Digest*, 298; Chancellor Kent in *Van Alst v. Hunter*, 5 Johnson's Ch. 148. Here I will say that no evidence shows, or tends to show, any fraud, undue influence, or even importunity, on the part of these grantees. Although alleged in the bills, there is not the slightest proof, and no contention of that kind is in the brief of counsel. The mental weakness must go further than it does in this case. The mysterious action of the person whose act was involved in *Mercer v. Kelso*, 4 Gratt. 106, went beyond that in this case. 'No degree of physical or mental imbecility which does not deprive the party of legal competency to act is of itself sufficient to avoid his contract.' *Farnam v. Brooks*, 9 Pick. 212. It must go so far as to disable him from knowing and understanding the nature and effect of his act. 2 *Minor's Institutes of Common and Statute Law*, 572; *Bishop on Contracts*, § 962. His mind may be weak

upon his election before the rights of third parties have intervened.¹ Where an attorney in fact conveys his principal's land to one who immediately conveys it to the attorney's wife, her title is good as against the principal, where no suit is brought to set aside the deeds until she has been in possession and paid taxes for seven consecutive years, since the deed to her is sufficient to give color of title.² And one who relies on the statutory title created by seven years' possession and payment of taxes under color of title need not plead laches or the statute of limitations in a suit to set aside the deed which constitutes his color of title. And the mere fact that a grantee knew at the time he received his deed that a third person claimed title to the property does not render his purchase an act of bad faith.³

and debilitated as compared with what it once was, the memory of things enfeebled, the understanding weak, the character and demeanor eccentric, and he may not have capacity to transact all the ordinary business of life; still, if he understands the nature of the act he does, recollects the property he is disposing of, and the person to whom he grants it, and how he desires to dispose of it, his act is valid. *Nicholas v. Kershner*, 20 W. Va. 251; *Kerr v. Lunsford*, 31 W. Va. 659; 8 S. E. Rep. 493."

¹ *Borders v. Murphy*, 125 Ill. 577; 18 N. E. Rep. 739.

² *Coward v. Coward*, 148 Ill. 268; 35 N. E. Rep. 759.

³ *Coward v. Coward*, 148 Ill. 268; 35 N. E. Rep. 759, per Craig, J.. "The complainant claims to be the owner of the lot in controversy, and seeks to set aside two deeds under which defendant derives title. The defendant, on the other hand, claims to be the absolute owner of the lot, and for the purpose of establishing her title and ownership, she reads in evidence a deed from Folts to herself, which is color of title, and makes proof of seven years' possession and payment of

taxes under such color of title, which, under the law, establishes title in herself. Under the act of 1839, where the right of entry and right of action are lost by operation of the statute, the party in possession is conclusively presumed to be the owner. *Faloon v. Simshauser*, 130 Ill. 649; 22 N. E. Rep. 835. Where the bar of the statute has become absolute, as in this case, and the party entitled to hold the land is in possession, the title acquired and held under the statute of limitations is as available for attack as defense, and it may be asserted against the persons claiming the land. *Hale v. Gladfelder*, 52 Ill. 91; *McDuffee v. Sinnott*, 119 Ill. 449; 10 N. E. Rep. 385; *Gage v. Hampton*, 127 Ill. 87; 20 N. E. Rep. 12. The defendant had the right to prove that she was the owner of the property, and held an absolute title. Whether that title was derived under the limitation act of 1839, or whether she acquired and held title in some other manner, was a matter of no consequence to the complainant; in other words, it was her right to establish title in any manner she could. In an action at law, where the defendant

§ 838. Stifling competition at judicial sale.—In a case where, while an administrator's sale was in progress, one of the bidders made arrangements with the others whereby, in consideration of various agreements made by him, they ceased to bid, and he obtained the property for less than its market value, it was held that the sale was voidable at the suit of the heirs. A delay of six years before bringing suit to set aside such a sale does not constitute laches where the two male heirs were non-residents at the time of the sale, two of the female heirs were invalids, and the third a minor, and none of the heirs knew of the fraudulent acts of the purchaser until a few days before they began the suit.¹

relies on title acquired and held under the limitation laws of the state, he is not required to plead the limitation laws in order that he may establish by proof his title in trust; and we are aware of no well settled rule which requires the defendant to plead the limitation laws to enable him to establish title thereunder in a suit in equity. But it is said the defendant did not acquire title in good faith. There is good faith where there is no fraud, and the color of title is not acquired in bad faith. *McConnell v. Street*, 17 Ill. 253; *Stubblefield v. Borders*, 92 Ill. 279. Good faith in the acquirement of title, within the meaning of the statute, does not require ignorance of adverse claims or defects in the title. Notice, actual or constructive, is of no consequence. *Chickering v. Failes*, 26 Ill. 507; *Dickenson v. Breeden*, 30 Ill. 279; *McCagg v. Heacock*, 34 Ill. 476; *Coleman v. Billings*, 89 Ill. 183; *County of Piatt v. Goodell*, 97 Ill. 84. There may be good faith, notwithstanding actual notice of existing claims or liens or knowledge of legal defects which prevent the title of which there is color from being absolute. *McCagg v. Heacock*, 34 Ill. 476; *Brian v. Melton*, 125 Ill. 647; 18 N. E. Rep. 318. Under the authorities cited, it

is manifest that there is not sufficient evidence in the record to establish that the defendant acquired title in bad faith. She knew that the complainant was claiming title to the property; but, as held in the cases cited, notice of existing claims or knowledge of legal defects do not establish bad faith. The deed to her purported on its face to convey title. She was guilty of no fraud in procuring it. She believed the deed passed title to her, and we think she acquired title in good faith."

¹ *Ingalls v. Rowell*, 149 Ill. 163; 63 N. E. Rep. 1016, per Bailey, J.: "It is a well-recognized rule that where a person desirous of purchasing property at auction prevents others, by his improper conduct, from bidding against him, and thus succeeds in purchasing the property at less than its fair market value, the sale will be set aside. So agreements not to bid at a public auction are in general void, as against public policy, and tending to fraud; and such agreements—at least when brought about or participated in by the purchaser—will vitiate the sale. See 1 Am. & Eng. Encyc. of Law, 997, and authorities cited. As said in *Wilson v. Kellogg*, 77 Ill. 47: 'The law may be regarded as well settled that

§ 839. Canceling mortgage—Want of consideration.—Where a mortgage and bond were delivered with the express understanding that they should be inoperative until the consideration therefor was paid, and were wrongfully recorded without paying the consideration, a cancellation of the bond and mortgage will be decreed, although in the hands of an innocent purchaser.¹ In an action to cancel a mortgage given defend-

the greatest fairness is required of those intrusted by law to conduct judicial sales, and of those who purchase at such sales; and any agreement, contract or arrangement entered into on the part of the bidders, calculated to stifle competition at the sale, is contrary to public policy, a fraud upon the law, and would vitiate the sale.' See also, *Loyd v. Malone*, 23 Ill. 43."

¹ *Rapps v. Gottlieb*, 142 N. Y. 164; 36 N. E. Rep. 1052, per Finch, J.: "The rule is conceded that the assignee of the mortgage takes subject to the equities between the original parties, and has no greater rights than the original mortgagee. The mortgage, therefore, was invalid in the hands of the assignee, because her assignor could not enforce it against the mortgagor. But, while conceding this rule, the appellant claims that there are exceptions to it, and cites the cases in which the owner of property has negligently, or from over-confidence, clothed another with its apparent ownership, and with seeming authority for its transfer, and in which, by estoppel or otherwise, the innocent assignee for value has been protected. Obviously, such an exception, applied to this case, would annihilate the rule, for in all cases of the assignment of a mortgage invalid between the original parties its existence, when it ought not to have existed, indicates the negligence or over-confidence referred to as the basis of the exception. None of those cases relate to the trans-

fer of a mortgage, which is but a security or lien, and enforceable only in equity, but all of them were instances in which the assignor had the legal title, and the means of transferring it in the most effectual manner. They related to the transfer of a conceded existing legal right, and respected the equities, not between the original parties, but between subsequent holders dealing in one way or another with the valid securities. The appellant's chief reliance is upon *McNiel v. Tenth Nat. Bank*, 46 N. Y. 325, and *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41. In neither case was there any question between the original parties. In the one the plaintiffs owned certain shares of bank stock by a title perfectly valid as between them and the corporation of issue, and without any existing equities in favor of the latter. That stock the plaintiffs pledged, and the pledgees made a further transfer to the defendant bank; and all the questions arose, not between the original parties to the stock obligation, but between the subsequent holders. In *Moore v. Bank* the plaintiff held a certificate of indebtedness issued by the capitol commissioners. There was no question of its validity, or of any equity in behalf of the state, but the whole quarrel was among the transferees, and respecting their dealings with a security concededly valid as between the original parties. It was argued in that case that protection to the assignee as a holder in good faith and for value would make all non-negotia-

ant as consideration for the erection of a house for plaintiff, on the ground that the contract for the building had been canceled, the judgment will not be disturbed where there is direct conflict in the evidence as to the cancellation of the contract.¹

ble securities at once negotiable, to which the court retorted: 'Not so. No one pretends but that the purchaser will take the former subject to all defenses valid as to the original parties.' These cases, therefore, in no manner infringe or work exceptions to the uniform rule that the assignee of a mortgage has no greater right against the mortgagor than belonged to the original mortgagee. * * * A further argument is made founded upon the doctrine that, where one of two innocent parties must suffer from a wrong, he must bear the loss whose action enabled the wrong to be done; but that doctrine applies only in an emergency. It is good and useful, in its place, but will always make trouble if not kept where it belongs. Applied to this case, it would, as I have already suggested, destroy the doctrine which we have long and steadily held, that the assignee of a mortgage takes no greater right than belonged to the original mortgagee, for the apparent mortgagor who does not owe the debt and the assignee who has parted with his money may each be innocent, and one must suffer, and that one would be the party who signed the mortgage, and set in motion the sequence of results. If it is always remembered that the doctrine as to innocence on both sides operates only when other solutions are not available, or possibly in aid of proper solutions, very much of needless confusion will be avoided."

¹ *Blagborne v. Hunger*, 101 Mich. 375; 59 N. W. Rep. 657. In *McCarn v. Wilcox* (Mich. 1895), 63 N. W. Rep. 978, it appeared that defendant pur-

chased a farm in 1872, a part of the price being paid by his wife, a part by defendant, and the balance with money obtained by mortgaging the property; and on the same day, after the mortgage was given, defendant conveyed the farm to his wife by warranty deed, and subsequently both moved upon the land, and occupied it till the wife's death, in 1892. Something was paid on the mortgage by the wife, and the balance by defendant, but, at the latter's request, the mortgage was not discharged; and, in an action by the wife's heirs brought solely to cancel the mortgage, defendant alleged that the deed to his wife was made to protect her for her part of the purchase-money, and was not intended as a gift, and asked that the respective rights of the parties be adjusted in accordance with the amounts paid on the premises by each. It appeared that in 1879 defendant knew that his wife denied that he had any interest in the land. It was held that the mortgage should be discharged, and that defendant's claim, if any, could only be adjudicated by an independent suit in chancery. Grant, J., said: "If it be a fact that Mrs. Wilcox refused to part with her money for the purchase of this land unless a deed was made to her, and he chose to place the title in her, relying upon her to do equity between them when the mortgage was paid, he is entitled to no relief. It is unnecessary to cite authorities to show that such a transaction would be within the statute of frauds. It is undoubtedly true that Mrs. Wilcox contributed six hundred dollars to the pur-

§ 840. The same subject continued—Security overvalued.—

Where, in an action to cancel a note and a mortgage, it appeared that defendant told plaintiff that the costs in a malicious prosecution suit against him would amount to a specified sum and that plaintiff in such suit would compromise for that amount, which defendant would pay, if plaintiff would execute a note for the amount with mortgage security; that plaintiff executed the note and mortgage for defendant; and that defendant never compromised the suit, or paid any amount in settlement or otherwise, it was held that there was a failure of consideration for the note and mortgage, and that they should be canceled. It is no defense to such action that plaintiff was illiterate, deaf, and unable to understand well what was said and done when the false representations were made, and the note and mortgage executed, since plaintiff was entitled to rely on defendant's express statements.¹ Where a mortgage com-

chase of this land; that he contributed two hundred and fifty dollars; and that, by their joint efforts, they paid the mortgage. It is a hardship and probably an injustice that he should now be deprived of any interest in the land, but courts of equity can not ignore the well-settled rules of law. He knew in 1879 that she denied that he had any interest in it. It is conceded that the mortgage is paid, and that it is necessary to sell the land in order to pay the claims allowed against the estate. It can not sell to advantage with this mortgage undischarged, for, if it still exists, the amount now due would be more than half the value of the land. The necessity of discharging the mortgage is therefore apparent. Gilblas' interest, if he has any, can be enforced only in an independent suit in chancery."

¹ *Kramer v. Williamson*, 135 Ind. 655; 35 N. E. Rep. 388, per Dailey, J.: "The appellee, it seems, is not possessed of a very high degree of intelligence, and can neither read nor write. Besides his illiteracy, he tes-

tified that he was in poor health; that during his service in the army he became and was afflicted with catarrh, deafness and pulmonary trouble; that he had a headache, and could not well understand. But we do not see how his mental sufferings and physical misfortunes can aid the appellant, who seeks to enforce a contract against him, made while in that condition. The contention comes with bad grace, and is placed upon dangerous grounds in a court of equity, where the weak and helpless come to demand relief from the avarice, greed and cupidity of shrewd and crafty neighbors. It is a mistaken assumption that a false representation made by one of the parties to a contract puts the other on inquiry as to its truth, even where they are on an equal footing. Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual engagement; and he is under no obligation to in-

pany filed a bill to rescind a mortgage, and secure a return of the money loaned, on the ground of fraud, and afterwards it advertised the premises for sale under the deed of trust, and it did not, however, attempt to make the sale, but pressed its suit for rescission with due speed, it was held that the act of advertising should not be considered an affirmation of the mortgage. In that instance a number of persons, each doing his part, acted together in procuring a loan from the company upon the security of land which was greatly overvalued, and it was held that the mortgagee was entitled to a rescission of the mortgage, and a decree against all the parties for the return of the money loaned, regardless of what disposition had been made of it, or which of the defendants had executed the papers.¹

§ 841. Deed given for illegal purpose—Exception.—A person can not have a conveyance made by him set aside on the ground that the consideration was in part the dismissal of a criminal prosecution, and therefore illegal, when he himself procured such dismissal, the prosecution being against him, since he can not thus set up his own illegal act; and where it is

investigate or verify the statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith. *Union Central Insurance Co. v. Huyck*, 5 Ind. App. 474; 32 N. E. Rep. on page 581; *Jones v. Hathaway*, 77 Ind. 14; *Mead v. Bunn*, 32 N.Y. 275."

¹ *Watts v. British, etc., Mortgage Co.* (1894), 60 Fed. Rep. 483, per McCormick, J.. "After filing its bill the appellee advertised the mortgaged premises for sale under the deed of trust. The appellants insist that this was an affirmation after a full knowledge of the facts. They support this contention by a reference to *Grymes v. Sanders*, 93 U. S. 55; *McLean v. Clapp*, 141 U. S. 429; 12 Sup. Ct. Rep. 29. It is sound doctrine that a party who desires to rescind a contract on the ground of subsequently discovered

fraud must announce his purpose as soon as such discovery is fully made, and must adhere to it. He will not be permitted to vacillate, and play fast and loose. In this case the appellee did announce its purpose, endeavored to obtain a rescission and the return of the money without resort to a court of equity, and, failing in that, duly exhibited its bill, and has sped the cause. The sale was not attempted to be made. No other indication of a vacillating purpose is shown. Grant that this act is not adequately explained. Is it, under the circumstances, to be taken as a conclusive abandonment of appellee's bill, and an affirmation of the contract which by the bill the appellee seeks to have canceled? In our view the adjudged cases and sound reason do not go to that extent."

sought to set aside a conveyance on the ground that the consideration was illegal, plaintiff must tender back the purchase-money received by him.¹ Where a woman of seventy years, and illiterate, is induced by her son-in-law and the sureties upon his bond to execute a mortgage to the sureties to indemnify them on a defalcation by the son-in-law, by holding out to her the anticipated punishment of the latter, without allowing her a chance to consult any disinterested friend, the mortgage will be set aside,² and the fact that she executed the

¹ *Teague v. Williams*, 6 Texas App. 468; 25 S. W. Rep. 1048, per Lightfoot, C. J.. "If the transaction in procuring the criminal prosecution to be dismissed, and the payment of the forty dollars to the county attorney, was unlawful, and thereby tainted the whole transaction with fraud, it is fully shown from the evidence that it was done at the instance of appellants, and by their agent and for their benefit. They can not be heard, in a court of equity, to allege their own unlawful acts as a ground for setting aside a settlement and conveyance, especially where they do not offer to do equity by tendering the purchase-money received by them for the property. *Hunt v. Turner*, 9 Texas, 385; *Glenn v. Mathews*, 44 Texas, 400; *Jones v. Williams*, 41 Texas, 390; *Robertson v. Marsh*, 42 Texas, 149."

² *Bell v. Campbell*, 123 Mo. 1; 25 S. W. Rep. 359, per Sherwood, J.: "The circumstances of this case clearly bring it within the operation of the principle that condemns and avoids a contract entered into where the obligor is not a free agent; where he stands *in vinculis*; where he is not equal to the task of protecting himself; where the circumstances which surround him at the time are of such extreme necessity or of distress that his will is overcome, his free agency destroyed, by some oppression or fraudulent advantage or imposition incident to the transaction. In such case a court of

equity will protect him by setting aside the contract thus made. 1 Story on Equity Jurisprudence (13th ed.), § 239. In instances like the present, where surprise and sudden action are the chief ingredients, where due deliberation is, therefore, wanting, these incidents are classed by courts of equity under the head of fraud or imposition. Wherever undue advantage is taken of a party 'under circumstances which mislead, confuse, or disturb the just result of his judgment, and thus expose him to be the victim of the artful, the importunate and the cunning;' where 'proper time is not allowed to the party, and he acts improvidently; if he is importunately pressed; if those in whom he places confidence make use of strong persuasions; if he is not fully aware of the consequences, but is suddenly drawn in to act; if he is not permitted to consult disinterested friends or counsel before he is called upon to act in circumstances of sudden emergency or unexpected right or acquisition—in these and many like cases, if there has been great inequality in the bargain, courts of equity will assist the party upon the ground of fraud, imposition, or unconscionable advantage.' 1 Story on Equity Jurisprudence (13th ed.), § 251, and cases cited. Other cases announce the same principle, and its application to like circumstances are here presented. *Turley v. Edwards*, 18 Mo. App. 676; *Sharon v.*

mortgage with the purpose of shielding her son-in-law from punishment will not bar her from relief on the ground that she was *in pari delicto*.¹ Where there are different degrees of guilt as between the parties to the fraudulent or illegal transaction, if one party act under circumstances of oppression, imposition, undue influence, or at great disadvantage with the other party concerned, so that it appears that his guilt is

Gager, 46 Conn. 189; *Foley v. Greene*, 14 R. I. 618; *Jordan v. Elliot* (Pa.), 15 Cent. Law J. 232; *Meech v. Lee*, 82 Mich. 274; 46 N.W. Rep. 383; *Eadie v. Slimmon*, 26 N. Y. 9; *Coffman v. Lookout Bank*, 5 Lea, 232; *Berlien v. Bieler*, 96 Mo. 491; 9 S. W. Rep. 916. The true question, as announced by Lord Eldon in *Peel v. Blank*, 16 Ves. 157, in all such cases is 'whether the mind was not so subdued that, although the execution was the free act of that person, it was an act speaking the mind, not of that person, but of another.' In *Earle v. Norfolk*, etc., *Hosiery Co.*, 36 N. J. Eq. 188, *Van Fleet*, V. C., aptly epitomizes this whole doctrine when he says: 'Whatever destroys free agency, and constrains the person whose act is brought in judgment to do what is against his will, and what he would not have done if left to himself, is undue influence, whether the control be exercised by physical force, threats, importunities, or any other species of mental or physical coercion.'"

¹ *Bell v. Campbell*, 123 Mo. 1; 25 S. W. Rep. 359, per *Sherwood, J.* "It is urged that if the deed of trust and notes executed by plaintiff had been given through fear of Carter's criminal prosecution, and in order to prevent the same, then she stands *in pari delicto* with the other parties to the transaction, and therefore could have no relief against the enforcement of those writings obligatory. There are two answers to this contention: (1) Granting that plaintiff did

enter into the contract with that purpose in view, she will not be debarred from pursuing her remedy, because she can not, in any event, be regarded as equally culpable with the adversary parties. When this is the case, a court of equity will interfere, and go to the relief of the less guilty party, whose transgression has been brought about by the imposition, undue influence, etc., of the party on whom the burden of the original blameworthiness principally rests. 2 *Pomeroy on Equity Jurisprudence* (2d ed.), § 942; 1 *Story on Equity Jurisprudence* (13th ed.), § 300; *Pinckston v. Brown*, 3 *Jones Equity* (N. C.), 494; *Kitchen v. Greenabaum*, 61 Mo. 110. (2) For reasons already given, plaintiff can not be regarded as having entered into a binding contract that can prejudice her rights." In *Thiemann v. Heinze*, 120 Mo. 630; 25 S.W. Rep. 533, it appeared plaintiff exchanged his house for defendant's half interest in an hotel. The business of the hotel was profitable, but defendant knew nothing of its character. Both plaintiff and defendant supposed it was reputable. The principal business of the hotel was proper, although some rooms were used for immoral purposes. Defendant refused plaintiff's request to re-exchange. Plaintiff ran the hotel profitably for six months and then disagreed with his co-owner and sold out. It was held that plaintiff, who had never complained to defendant of the character of the business, was not entitled to a rescission of the exchange.

subordinate to that of the defendant, the court in such case may, in exception to the general rule, relieve.¹

§ 842. Where parties were in illicit relation.—A bill which rests on the allegation that the complainant's intestate gave a certificate of stock to the defendant in consideration for her living thereafter in illicit relations with him, and which prays for a surrender of such certificate, will be stricken out on motion, because it shows that the contract was illegal and immoral.²

¹ Roman v. Mali, 42 Md. 513.

² Brindley v. Lawton (N. J. Eq. 1895), 31 Atl. Rep. 394, Bird, V. C.: "Contracts based upon the consideration, either past or future, of illicit sexual intercourse, or stipulating for such future intercourse, or in any manner promoting or furnishing opportunities for unlawful cohabitation or prostitution. 2 Pomeroy on Contracts, § 936; 1 Story on Equity Jurisprudence, § 296. That the contract presented by the bill was illegal and immoral is so declared in the bill itself. Will the court aid either party in asking for a rescission? The answer to this was in the negative in the case of Ellicott v. Chamberlin, 38 N. J. Eq. 604. In that case, in order to induce the resignation of an executor, he was offered \$10,000. After the payment of \$5,000 in cash and the assignment of a bond and mortgage for \$1,300, a promissory note was given for the remaining \$5,000. After the payment of \$2,500 on this note, an action at law was begun for the recovery of the amount due thereon. A bill was then filed in this court, presenting the whole transaction, and asking that the action at law be enjoined. The bill was dismissed by the chancellor. An appeal was taken. In delivering the opinion of the court of errors, Mr. Justice Parker used the following language: 'There is no doubt that Mrs. Ellicott could have

successfully resisted payment of any part of the money she agreed to give Mr. Chamberlin for the renunciation of his executorship, had she interposed defense; but she chose voluntarily to pay the greater part of the money, and she can not now recover what she has paid. She was a participant in an illegal contract for the purpose (as the evidence shows) of obtaining for herself the administration of the estate. If a contract be illegal as against public policy, its invalidity will be a defense while it remains unexecuted. If the illegal contract be in part performed, and money has been paid in pursuance of it, no action will lie to recover the money back. Smith on Contracts, 259. The law will not assist either party to an illegal contract, and, the parties being *in pari delicto*, it will leave them where it finds them. If the contract be still executory, it will not enforce it; and, if already executed, it will not restore the price paid nor the property delivered. Setter v. Alvey, 15 Kan. 157. Mrs. Ellicott can not, therefore, compel the payment of the money she gave Mr. Chamberlin on the agreement or on the note, nor can she compel the assignment to her of the Yauger bond and mortgage, as prayed for in her bill. To that extent the contract has been executed. But she can resist the payment of the balance of the note, for which suit has

§ 843. **Parties in pari delicto.**—Where an owner, during the pendency of a suit against him, and in view of a possible judgment being rendered therein adversely to him, conveys his property to another, with intent to defeat the satisfaction of such judgment as may be recovered against him in the suit, he can not, after judgment in such suit in his favor, have the aid of a court of equity to compel the grantee to reconvey to him the property.¹ While in such a case the fraudulent grantee, from a sense of his moral duty, ought to give back the property to him from whom he received it, yet the law, to dis-

been brought. Her defense to the note can, however, be made in a court of law, and therefore the suit in the circuit court, already commenced, should not be enjoined. The bill was properly dismissed by the chancellor without costs. *Johns v. Norris*, 27 N. J. Eq. 485; *Slocum v. Wooley*, 43 N. J. Eq. 451; 11 Atl. Rep. 264.'''

¹ *Pride v. Andrew*, 51 Ohio St. 405; 38 N. E. Rep. 84, per Dickman, C. J.: "In *Fletcher v. Fletcher*, 2 MacArthur, 38, an action of slander had been commenced against the grantor and his wife, and the conveyance was executed to the defendant to protect the real estate therein described from the result of the action at law, upon an agreement with the defendant that, as soon as the action was dismissed, or decided in favor of the grantor and his wife, he would reconvey the property to the grantor, his heirs or assigns. It was held that such an averment was fatal to the bill of complaint, and that a court of equity would not interpose to set the conveyance aside, but would leave the parties to the consequences of their own act. It was conceded, however, that a court of equity might assist the grantor where circumstances were shown to exist which recognized its interposition on other grounds of settled equity jurisdiction, 'such as fraud

in procuring the deed, imposition by the grantee, a violation of some fiduciary relation, an abuse of confidence, delusion or the like on the part of the grantor at the time of executing the deed.' See also, *Pinckston v. Brown*, 3 Jones Eq. 496; *Boyd v. De La Montagnie*, 73 N. Y. 498; *Freelove v. Cole*, 41 Barb. 318; *Ford v. Harrington*, 16 N. Y. 285; *Holliway v. Holliway*, 77 Mo. 392; *Nichols v. McCarthy*, 53 Conn. 299; 23 Afl. Rep. 93; *Barnes v. Brown*, 32 Mich. 146. In commenting upon the foregoing and other cases of like tenor, Mr. Wait, in his work on *Fraudulent Conveyances* (§ 401), very forcibly says: 'While it is possible to deduce from them a general principle that degrees of guilt will be recognized in such transactions, and that grantors may, in certain cases, reclaim the property fraudulently alienated where the transaction was superinduced by the unfair action of a vendee who occupied some relation of confidence which enabled him to unduly influence the vendor, yet a very clear case, with well-defined reasons for excepting it from the general rule, must be presented. Debtors contemplating fraudulent alienations should draw little encouragement from these exceptional cases, for as a general rule, after passing through the troubled waters of insolvency, they will find

courage frauds, will not compel him to restore it to the fraudulent grantor.¹

§ 844. **The same subject continued.**—Where two persons guilty of participation in an unlawful transaction are in *pari delicto*, neither a court of law nor a court of equity will aid either to recover or re-invest himself with any title or interest which he, in consideration of such unlawful contract, has vested in the other, but will leave them in the same condition as to vested interests as they, by their own acts, have placed themselves. If such a participator can not recover in a suit at law, on account of the principle embodied in the maxim, “*in pari delicto, melior est conditio possidentis*,” he can have no relief in equity; because a court of equity will not relieve him from the operation of such principle any more than will a court of law, but merely lends its aid in the case of executory contracts, when the circumstances are such that the defensive remedy at law is not equally certain, complete, and adequate as it may be made in equity.² Thus, for example, a court of equity will not order that notes given as collateral to a note given in consideration of a gambling debt be delivered up.³

themselves stripped of the power to reach or recover the secreted property in the hands of their fraudulent grantees. The ancient rule, ‘*In pari delicto melior est conditio possidentis*,’ is not to be easily uprooted, and must not be considered as overthrown or abrogated by these cases.”

¹ Swift v. Holdridge, 10 Ohio, 230.

² Beer v. Landman (Texas, 1895), 31 S. W. Rep. 805. And see Adams’ Equity, 175; Pomeroy’s Equity Jurisprudence, §§ 937-941, and authorities cited.

³ Beer v. Landman (Texas, 1895), 31 S. W. Rep. 805, per Denman, J.: “Thus Parke, B., in Scarfe v. Morgan (1838), 4 Mees. & W. 270, where a mare was delivered by plaintiff to defendant as security for a debt unlawfully contracted on Sunday, said: ‘This is not the case of an executory

contract (both parties were in *pari delicto*); it is one which has been executed, and the consideration given. And although, in the former case, the law would not assist one to recover against the other, yet if the contract is executed, and the property, either special or general, has passed thereby, the property must remain’—and refused to allow plaintiff to recover. In the leading case of Taylor v. Chester (1869), L. R. 4 Q. B. 309, it was held that the plaintiff, having deposited with the defendant the half of a £50 bank note, as a pledge to secure the payment for wine, etc., supplied to plaintiff by defendant in a brothel kept by her, to be there consumed in a debauch, could not recover such half note, the court saying: ‘Plaintiff’s argument was based upon the hypothesis that, in spite of the finding

§ 845. **Rescission for non-performance.**—Where a contract between a city and a water-works company fixed the number of hydrants to be rented by the city and the rental thereof, and

of the jury, the plaintiff was entitled to recover by virtue of his property in the half note, and that it was the defendant alone who set up an immoral transaction as the answer to the plaintiff's claim.' This argument appears to us to be founded upon an entirely erroneous view of the facts. The plaintiff, no doubt, was the owner of the note, but he pledged it by way of security for the price of meat and drink provided for, and money advanced to him by the defendant. Had the case rested there, and no pleading raised the question of illegality, a valid pledge would have been created, and a special property conferred upon the defendant in the half note, and the plaintiff could only have recovered by showing payment or a tender of the amount due. In order to get rid of the defense arising from the plea, which set up an existing pledge of the half note, the plaintiff had recourse to the special replication, in which he was obliged to set forth the immoral and illegal character of the contract upon which the half note had been deposited. It was therefore impossible for him to recover except through the medium and by the aid of an illegal transaction, to which he was himself a party. Under such circumstances, the maxim, '*In pari delicto, potior est conditio possidentis*,' clearly applies, and is decisive of the case. In the case of *King v. Greene* (1863), 6 Allen, 139, where plaintiff had pledged his watch to secure an unlawful livery bill, the court refused to allow him to recover the same, saying: 'It is true that the law would not enable the defendant to recover such a debt (*Way v. Foster*, 1 Allen, 408); but neither will it enable the plaintiff to recover back his

property given in pledge for the debt, any more than to recover back the money after paying it. In such cases the maxim, "*Potior est conditio possidentis*," is applicable. The plaintiff has, at least, as little claim to the aid of the law as the defendant.' In *Harris v. Woodruff* (1878), 124 Mass. 205, where plaintiff had delivered a mare to defendant for the purpose of training her for races, the court, after holding that defendant had an implied lien on the mare for such training, on the question of illegal consideration, Gray, C. J., said: 'It is quite clear that, even if the parties were in *pari delicto*, *potior est conditio possidentis*; and the law will not assist the plaintiff to obtain possession of the mare without paying the defendant for his services under the executed contract, by which the general owner had voluntarily transferred to the defendant a special property in the mare.' The principles applicable to cases of this character will also be found ably discussed by Judge Gray in *Hall v. Corcoran* (1871), 107 Mass. 251, and *Cranston v. Goss*, 107 Mass. 439. In *Frost v. Plumb* (1873), 40 Conn. 111, discussing the principle under consideration, and following in the line of the English and Massachusetts cases above cited, the court say: 'We understand the rule to be this: The plaintiff can not recover when it is necessary for him to prove, as a part of his cause of action, his own illegal contract or other illegal transaction; but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear, and may be important even as explanatory of other facts in the case,

provided that the company should furnish sufficient pure water for domestic purposes and for fires, and that the pumps should have a certain pressure power, and a test of the works showed that the pressure was insufficient, that the water from wells was exhausted in a few minutes, and that impure water was then taken from the river, and the city never accepted the works, and the council passed a resolution that they were inadequate to the needs of the city, and directed the city fire department not to use water from the company's hydrants, it was held that the company had not performed the contract, and that the city was entitled to a rescission thereof.¹ And, where the purchaser of goods notifies the sellers and their agent that he will not pay any more drafts according to the terms of sale unless he is given a certain guaranty as to the quality of the goods, not provided for in the contract of sale, the sellers may rescind the contract.² But equity will not interfere to cancel a contract where the failure to perform within the stipulated time

he may recover. It is sufficient if his cause of action is not essentially founded upon something which is illegal. If it is, whatever may be the form of the action, he can not recover."

¹ *City of Grand Haven v. Grand Haven Waterworks Co.*, 99 Mich. 106; 57 N. W. Rep. 1075, per Long, J.: "We think the bill states a case of equitable cognizance, and we may add that, on the hearing here, the jurisdiction of a court of equity was admitted. It is very similar in principle to the case of *Farmers', etc., Trust Co. v. Galesburg*, 133 U. S. 156; 10 Sup. Ct. Rep. 316. It is for the rescission of a contract for non-performance, and as such is within the general jurisdiction of a court of equity. If the alleged contract is void, either from intrinsic infirmity or from failure to perform its terms, it may be so decided in equity. *Story's Equity Jurisprudence*, §§ 698-700." In *Reddish v. Smith*, 10 Wash. St. 178; 38 Pac. Rep. 1003, Dunbar, C.

J., says: "The rule is thus laid down in 21 Am. and Eng. Encyc. Law, p. 77: 'The right to rescind belongs only to the party who is himself without default. Thus, if one, having sufficient ground therefor, wishes to avoid a contract, but has done some act which hinders performance by the other, or has failed in any way to perform his own part of the stipulation, his right is thereby lost to him,' citing many cases in support of this proposition. In this case, too, the appellants are further precluded by the fact that they have never tendered any portion of the amount due the plaintiffs; and, until that is done, it can scarcely be contended that they would be entitled to a rescission of the contract. See *Drown v. Ingels*, 3 Wash. St. 424; 28 Pac. Rep. 759."

² *King v. Faist*, 161 Mass. 449; 37 N. E. Rep. 456. And see also, *Ballou v. Billings*, 136 Mass. 307; *Perry v. Quackenbush*, 105 Cal. 299; 38 Pac. Rep. 740.

has been waived by the complainant.¹ So also, where plaintiff conveys the land on which he is living to his daughter-in-law in consideration of support for life, and leaves the premises without fault on her part, the conveyance will not be set aside, the grantee being ready to perform.²

§ 846. Deed defrauding cotenants.—An action to cancel a recorded deed executed to one cotenant pursuant to a power in a will, as being unauthorized by such power, and without consideration, and fraudulent as against the other cotenants whose rights are prejudiced thereby, is maintainable by them although they are not in possession, and there has been no actual ouster. In such an action plaintiffs may demand judgment on the law side of the court for an amount alleged to be due them from the grantee in such conveyance, and may also ask relief on the equity side from the fraud which they allege will render their action fruitless, and the absence from a complaint to cancel a conveyance for fraud of a formal demand for judgment for an amount claimed to be due plaintiff from defendant will not prevent a judgment from being rendered therefor on the law side of the court, where the complaint contains other allegations sufficient to warrant such a judgment.³ In an action to cancel a deed which was

¹*Kraner v. Chambers* (Iowa 1894), 61 N. W. Rep. 373. In *Hensley v. Hensley* (Ky. 1895), 30 S. W. Rep. 613, it appeared that R. deeded land to defendant on condition that the latter should provide for grantor and wife during the life of each, and bury them decently, and upon failure so to do the land was to revert to grantor, or to his wife in case she survived him. R. having died, his heirs sought to have the deed canceled for failure on defendant's part to comply with its conditions. It was held that the petition was properly dismissed, it appearing that neither R. nor his widow ever complained of non-performance of the conditions, that plaintiffs had suffered no pecuniary loss, and that in case of cancellation the land would

revert to R.'s widow, who was not a party.

²*Scott v. Scott*, 89 Wis. 93; 61 N.W. Rep. 286.

³*Sires v. Sires*, 43 S. C. 256; 21 S. E. Rep. 115, Gary, J.: "If the land was owned by the parties as tenants in common, then the action of Samuel W. Sires was an act of wrong, and entitled the parties to seek relief in equity from the alleged fraud upon their rights. The views which we entertain on this subject are expressed in the case of *Miller v. Hughes*, 33 S. C. 530; 12 S. E. Rep. 419, in which Chief Justice McIver says: 'The foundation of a cause of action in such a case is a fraud, and if the plaintiff, after alleging the fraud, makes further allegations, showing

delivered in escrow, and fraudulently abstracted from the depositary by the grantee, the grantor is not bound to tender back land conveyed to him by the grantee in exchange, which was to be forfeited on the grantee's failure to perform the contract on which his deed was to be delivered to him by the depositary.¹

§ 847. Directors' contracts for their own benefit.—The directors of a corporation, without the sanction of the stockholders, have no power to contract for the corporation with themselves, or for the benefit of themselves, and if they attempt to do so the contract may be rescinded by the corporation or its stockholders not consenting, whether the contract appears

that his rights are impaired or destroyed by the perpetration of the fraud, then he states a cause of action. Of course, the mere fact that his debtor has perpetrated a fraud, even of the grossest character, gives him no cause of action; but when he alleges facts tending to show that his rights are injuriously affected by such fraud, then he states a complete cause of action, which, if established, will entitle him to relief. * * * * But fraud is peculiarly a matter of equitable cognizance, and, when fraud is alleged, and the further allegation is made that such fraud is injurious to the creditor's rights, it seems to us that a court of equity has jurisdiction of such a case. In such a case the creditor does not ask the aid of the court of equity upon the ground that he can obtain no relief at law, but his claim to the aid of equity is based upon the fraud which has been practiced upon him, and from which the court of equity has jurisdiction to relieve him. It is not universally true that a plaintiff must show that he has no plain adequate remedy at law before he can invoke the aid of a court of equity, for there are some cases in which the jurisdictions are concurrent, and fraud is one of those matters.

* * * * It is further urged that the claim of the plaintiffs, being a plain legal demand, should first be established by a judgment at law before the aid of equity can be invoked. Whatever embarrassments this might have offered under our former system of judicature, when law and equity were administered by different tribunals, can not be felt now, under our present system, especially after the code has provided that both legal and equitable causes of actions may be united in the same complaint.²

¹Jackson v. Lynn (Iowa 1895), 62 N. W. Rep. 704, Deemer, J.: "It will be observed that this is not an action to rescind the contract entered into between the parties for fraud, in which event plaintiff would be compelled to make tender back of all he had received; but that it is an action to set aside a stolen deed, in which plaintiff is insisting upon the letter of his contract. There is nothing for him to tender back. Defendant has forfeited all his rights to the deed by failing to perform the conditions which entitled him to it, and under the express terms of the contract plaintiff is entitled to the land in controversy, and to the return of the deed without tendering back anything."

to be fair and just or not. It has been held under such circumstances that the company or its stockholders may rescind a contract requiring the action of the board of directors to make it, whether made in good faith or not, where so many of the directors are interested in the contract, adversely to the company, that the company is not represented by a disinterested majority of the directors voting.¹

¹Higgins v. Lansingh, 154 Ill. 301; 40 N. E. Rep. 362, per Carter, J.: "It may be, as contended by appellants, that the settlement of 1872 was the best thing that could have been done at that time for the company, situated as it was; and doubtless the directors, had they not been interested as and for the creditors in that settlement, would have been far better qualified to judge of the interests of the company than any one else could at this late day. But the law is, nevertheless, that they were incapacitated to act, by reason of this interest. And the fact remains, also, as shown by the evidence, that, whatever the necessities of the company may have been, the terms of this contract were harsh and inequitable, in respect to the calculation of interest. Interest was not only computed upon unpaid interest as it became due from year to year, but a new principal, composed of interest, was created, and interest computed thereon with annual rests. The company did not owe the amount fixed upon as due at this settlement by the method of computation resorted to, and the transaction would, in a court of equity, be regarded as oppressive and unjust, independent of any statute prohibiting usurious contracts. See Bowman v. Neely, 137 Ill. 443; 27 N. E. Rep. 758, and cases there cited. In the Bowman-Neely case, this court held that an agreement, made in advance, to pay compound interest, except upon interest coupons, while not usurious, is not

enforceable in this state. It is true that it has been held that an agreement, made after installments of interest have become due, to pay interest thereon, is not invalid, but such an agreement to pay simple interest on overdue interest is quite a different thing from an agreement to compound such interest retrospectively for many years. In Van Benschooten v. Lawson, 6 Johns. Ch. 313, Mr. Chancellor Kent held that such compound interest could not be collected. He said: 'If the creditor was permitted to exact from the debtor a stipulation to pay interest on arrears of interest then due, it would lead to great and inevitable abuse. It would, perhaps, be less mischievous, because the parties would stand upon more equal terms, to allow of such a stipulation for compound interest when the original contract is about to be made. The parties are then independent of each other. But in the other case the debtor is comparatively dependent, and probably distressed, and the creditor exacts the stipulation under the evident advantage of power and superiority. The agreement on the part of the defendant to pay compound interest retrospectively does not alter the case, for the maxim, *Volenti non fit injuria*, does not apply in these cases.' This case was criticised in Stewart v. Petree, 55 N. Y. 621, but was re-affirmed in Young v. Hill, 67 N. Y. 162. It is unnecessary, however, in this case, to determine whether such an agreement

§ 848. Rescinding note procured by fraud—Enjoining transfer.—Where the insolvent holder of a note secured by chattel mortgage has seized the property in order to foreclose, and the note, which was procured by fraud, is not yet due, a court of equity has jurisdiction to cancel the note and mortgage and enjoin the transfer of the note.¹

could be enforced in this state, if made between parties dealing at arm's length; but we do hold that such an agreement made between a corporation, by its board of directors, on the one hand, and one or more of such directors on the other, is unfair to the corporation and its stockholders, and would lead to great injustice and oppression, and can not be enforced. In transacting the business of the corporation, it is the duty of the directors to act for the highest interest of the corporation and its stockholders, and not for their own personal advantage; and a court of equity will set aside an injurious and oppressive contract obtained by a director, in his own interest from the company, even although the company may be represented by a majority of disinterested directors." See also, *Gilman, etc., R. Co. v. Kelly*, 77 Ill. 426.

¹ *Hodson v. Eugene Glass Co.* (Ill. 1895), 40 N. E. Rep. 971, *Magruder, J.*: "The jurisdiction proceeds upon the ground that, where the enforcement of an instrument would be inequitable and unjust, the party holding it should be compelled to surrender it for cancellation. One of the instances in which the jurisdiction is often exercised is in relation to negotiable instruments before their maturity. 3 *Pomeroy's Equity Jurisprudence*, § 1377; 1 *Story's Equity Jurisprudence*, §§ 695, 700. In such cases an injunction is generally granted against the transferring such an instrument. 3 *Pomeroy's Equity Jurisprudence*, § 1377, p. 417, note 1. The relief here asked is not only

against interference with the property mortgaged, but for the cancellation of a note not yet due, alleged to have been obtained by fraud, and liable to be transferred to an innocent holder, separately from any transfer of the mortgage. A maker of a promissory note secured by a chattel mortgage may, by a bill in equity, restrain the insolvent payee thereof from transferring the same before maturity, and from proceeding to foreclose, on the ground of fraud and failure of consideration, and may show the real character of the transaction by parol testimony. *Belohradsky v. Kuhn*, 69 Ill. 547; *Petillon v. Noble*, 73 Ill. 567; *Carpenter v. Talbot*, 33 Fed. Rep. 537; *Becker v. Anderson*, 6 Neb. 499; *Lanier v. Adams*, 72 Ga. 145; *Mayrant v. Dickerson*, Rich. Eq. Cas. 199; *McCormick v. Hartley*, 107 Ind. 248; 6 N. E. Rep. 357; *Badgett v. Frick*, 28 S. C. 176; 5 S. E. Rep. 355. In *Normandin v. Mackey*, 38 Minn. 417; 37 N. W. Rep. 954, the action was to have a chattel mortgage adjudged to be paid in full and to have the same canceled, and it was there held that the remedy was at law for trespass or conversion, or in replevin. It does not appear in that case that there was a note secured by the mortgage, but it does appear that the debt had been paid, and the time for payment had passed, and the property was in the possession of the mortgagor, so that the application for an injunction against a threatened taking of the property under the mortgage was merely an application to enjoin a trespass. In the case at bar, however, the mortgagee had pos-

§ 849. Rescission of sale where price payable in installments.—In a contract for the sale of goods, to be executed by a series of deliveries and payments, defaults of either party with reference to one or more of the stipulated acts will not ordinarily discharge the other party from his obligation and entitle him to rescind the contract unless the conduct of the party in default be such as to evince an intention to abandon the contract, or a design no longer to be bound by its terms.¹ Thus when the seller of goods has agreed to deliver them in installments;² and the buyer has agreed to pay the price in in-

session of the property, having begun the foreclosure by a seizure of it, and the mortgage secured a note not yet due, and both note and mortgage were procured by fraud, and were never legally executed by the mortgagor; and the relief asked is for the cancellation, not merely of the mortgage, but of the note also. Other authorities referred to by counsel for appellants will, upon examination, be found to be distinguishable from this case."

¹ *Blackburn v. Reilly*, 47 N. J. Law, 290. In the case just cited this rule was enforced against the buyer. In *Trotter v. Heckscher*, 40 N. J. Eq. 612; 4 Atl. Rep. 83, the court of chancery, and in *Otis v. Adams*, 56 N. J. Law, 38; 27 Atl. Rep. 1092, the supreme court enforced it against the seller.

² *Gerli v. Poidebard Mfg. Co.* (N. J. Err. 1895), 31 Atl. Rep. 401, Dixon, J.: "That the conduct of the vendors in the present case did not evince an intention to abandon the contract, or not to be bound by its terms, appears beyond dispute. They failed to deliver the July installment because it was impossible to do so, offered to deliver other silk which they considered equally valuable, expressed their willingness to come to an equitable arrangement for their default, and, on the first intimation of a pur-

pose on the part of the vendee to rescind the contract, they protested against the right of rescission, and insisted that they should be permitted to make the subsequent deliveries. They showed a design the very opposite of repudiation. Nor do we find anything in this contract or the circumstances of the parties from which it can reasonably be inferred that the parties intended the delivery of each installment of silk to be a condition precedent to the continuing obligation of the contract. So far as appears, the usefulness to the buyer of any installment did not at all depend upon the prompt delivery of prior installments, and full indemnity for every default could be secured by action based thereon. So that, under the rule before declared, it would seem that the attempt to rescind was illegal. The defendant, however, insists that the rule is not applicable to the present case, because the seller's fault consisted in failing to do the first thing required to be done in performance of the contract; and *Norington v. Wright*, 115 U. S. 188; 6 Sup. Ct. Rep. 12, is cited as an authority for this distinction. On principle, I do not see that, for such a purpose, the first act to be done stands upon a different footing from subsequent acts. A default in that

installments which are proportioned to and payable on the delivery of each installment of goods, default by either party with reference to any one installment will not ordinarily entitle the other party to rescind the contract.

does not make it more certain than do other defaults that the party aggrieved can not get exactly what he contracted for; for that default, as well as for others, he may be compensated by suit; and by that default, as readily as by others, he may obtain an unconscionable advantage, if he is entitled to rescind or retain the bargain as self-interest may dictate.

* * * * * In *Norrington v. Wright, supra*, the plaintiff had contracted to ship from Europe to the defendant in Philadelphia 1,000 tons of rails in each of the months of February, March, April, May, and June; in February he had shipped 400 tons, which the defendant had received and paid for, not knowing that less than the required quantity had been shipped; in March the plaintiff had shipped 885 tons; and the defendant, on learning of these deficiencies, declared the contract terminated. The court held that he was justified in doing so. I am not sure that I perceive definitely the principle on which this decision was rested. But the case seems now to be cited for the following paragraph in the opinion of the court: 'The seller is bound to deliver the quantity stipulated, and has no right * * * to compel the buyer to accept a less quantity; * * * and, when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first

month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.' I can not but think that there is here some confusion of thought. If a contract of sale requires the delivery of all the goods at once, and the seller tenders only part at the time specified, certainly the buyer may refuse to accept the part; but it is scarcely accurate to say his refusal is based upon a rescission of the contract. He has simply refused to do what he never agreed to do.

* * * * * We are thus brought to the real question in all bargains of this nature, whether, on the proper construction of the contract, the performance of any particular stipulation by one party is a condition precedent to the continuance of obligation upon the other party; and logically this must be the question as well with regard to the first stipulation as the subsequent ones. On this question this court adopted the general rule that when the seller has agreed to deliver the goods sold in installments, and the buyer has agreed to pay the price in installments which are proportioned to and payable on the delivery of each installment of goods, then default by either party with reference to any one installment will not ordinarily entitle the other party to abrogate the contract."

END OF VOLUME ONE.

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Author

Beach, Charles Fisk

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